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**Victims of Crime: Plea Bargains,
Compensation, Victim Impact
Statements and Support Services**

by

Rowena Johns

Briefing Paper No 10/02

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EXECUTIVE SUMMARY

This briefing paper outlines and evaluates the range of entitlements and services available to victims of crime in New South Wales. These include the government-funded statutory victims compensation and counselling schemes; the tendering of victim impact statements in sentence proceedings; the capacity of victims to make submissions regarding whether offenders should be released on parole; the right of sexual assault victims to claim privilege against the disclosure of information revealed in the course of counselling; and various types of assistance provided by government agencies and community-based victims support groups.

Legislation affecting victims in NSW (pages 2-9)

The main provisions focusing specifically on victim entitlements are found in the *Victims Support and Rehabilitation Act 1996* and the *Victims Rights Act 1996*. A Charter of Victims Rights was given formal status in the *Victims Rights Act 1996* and outlines guiding principles for the treatment of victims. These are not legally enforceable but many have been adopted as policy by government departments.

Some of the legislative developments affecting victims in 2001-2002 were the introduction of industrial relations amendments to entitle victims to unpaid leave from their work to attend court, and the codification of general criteria to be taken into account at sentence, including the personal circumstances of the victim. The *Victims Support and Rehabilitation Act* and the *Victims Rights Act* are also in the process of being reviewed by the Legislation and Policy Division of the Attorney General's Department.

Victim impact statements (pages 10-20)

A victim impact statement is a document that is tendered at sentence proceedings to express the personal harm suffered by a victim or a witness as a direct result of an offence of violence, or to convey the effect of a victim's death upon their immediate family members.

Victim impact statements received legislative recognition in 1997. The relevant provisions are now found at ss 26-30 of the *Crimes (Sentencing Procedure) Act 1999*. The statement is optional, must be in writing, and is unsworn. The legislation distinguishes between the way that the court is to treat the impact statements of different types of victims. The court may receive and consider an impact statement from a primary victim, meaning the person against whom the offence was committed or a witness to that offence, if the court finds it appropriate to do so. The court must receive and acknowledge an impact statement from a member of a primary victim's immediate family (a 'family victim') when the primary victim has died as a direct result of the offence. But the court must not use the impact statement of a family victim in determining the punishment for the offence unless it considers this appropriate.

The Supreme Court has preferred a more restrictive use of victim impact statements than the legislation allows, repeatedly finding in homicide cases that judges should not have regard to victim impact statements by family members in formulating the sentence.

Victims compensation scheme (pages 21-35)

A statutory, government-funded victims compensation scheme was introduced in New South Wales in 1967. The maximum which the court could award had reached \$20,000 by 1984. The Victims Compensation Tribunal was established in 1987 as an independent body to assess applications and make awards. The maximum claimable amount was set at \$50,000 and has remained the same since. Additional amendments were passed in 1996, including the evaluation of applications by compensation assessors and the implementation of a schedule of injuries prescribing standard amounts for specific injuries. The schedule effectively precludes calculation of compensation by reference to common law principles of damages. Between 1997 and 2000 the recommendations of the Joint Select Committee on Victims Compensation influenced further legislative reform, such as modifying the categories of compensable psychological injuries.

The current compensation provisions under the *Victims Support and Rehabilitation Act 1996* require an 'act of violence' to occur during the commission of the offence, and specify 3 categories of eligible victims: primary victims, secondary victims, and family victims. Applications must generally be lodged within two years of the offence. Other restrictions apply in relation to the types of injuries that are compensable; the minimum threshold for a claim; dividing compensation between multiple claimants; preventing 'double dipping' when another form of monetary entitlement is payable; and awarding sums to cover financial loss, legal costs or funeral expenses.

Approved counselling scheme (pages 35-37)

The statutory counselling scheme has operated since 1996, and was originally only available to victims who were eligible for compensation. Today, in addition to those persons who qualify as primary, secondary or family victims, counselling can be accessed by relatives of victims who died as a result of an act of violence, and by persons who are victims of an act of violence but did not sustain a compensable injury within the meaning of the *Victims Support and Rehabilitation Act 1996*. Relatives (encompassing 'family victims' and 'relevant family members') can initially receive up to 20 hours of counselling, with extra counselling possible on request, while other victims qualify for an initial period of two hours and for such further periods up to 20 hours as may be considered appropriate by a compensation assessor.

Sexual assault communications privilege (pages 38-43)

The sexual assault communications privilege was introduced in 1997 with the intention of preventing communications made in the course of counselling a sexual assault victim from being disclosed in court, except in specific circumstances at the discretion of the judge. The original form of the privilege created a presumption that comments made in confidence by a sexual assault victim to a counsellor, and notes of such communications, were inadmissible as evidence in a court proceeding. In 1999, the privilege was extended to cover documents produced on subpoena, and to preclude evidence of sexual assault communications from being produced in connection with preliminary criminal proceedings such as bail applications and committals. The Court of Criminal Appeal in *R v Lee* (2000) 50 NSWLR 289 interpreted the concept of counselling narrowly, as entailing the 'provision

of expert advice...by persons skilled, by training or experience, in the treatment of mental or emotional disease or trouble.’ The Government responded with the *Criminal Procedure Amendment (Sexual Assault Communications Privilege) Act 2002* No 13, which clarifies that the capacity to counsel sexual assault victims is not restricted to mental health professionals.

Victim participation in the parole process (pages 44-51)

Since 1996, victims who are registered on the Department of Corrective Services’ Victims Register have had the statutory right to make a written submission as to whether a ‘serious offender’ should be released on parole. Such victims are also entitled to make submissions prior to an offender being approved for a ‘low security’ classification and thereby becoming eligible for work release and other forms of unsupervised external leave. On a policy basis, any registered victim, not just victims of serious offenders, are permitted to make written submissions. Under the *Crimes (Administration of Sentences) Act 1999*, victims could deliver a submission orally with the leave of the Parole Board but they will be able to exercise this option automatically when the *Crimes (Administration of Sentences) Amendment Act 2002* No 36 commences. There is no provision for victims to make oral submissions regarding unescorted absences from custody.

Plea bargaining (pages 52-64)

Plea bargaining involves reducing or withdrawing charges in a case, in exchange for the offender agreeing to plead guilty. In 2001, an intense debate was prompted when several victims complained in the media that the prosecution had failed to consult with them sufficiently before accepting plea bargains. The Attorney General commissioned Hon. Gordon Samuels AC CVO QC to conduct a review of the plea bargaining practices of the Office of the Director of Public Prosecutions (DPP). The report of the review, released on 6 June 2002, found that the DPP’s existing *Prosecution Policy and Guidelines* did require adequate consultation with victims and did require the charges and agreed facts to reflect the criminality of the offences. But the report referred to cases in which the guidelines were not followed, and suggested measures to reinforce the duties of prosecution officers towards victims during charge negotiations.

The Deputy Leader of the Opposition, Mr C. Hartcher MP, introduced the Crimes (Sentencing Procedure) Amendment (Victims’ Rights and Plea Bargaining) Bill 2002 in the Legislative Assembly on 20 June 2002. The Bill proposes a maximum discount of 10% for pleading guilty and states that prosecutors must seek the views of victims about plea bargains prior to sentencing. Judges would also be required to disclose in court the details of the prosecution’s decision to accept a plea bargain.

Government services for victims (pages 65-76)

The Victims Services branch of the Attorney General’s Department is the main provider of government assistance to victims. It comprises the Victims Compensation Tribunal (VCT), Victims Advisory Board (VAB) and the Victims of Crime Bureau (VCB), which are all statutory agencies. The VCT was established in 1987 as an independent body to assess applications for victims compensation. Today it determines only selected

applications on referral or appeal. The VCB and VAB were both created by the *Victims Rights Act 1996*. The functions of the VCB include to oversee the implementation of the Charter of Victims Rights and administer the approved counselling scheme. The VAB consists of up to 10 Members who are drawn from government departments and community organisations to consider issues and policies on victims of crime, advise the Attorney General, and contribute to law reform.

Some statutory bodies and government departments which serve a broader purpose also undertake activities for the benefit of victims. For example, the Department of Corrective Services conducts victim-offender conferencing and mediation, gives grants to victims organisations using funds from inmate labour, and maintains the Victims Register to advise victims about the release of offenders and other relevant developments. The Police Service employs liaison officers who can assist victims with special needs, while the Office of the Director of Public Prosecutions has a Witness Assistance Service which provides information and court support to victims.

Victims support groups (pages 77-82)

Community-based victims organisations gained prominence in New South Wales from the 1980s. Some of the main groups operating today are the Victims of Crime Assistance League, the Homicide Victims Support Group, and Enough is Enough. All were founded by family members of deceased victims. These groups supply information about victims entitlements, coping with grief or the effects of crime, and understanding criminal justice procedures. Practical assistance is also offered such as counselling and accompanying victims to court. Another objective of victims groups is raising awareness, for example by holding public meetings and delivering presentations to students and prison inmates. In recent years, victims have campaigned actively for law reform, particularly to promote greater acknowledgment of their perspective in sentencing, plea bargaining and the release of offenders on parole.

1. INTRODUCTION

The concept of a victim of crime fluctuates depending on the context and the era. There is little doubt that a person who is killed or wounded during the commission of a criminal offence is a victim, provided that they were not participating in the unlawful conduct themselves. Someone who is subjected to an offence with an element of force or deprivation, such as sexual assault, kidnapping or domestic violence, is also likely to be considered a victim. But more difficult to categorise are witnesses of crime, family members of deceased victims, police officers on duty, victims who manifest purely psychological symptoms, and people who experience fraud, property damage, or a motor vehicle accident.

Statutory rights and protections depend on classifying different types of victims and employing specific meanings for terms like ‘act of violence’, ‘injury’ and ‘family member’ that are not uniform across the victim-related provisions. Consequently, definitional aspects will be clarified at the start of each section of this briefing paper.

The analysis commences with a brief overview of legislation relevant to victims of crime in New South Wales. Next, the main areas of statutory entitlement are examined: victim impact statements; the victims¹ compensation and counselling schemes; the capacity for alleged sexual assault victims to claim privilege over material disclosed during counselling; and the right of victims to make a submission prior to the release of an offender on parole or an approved program. The current debate regarding plea bargains and the consultation of victims is then reviewed. Lastly, the support services provided to victims by different government agencies and community-based groups are summarised.

This paper focuses on laws and policies that are explicitly designed to assist victims of crime. Civil actions for personal injury, workers compensation, and other remedies that may be available to victims are not covered. The material presented here was current at 25 June 2002.

¹ Most legislation, literature, and organisations have adopted a practice of omitting the apostrophe when using the plural ‘victims’, eg. *Victims Rights Act 1996*, Charter of Victims Rights, Victims Advisory Board, Joint Select Committee on Victims Compensation. The convention has been followed in this paper.

2. LEGISLATION AFFECTING VICTIMS IN NSW

2.1 An overview of current legislative provisions

Two statutes concentrate specifically on the needs of victims: the *Victims Support and Rehabilitation Act 1996*, which outlines the victims compensation and counselling schemes, and the *Victims Rights Act 1996*, which formalised the Charter of Victims Rights and established the Victims of Crime Bureau and the Victims Advisory Board.

Other statutory provisions that grant victims protection or entitlements are found in sentencing and procedural legislation, most notably the *Crimes (Sentencing Procedure) Act 1999*, the *Crimes (Administration of Sentences) Act 1999*, and the *Criminal Procedure Act 1986*.

The following table summarises the provisions of significance to victims. Accompanying regulations are only cited when they contain relevant material.

NAME OF ACT/REGULATION	SUBJECT MATTER
Victims Support and Rehabilitation Act 1996; Victims Compensation Rule 1997	<ul style="list-style-type: none"> ▪ Statutory victims compensation scheme ▪ Approved victims counselling scheme ▪ Victims Compensation Tribunal
Victims Rights Act 1996	<ul style="list-style-type: none"> ▪ Charter of Victims Rights ▪ Victims of Crime Bureau ▪ Victims Advisory Board
Crimes (Administration of Sentences) Act 1999; Crimes (Administration of Sentences) Regulation 2001	<ul style="list-style-type: none"> ▪ Parole – submissions of victims concerning serious offenders ▪ Victims Register ▪ Serious Offenders Review Council – submissions of victims
Crimes (Sentencing Procedure) Act 1999; Crimes (Sentencing Procedure) Regulation 2000	<ul style="list-style-type: none"> ▪ General sentencing principles affecting victims ▪ Victim impact statements
Criminal Procedure Act 1986	<ul style="list-style-type: none"> ▪ Sexual assault communications privilege – protecting disclosures by sexual assault victims during counselling
Industrial Relations Act 1996	<ul style="list-style-type: none"> ▪ Leave entitlements for victims to attend court

Rather than describing provisions in detail here, the substance of each of the Acts will be considered in the context of the themes raised in this paper.

2.2 Statutory Charter of Victims Rights

The Charter of Victims Rights does not belong to any single category of victim entitlements. It deals with a wide range of issues such as access to information, victim

impact statements, bail and parole. The ideals that it promotes cannot be legally enforced in a direct manner but it has affected the practical operations of organisations that liaise with victims.

The inclusion of the Charter in the *Victims Rights Act 1996* formalised the principles already endorsed by the New South Wales Government in 1989 for implementation throughout justice, health and community services agencies.

The purpose of the Charter was explained by the Attorney General:

The charter will place a statutory obligation on agencies to ensure that a victim is treated with courtesy and compassion and respect for their rights and dignity...All agencies involved with crime victims are required to have regard to the charter principles to the extent it is practicable and relevant, in addition to any other relevant matter.²

The Charter of Victims Rights occupies s 6 of the *Victims Rights Act 1996* and is reproduced here in full.

Charter of rights for victims of crime

6 The following comprises the Charter of rights of victims of crime:

6.1 Courtesy, compassion and respect

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

6.2 Information about services and remedies

A victim should be informed at the earliest practical opportunity, by relevant agencies and officials, of the services and remedies available to the victim.

6.3 Access to services

A victim should have access where necessary to available welfare, health, counselling and legal assistance responsive to the victim's needs.

6.4 Information about investigation of the crime

A victim should, on request, be informed of the progress of the investigation of the crime, unless the disclosure might jeopardise the investigation. In that case, the victim should be informed accordingly.

6.5 Information about prosecution of accused

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

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

²

Victims Rights Bill, Victims Compensation Bill, Sentencing Amendment (Parole) Bill, Second Reading Speech, Hon. J.W. Shaw, Attorney General, *NSWPD(LC)*, 15 May 1996, p 973.

6.6 Information about trial process and role as witness

A victim who is a witness in the trial for the crime should be informed about the trial process and the role of the victim as a witness in the prosecution of the accused.

6.7 Protection from contact with accused

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

6.8 Protection of identity of victim

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

6.9 Attendance at preliminary hearings

A victim should be relieved from appearing at preliminary hearings or committal hearings unless the court otherwise directs.

6.10 Return of property of victim held by State

If any property of a victim is held by the State for the purpose of investigation or evidence, the inconvenience to the victim should be minimised and the property returned promptly.

6.11 Protection from accused

A victim's need or perceived need for protection should be put before a bail authority by the prosecutor in any bail application by the accused.

6.12 Information about special bail conditions

A victim should be informed about any special bail conditions imposed on the accused that are designed to protect the victim or the victim's family.

6.13 Information about outcome of bail application

A victim should be informed of the outcome of a bail application if the accused has been charged with sexual assault or other serious personal violence.

6.14 Victim impact statement

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

6.15 Information about impending release, escape or eligibility for absence from custody

A victim should, on request, be kept informed of the offender's impending release or escape from custody, or of any change in security classification that results in the offender being eligible for unescorted absence from custody.

6.16 Submissions on parole and eligibility for absence from custody of serious offenders

A victim should, on request, be provided with the opportunity to make submissions concerning the granting of parole to a serious offender or any change in security classification that would result in a serious offender being eligible for unescorted absence from custody.

6.17 Compensation for victims of personal violence

A victim of a crime involving sexual or other serious personal violence should be entitled to make a claim under a statutory scheme for victims compensation.

Section 7 stipulates that, 'The Charter of Victims Rights is, as far as practicable and appropriate, to govern the treatment of victims in the administration of the affairs of the State', including the administration of justice, Government departments, and police services.

Section 8 clarifies that the Charter **does not create legal rights**, nor affect the validity of any judicial or administrative act or omission. However, breaches of the Charter can be the subject of disciplinary proceedings against an official or a complaint to the Victims Bureau.

2.3 Review of the 1996 victims legislation

The NSW Attorney General's Department is in the process of reviewing the *Victims Rights Act 1996* and the *Victims Support and Rehabilitation Act 1996* as required by section 18 and section 92 respectively of those Acts.³

The aim of the review is to determine whether the policy objectives of the Acts remain valid and whether the terms of the Acts remain appropriate for securing those objectives. The object of the *Victims Rights Act 1996* is 'to recognise and promote the rights of victims of crime': s 3. The objects of the *Victims Support and Rehabilitation Act 1996* are more detailed:

- to provide support and rehabilitation through an approved counselling scheme and a statutory compensation scheme;
- to enable compensation to be recovered from offenders;
- to impose a levy on offenders found guilty of crimes punishable by imprisonment, for the purpose of funding the compensation scheme;
- to give effect to an alternative option whereby the court may order the offender to pay compensation to a victim: s 3.

The official closing date for written submissions from interested individuals and organisations was 19 April 2002. The inquiry will be conducted by officers of the Legislation and Policy Division of the Attorney General's Department. It is anticipated that submissions will be reviewed over the next few months and further consultations held with stakeholders as necessary. A report will be completed, probably at the end of this year or early next year, and will be tabled by the Attorney General in Parliament.⁴

2.4 Industrial Relations Amendment (Leave for Victims of Crime) Act 2001

The *Industrial Relations Amendment (Leave for Victims of Crime) Act 2001* No 21 created a separate entitlement of victims leave to 'allow victims of serious crime to attend court without fear of losing their jobs.'⁵ The legislation was introduced by the Government and was unopposed by the Opposition. It commenced on the date of assent, 19 June 2001, and

³ Sections 18 and 92 state that a review is to be undertaken as soon as possible after 5 years from the date of assent to the Act, which in both cases was 2 December 1996.

⁴ Personal communication on 27 May 2002 from Kristen Rundle, Policy Adviser, who is the contact officer for the review: <Kristen_Rundle@agd.nsw.gov.au> The postal address is: Victims Legislation Review, Legislation and Policy Division, NSW Attorney General's Department, GPO Box 6, Sydney, NSW, 2001.

⁵ Industrial Relations Amendment (Leave for Victims of Crime) Bill, Second Reading Speech, Mr Gaudry MP, Parliamentary Secretary, *NSWPD(LA)*, 28 March 2001, pp 12816-12817.

inserted Part 4B into Chapter 2 of the *Industrial Relations Act 1996*.⁶

Victims leave is without pay. An employee who is a victim of crime is entitled to unpaid victims leave in connection with court proceedings relating to a ‘violent crime’ (as defined below): s 72AC. The amendments extend to all employees, including part-time and casual employees, employed on or after the commencement of the amending Act. The violent crimes in question can be committed before or after commencement.

The purposes for which victims leave may be taken are outlined in s 72AD:

- Attending court proceedings scheduled in relation to the violent crime (whether or not as a witness).
 - ⇒ In this situation, victims leave may be taken for a full working day, even if the proceedings are only scheduled for a part of the day or do not proceed on the day on which they were scheduled.
- Travel to attend court proceedings if the victim usually resides more than 100 kilometres from the place where the proceedings are scheduled to be held.
 - ⇒ Leave for the purpose of travel is not to exceed one working day for the duration of any stage of the court proceedings.

The employee is required to give one week’s notice of an intention to take victims leave, where it is reasonably practicable to comply in the circumstances: s 72AE. Upon returning to work after a period of victims leave, the employee is entitled to be employed in the position held immediately before taking leave: s 72AF.

The terms used in Part 4B are defined in s 72AB as follows:

- **victim of crime** –
 - (a) a person who suffers harm as a direct result of an act committed or apparently committed by another person in the course of an alleged violent crime; or
 - (b) the parent, grandparent or guardian of a child who suffers such harm, if the child is under 18 years at the time victims leave is taken; or
 - (c) a member of the immediate family of a person who dies as a direct result of an act committed or apparently committed by another person in the course of an alleged violent crime.
- **violent crime** – an indictable offence, punishable by imprisonment for 5 years or more, that involves violence, including sexual or indecent assault.
- **harm** – actual physical bodily harm, mental illness or nervous shock.
- **member of the immediate family** – spouse, de facto (within the meaning of the

⁶

Commencement was determined by s 2 of the *Industrial Relations Amendment (Leave for Victims of Crime) Act 2001*.

Property (Relationships) Act 1984), parent, guardian, step-parent, grandparent, step-grandparent, child, step-child, grandchild, step-grandchild, brother, sister, step-brother, or step-sister.

- ***court proceedings*** – proceedings against a person charged with a violent crime, including committals, trials, sentences, appeals, and proceedings on a back up charge or related offence (as defined by s 35 of the *Criminal Procedure Act 1986*). The Government indicated⁷ that regulations may also be made to include other proceedings such as pre-trial conferences.

2.5 Codification of general sentencing principles in 2002

Two fundamental issues that judges consider in determining a suitable sentence are the objective seriousness of the offence and the subjective features of the offender. The type of victim and the harm done to them are relevant to the gravity of the crime. Deterrent sentences are required to protect persons who are at risk, especially the elderly, children, the disabled, and those who work in vulnerable occupations, such as nurses and service station attendants. Authority on this point includes: *R v Smith* (unreported, CCA, 7 July 1988) and *R v Hitchens* [1983] 3 NSWLR 318 (taxi drivers); *R v L* (unreported, CCA, 3 July 1986) and *R v Dent* (unreported, CCA, 14 March 1991) (young children); and *R v Heath* (unreported, CCA, 14 August 1990) (elderly women).

The *Crimes (Sentencing Procedure) Amendment (General Sentencing Principles) Act 2002* No 5 imposed a statutory requirement on judges to take the sentencing principles accepted at common law into account. The Amendment Act inserted s 21A into the *Crimes (Sentencing Procedure) Act 1999*. Section 21A(2) outlines the matters (if relevant and known) that the court must take into account in formulating a sentence of a severity that is appropriate:

- (a) the nature and circumstances of the case;
- (b) where the offence formed part of a course of conduct, that course of conduct;
- (c) the **personal circumstances of any victim** of the offence;
- (d) any **injury, loss or damage** resulting from the offence;
- (e) the degree to which the offender has shown contrition for the offence;
- (f) the need to deter the offender or others from committing a similar offence;
- (g) the protection of the community from the offender;
- (h) the need to ensure that the offender is adequately punished for the offence;
- (i) the character, antecedents, cultural background, age, means and physical or mental condition of the offender;
- (j) the prospect of rehabilitation of the offender.

With regard to the personal circumstances of the victim under s 21A(2)(c), several further factors are identified:

⁷ Industrial Relations Amendment (Leave for Victims of Crime) Bill, Second Reading Speech, Mr Gaudry MP, Parliamentary Secretary, *NSWPD(LA)*, 28 March 2001, p 12817.

- (i) the age of the victim, particularly if the victim is very old or very young, and
- (ii) any physical or mental disability of the victim, and
- (iii) any vulnerability of the victim arising because of the nature of their occupation.

The Amending Act began as a more radical plan to give special recognition to senior victims. The original Bill, entitled the *Crimes (Sentencing Procedure) Amendment (Assaults on Aged Persons) Bill* was introduced by Hon. John Tingle MLC, representing the Shooters Party, in the Legislative Council on 26 September 2001. The Bill envisaged imposing higher penalties on offenders who commit assaults (or any other offences occasioning actual bodily harm) upon persons over 65 years of age. A scale of penalties was proposed, according to the victim's age category:

- victims aged between 65 and 70 years – increase of 10% on the maximum penalty available to the court;
- victims above 70 years up to 90 years – extra 10% on the maximum penalty for every 5 years of age;
- victims over 90 years – increase of 75% on the maximum penalty;
- offence occurred following the offender's forcible entry into the victim's residential premises – further 10% increase.

The higher penalties were to be imposed regardless of whether the offender knew the victim's age when committing the assault.

However, the Government obtained the support of Hon. John Tingle MLC to absorb the Bill into the broader concept of legislating general sentencing principles, with particular attention to offences against several categories of vulnerable victims. The notion of a 'prescriptive formula for sentence loading based on increments of the age of the victim' was dropped.⁸ The new statutory formulations were also to apply to all crimes, not just assaults.

The Government acknowledged that its planned legislation formalised the current practice of the courts:

There is an existing principle in law that the sentencing of those who prey on weaker victims should reflect the aggravated nature of the crime. There is nothing contentious about that principle; it is expressed in numerous cases in common law. Its most famous expression was by Justice Kirby in the Court of Criminal Appeal, as he then was, in the case of *Regina v Bradley*.⁹

⁸ Crimes (Sentencing Procedure) Amendment (Assaults on Aged Persons) Bill, Second Reading Debate, Hon. John Hatzistergos MLC, *NSWPD(LC)*, 15 November 2001, p 18669.

⁹ Crimes (Sentencing Procedure) Amendment (Assaults on Aged Persons) Bill, Second Reading Debate, Hon. John Hatzistergos MLC, *NSWPD(LC)*, 15 November 2001, p 18669. The judgment in *R v Bradley* was delivered on 26 October 1993 and is unreported.

Hon. John Tingle MLC responded during the Second Reading Debate:

...in discussions with the Attorney General's office, I was persuaded that it was, perhaps, as some people have suggested, a little uneven to provide special attention to penalties for attacks on the elderly and not to make similar provision for other groups who might be just as vulnerable and just as defenceless when attacked.

...I admit that I felt that the whole idea of sliding scales was not perfect, because the idea could be seen as arbitrary, but in discussions with my legal advisers I was not able to come up with a formula that would be more wide reaching and less arbitrary. During those discussions we finally looked at the Commonwealth Crimes Act.¹⁰

Section 16A of the *Crimes Act 1914* (Cth), on which the New South Wales amendments were modelled, outlines the matters to which the court is to have regard when passing sentence for Federal offences.

In the Committee stage in the Legislative Council, amendments were made to implement the Government's proposal and to rename the legislation as the *Crimes (Sentencing Procedure) Amendment (General Sentencing Principles) Act 2001*. The Bill passed the Upper House on 29 November 2001 and the Legislative Assembly on 21 March 2002. The Act commenced on 15 April 2002.¹¹

¹⁰ Crimes (Sentencing Procedure) Amendment (Assaults on Aged Persons) Bill, Second Reading Debate, *NSWPD(LC)*, 15 November 2001, p 18690.

¹¹ *Government Gazette*, No 74 of 15 April 2002, p 2357.

3. VICTIM IMPACT STATEMENTS

A victim impact statement is a document that refers to the personal harm suffered by a victim or a witness as a direct result of a violent offence, or the effect of a victim's death upon their immediate family members. It is supplied predominantly for sentence proceedings.

3.1 Chronological history of victim impact statements

Common law: In New South Wales at common law, victim impact statements were admitted in some cases such as sexual assaults to provide the court with information which it otherwise did not have concerning the severity of the offence upon the victim.¹² But victim impact statements from family victims were generally excluded in homicide cases.

For example, in the sentence proceedings of *R v De Souza* (unreported, Supreme Court, 10 November 1995) the Crown sought to tender a number of victim impact statements from family members of a young woman who had been murdered. The defence objected to the admission and relevance of the statements. Justice Dunford found that the statements 'to some extent' dealt with the impact of the victim's death on her relatives, including depression, insomnia, and lack of concentration on studies and work. But the relatives also expressed their views on extraneous matters: the defence of diminished responsibility and other aspects of the case; their desire for revenge; their own medical problems, unsupported by documentation from medical practitioners; and the penalty that should be imposed. Dunford J concluded that, 'The so-called Victim Impact Statements therefore being objected to and unsworn, and irrelevant to any issue of sentencing, are not admissible and are rejected.'¹³ Some commentators have asserted that the case influenced the Government to introduce legislative provisions, but there is no mention of it in the Second Reading Speech on the Victims Rights Bill 1996.¹⁴

1987: The first attempt at statutory recognition of victim impact statements in New South Wales occurred in 1987 when s 447C of the *Crimes Act 1900* was created by the *Crimes (Sentencing) Amendment Act 1987* No 183. At the time, the Labor Premier, Mr Barrie Unsworth, stated:

The proposed New South Wales legislation will allow the tendering of victim

¹² New South Wales Law Reform Commission, Report 79, *Sentencing*, December 1996, pp 30-31. Sexual assault cases in which victim impact statements were admitted included *R v Church* (unreported, Supreme Court, 16 July 1993) and *R v RKB* (unreported, Court of Criminal Appeal, 30 June 1992).

¹³ Page 4 of the judgment.

¹⁴ Tracey Booth, a law lecturer, states that the NSW statutory provisions appear to be a direct response to *R v De Souza*: 'The Dead Victim, the Family Victim and Victim Impact Statements in New South Wales' (2000) 11(3) *Current Issues in Criminal Justice* 292 at 296.

impact statements to the court at sentence. It is an important step in the recognition of the rights of the victims of crime. It is an historic step for a common law jurisdiction like New South Wales where the criminal trial has been exclusively a relationship between the State and the offender.¹⁵

However, s 447C was never proclaimed and its scope was narrower than the subsequent provisions.¹⁶

1996: The *Victims Rights Act 1996* No 114 was assented to on 2 December 1996 and commenced on 2 April 1997.¹⁷ It inserted provisions on victim impact statements at Part 6A (ss 23A-23E) of the *Criminal Procedure Act 1986*. These were later relocated to ss 164-169 of the Act.¹⁸ Some features of the regime were:

- statutory backing for the presentation of victim impact statements only in the District Court and the Supreme Court;
- two categories of victims could submit victim impact statements:
 - *primary victim* - a person against whom the offence was committed, or who was a witness to the act of actual or threatened violence, and who suffered personal harm as a direct result of the offence;
 - *family victim* - a person who was, at the time the offence was committed, a member of the immediate family of a primary victim who died as a direct result of the offence.

The definitions are almost identical to those in force today. Terms such as ‘personal harm’ and ‘immediate family’ are explored later in this chapter at ‘**3.2.1 Definitions and terminology**’.

- the present distinction between the treatment of each category of victim was also instigated:
 - the court may receive and consider a victim impact statement from a primary victim

¹⁵ Crimes (Sentencing) Amendment Bill, Second Reading Speech, Mr Unsworth MP, Premier, NSWPD(LA), 12 November 1987, p 15915.

¹⁶ For example, s 447C did not provide for victim impact statements to be given by family members of deceased victims. The provision received assent on 4 December 1987 but remained unproclaimed until it was repealed by the *Victims Rights Act 1996*.

¹⁷ *Government Gazette No 31*, 27 March 1997, p 1666.

¹⁸ The *Criminal Procedure Act* was renumbered by the *Crimes Legislation Amendment (Sentencing) Act 1999* No 94, transferring the victim impact statement provisions from ss 23A-23E to ss 164-169. This was a temporary arrangement until the enactment of the *Crimes (Sentencing Procedure) Act 1999* No 92, in which the provisions now appear at Part 3, Division 2.

before sentencing an offender, if the court considers it appropriate to do so;

- the court must receive a victim impact statement from a family victim and acknowledge its receipt, but must not consider the statement in connection with determining the punishment unless the court decides that it is appropriate to do so.

Also in 1996, the New South Wales Law Reform Commission declared its support for a legislative basis for victim impact statements. By the time the Commission's report on *Sentencing* was released in December 1996, the *Victims Rights Act 1996* No 114 had received assent but not been proclaimed. The Commission recommended that:

- victim impact statements should not be admissible in cases where the victim had died in the offence ('death cases'), and that the new amendments to the *Criminal Procedure Act 1986* allowing such statements should be repealed;
- in other cases, victim impact statements should be optional and should be admissible at sentence hearings to indicate the seriousness of the offence;
- the concept of a 'victim' should be limited to the person against whom the offence was committed or a witness to the act, where they suffered personal harm as a direct result of the offence;
- the victim impact statement should be sworn, that is, verified on oath;
- the authors of victim impact statements should, in principle, be subject to cross-examination on the contents of the statement;
- in appropriate cases, the court should mark victim impact statements as confidential exhibits or order their non-publication.¹⁹

The Law Reform Commission's reasoning for wishing to exclude victim impact statements in 'death cases' was that the consequence of the offence to the victim was already known; if the court had regard to the victim impact statement it would be engaging in 'pure retribution' and valuing some lives above others.²⁰ The NSW Council for Civil Liberties, the NSW Young Lawyers' Criminal Law Committee, and the District Court's Criminal Law Committee shared this perspective, while the Director of Public Prosecutions and the Victims Advisory Council took an opposing view.²¹

The Commission disagreed with the distinction drawn by the newly created s 23C(3) of the *Criminal Procedure Act 1986*, whereby the statement of a family victim must be received, but the statement of a primary victim may be received if the court considers it appropriate. Rather, the Commission advocated that the court should have the power in all cases to exclude victim impact statements, for example, if their contents were exaggerated,

¹⁹ New South Wales Law Reform Commission, Report 79, *Sentencing*, December 1996, pp xii-xiii. The Commission's Discussion Paper 33, *Sentencing*, April 1996, also explored these issues.

²⁰ New South Wales Law Reform Commission, Report 79, *Sentencing*, December 1996, pp 35-36.

²¹ *Ibid*, footnotes 46-48 of the Report.

irrelevant or prejudicial.²² The Commission's preference for victim impact statements to be sworn and subject to cross-examination did not feature in the statutory provisions.²³

1997: The *Crimes Legislation Further Amendment Act 1997* No 135 rectified two problems that had arisen in practice. The first issue was the type of offence in response to which a victim impact statement could be submitted. Judges had expressed uncertainty about whether the existing definition of an *offence* as 'an indictable offence that involves an act of actual or threatened violence (including sexual assault) and that is being dealt with on indictment' applied to dangerous driving causing death.²⁴ The amendments confirmed that any offences involving death or physical bodily harm to a person were covered.

Secondly, the amending Act extended the operation of the victim impact statement provisions to the Local Court and the Children's Court. The Attorney General explained:

While it is clear enough that the common law allows victim impact evidence to be given in the Local Court and Children's Court in relevant cases involving injury, it has become apparent, following the commencement of the *Victims Rights Act*, that the common law severely limits the giving of such evidence in cases involving death.

...

The bill will provide specifically that victim impact statements may be given in the Local Court and Children's Court, on the same basis as they may be given in the District and Supreme Courts, in cases where the offence involves the death of any person, or where the law provides a higher maximum because the offence has resulted in the death of a person.²⁵

3.2 Current legislative provisions

Statutory authority for the tendering of victim impact statements is currently found at ss 26-30 of the *Crimes (Sentencing Procedures) Act 1999*.

3.2.1 Definitions and terminology

The definitions under ss 26 and 27 of the *Crimes (Sentencing Procedures) Act 1999* clarify the entitlement to use victim impact statements.

²² New South Wales Law Reform Commission, Report 79, *Sentencing*, December 1996, pp 39-40.

²³ Supporters of these principles, besides the Commission, were the Director of Public Prosecutions, the NSW Council for Civil Liberties, the NSW Young Lawyers' Criminal Law Committee, and the Law Society of NSW: footnote 97 of the Report.

²⁴ Hon. J.W. Shaw, Attorney General, Second Reading Speech on the *Crimes Legislation Further Amendment Bill*, NSWPD(LC), 2 December 1997, p 2952.

²⁵ *Ibid*, pp 2952-2953.

Victim impact statement – means a statement containing particulars of:

- (a) in the case of a primary victim, any personal harm suffered by the victim as a direct result of the offence, or
- (b) in the case of a family victim, the impact of the primary victim's death on the members of the primary victim's 'immediate family' (as defined below).

Victim – means a primary victim or a family victim.

- **Primary victim** – a person who has suffered personal harm as a direct result of the offence and is either:
 - (a) a person against whom the offence was committed, or
 - (b) a person who was a witness to the act of actual or threatened violence, the infliction of physical bodily harm, or the death concerned.
- **Family victim** – a person who was a 'member of the primary victim's immediate family', at the time the offence was committed that directly resulted in the primary victim's death. It is irrelevant whether or not the family victim has suffered personal harm as a result of the offence.

Member of the primary victim's immediate family –

- (a) the victim's spouse; or
- (b) the victim's de facto spouse or same-sex partner, being a person who has cohabited with the victim for at least 2 years; or
- (c) a parent, guardian or step-parent of the victim; or
- (d) a child, step-child, or some other child for whom the victim is the guardian; or
- (e) a brother, sister, step-brother or step-sister of the victim.

Offence – outlined in detail by s 27 (see below) and depends on jurisdiction:

- when dealt with on indictment in the District Court or Supreme Court, an offence that results in death, or actual physical bodily harm, or involves an act of actual or threatened violence or sexual assault;
- when dealt with in the Local Court, an offence that results in death or attracts a higher maximum penalty than would otherwise apply because death or actual physical bodily harm was caused.

Personal harm – encompasses actual physical bodily harm, mental illness or nervous shock.

3.2.2 Types of proceedings

Victim impact statements can be received in the Supreme, District or Local Court or the Industrial Relations Commission, after conviction but before sentencing an offender. The other context in which victim impact statements may be submitted is when the Supreme Court hears an application for the redetermination of an existing life sentence of imprisonment. This scheme is available to eligible life sentence prisoners who were sentenced before the introduction of 'truth in sentencing' in 1989 and involves specifying

a term of sentence or a non-parole period. The conditions of the scheme are outlined in Schedule 1 of the *Crimes (Sentencing Procedure) Act 1999*.

In the **Supreme Court** and **District Court**, the statutory provisions on victim impact statements can be utilised in relation to offences which are dealt with on indictment and:

- result in the death of, or actual physical bodily harm to, any person; or
- involve an act of actual or threatened violence or an act of sexual assault; or
- the law provides a higher maximum penalty than would normally apply because the offence results in death or actual physical bodily harm²⁶: s 27(2).

In the **Industrial Relations Commission**, the victim impact statement provisions are available for offences against the *Occupational Health and Safety Act 2000* which result in death or actual physical bodily harm: s 27(2A).

In the **Local Court**, the provisions only operate if:

- the offence results in the death of any person; or
- the law provides a higher maximum penalty than would normally apply because the offence results in death²⁷: s 27(3).

It seems that the admissibility of victim impact statements for offences not covered by the wording of s 27(1)-(3) would be determined according to the common law. This would be consistent with s 27(4) which states: ‘Nothing in this Division [Division 2 of Part 3 of the *Crimes (Sentencing Procedure) Act 1999*] limits any other law by or under which a court may receive and consider a victim impact statement in relation to any offence to which this Division does not apply.’²⁸

3.2.3 Preparation, content and format

Formal requirements for victim impact statements are outlined in s 30 of the *Crimes (Sentencing Procedure) Act 1999* and in Part 2, Division 2 of the *Crimes (Sentencing Procedure) Regulation 2000*.

A victim impact statement may be prepared by:

²⁶ Dangerous driving occasioning death attracts a higher maximum penalty than dangerous driving occasioning grievous bodily harm, pursuant to s 52A of the *Crimes Act 1900*. An example of an offence with a higher maximum penalty if actual bodily harm occurs is kidnapping: s 86 of the *Crimes Act*.

²⁷ For instance, negligent driving attracts a higher penalty in the Local Court where death occurs: s 42 of the *Road Transport (Safety and Traffic Management) Act 1999*.

²⁸ See also the Second Reading Speech by the Attorney General on the Crimes Legislation Further Amendment Bill 1997, which introduced the jurisdictional guidelines of s 27 in their original form (by inserting s 23AA into the *Criminal Procedure Act 1986*): NSWPD(LC), 2 December 1997, p 2953.

- the victim(s) to whom it relates, or any victim's representative;
- any 'qualified person' designated by the victim, the victim's representative or the prosecutor in the proceedings to which the statement relates: cl 9 of the *Crimes (Sentencing Procedure) Regulation 2000*.

'Qualified person' is defined by cl 9(3) to mean an authorised counsellor under s 21 of the *Victims Compensation Act 1996*, or any other person who is qualified by training, study or experience to provide the particulars required for inclusion in a victim impact statement.

Only one victim impact statement may be tendered in respect of each victim, and the statement may only be tendered by the prosecutor in the proceedings before the court: cl 12.

The criteria for the visual presentation of victim impact statements are listed in cl 10 of the Regulation and include being legible, either typed or hand-written on A4 size paper, and (except with the leave of the court) no longer than 20 pages in length, including medical reports or other annexures. There is no provision for a victim impact statement to be made orally to the court.

The statement must not contain anything that is 'offensive, threatening, intimidating or harassing': cl 11(6). It must identify and be signed by the person who prepared it. When the statement is not prepared by the victim or the victim's representative, it must be signed by either of those persons to verify that there is no objection to the statement being given to the court. If the statement is submitted by a family victim, the nature of their relationship to the primary victim must be stipulated.

3.2.4 The court's use of victim impact statements

It is not mandatory to supply a victim impact statement, and the absence of one does not give rise to an inference that an offence had little or no impact on a victim: s 29 of the *Crimes (Sentencing Procedure) Act 1999*. In New South Wales, victim impact statements are unsworn and in that sense are untested.

In relation to **primary victims**, it would appear that strictly speaking there is no obligation on the court to accept the victim impact statement. Section 28(1) states that, 'If it considers it appropriate to do so' the Supreme Court or District Court may receive and consider a victim impact statement.

There is a greater sense of obligation towards **family victims** when the primary victim has died as a direct result of the offence:

- the court must receive and acknowledge a victim impact statement given by a family victim of a deceased primary victim; and
- the court may make any comment on the statement that it considers appropriate; but
- the court must not consider the statement in connection with determining a punishment for the offence unless it considers it appropriate to do so: ss 28(3)&(4).

The court may make a victim impact statement available to the offender or to any other

person, but subject to relevant conditions including a mandatory condition that the offender is not to retain a copy of the statement: s 28(5).

3.3 Judicial interpretation of the legislative regime

Judges have largely been unwilling to do more than receive victim impact statements, particularly in homicide cases. Case law after the introduction of the statutory provisions in 1996 has demonstrated that, to use the current language of s 28(4) of the *Crimes (Sentencing Procedure) Act 1999*, judges have not found it appropriate to consider a victim impact statement given by a family victim in connection with the determination of the punishment for the offence.

In the sentencing judgment of *R v Previtera* (1997) 94 A Crim R 76, Hunt CJ at CL stated (at 86) that where the victim is still alive, victim impact statements serve the useful purpose of establishing the effects of the crime upon that victim:

The consequences of any crime upon the victim who is *directly* injured by it are always relevant to sentencing the offender as part of the objective circumstances of the crime, and sometimes they are relevant also in aggravation of those circumstances: at 85.

However, if the victim died from the offence, the impact of the crime on him or her has already been proven or admitted by the time the offender is to be sentenced. Hunt CJ at CL reasoned that generally, except for a 'rare case' to the contrary, when a victim impact statement made by the deceased's family deals only with the effect of the death upon the family:

...it is impossible to see how any loss or injury suffered by persons other than the victim *directly* injured by the crime could ever be relevant to sentencing...however relevant they may be to the issue of compensation: at 85-86.

Hunt CJ at CL criticised the legislation as being 'poorly drafted', especially the requirement (at that time under s 23C(3) of the *Criminal Procedure Act 1986*) for a sentencing judge to receive and acknowledge the victim impact statement of a deceased victim's relative, yet not use it in connection with determining the punishment unless it is appropriate to do so:²⁹

It is unfortunate that the Legislature chose to pass s.23C(3) in a form which includes a statement from members of a victim's family in a death case which deals only with the effect of the death upon them, and which could never be appropriate to be taken into account on sentencing. The Legislature is therefore responsible for having raised the expectations of families of such victims and for the disappointment and dissatisfaction resulting from the non-fulfilment of those expectations: at 87.

²⁹ The same situation prevails in ss 28(3)&(4)(b) of the *Crimes (Sentencing Procedure) Act 1999*.

R v Previterra was followed in *R v Audsley* (unreported, Supreme Court, 30 May 1997), *R v Fernando* (unreported, Supreme Court, 21 August 1997), *R v Bollen* (1998) 99 A Crim R 510 and *R v Dang* (unreported) [1999] NSWCCA 42. The difficulty of envisaging a case in which victim impact statements from family members of deceased victims could appropriately bear upon the question of sentence has been reiterated in numerous cases: eg. *R v Audsley* (supra)³⁰ and *R v Fernando* (supra).³¹

The comments of Adams J in *R v Dang* [1999] NSWCCA 42 at para 25 typify the view of most Supreme Court judges:

Essentially, then, the reason that victim impact statements in cases involving death are not taken into account in imposing sentence is that [the] law holds, as it must, that in death we are all equal and the idea that it is more serious or more culpable to kill someone who has or is surrounded by a loving and grieving family than someone who is alone is offensive to our notions of equality before the law.

There seems to be a fine line for sentencing judges between correctly acknowledging a victim impact statement and incorrectly giving it weight. In *R v Dang* (supra), the Court of Criminal Appeal (Abadee J with whom Barr J agreed; Adams J agreed with additional remarks) found that the sentencing judge took into account irrelevant material and fell into appellable error ‘when he referred to the objective fact that the husband of the deceased and other relatives of the deceased had suffered grief as a result of the death of the deceased’: para 15. Yet in *R v Mansour* (unreported) [1999] NSWCCA 180, the Court of Criminal Appeal (Spigelman CJ with whom Studdert J and Adams J agreed) held that the judge had not erred by stating in the remarks on sentence that the material in the victim impact statements indicated the ‘immeasurable grief’ that the death of the victim had caused to her family. Spigelman CJ found there was nothing to suggest that the sentencing judge had given weight to the impact of the offence on the victim’s family in determining the sentence imposed.³²

The importance of remaining focussed on relevant considerations in victim impact statements, as highlighted in the pre-legislation cases of *R v De Souza* (unreported, Supreme Court, 10 November 1995) and *R v Bakewell* (unreported, Court of Criminal Appeal, 27 June 1996), continued after the introduction of the statutory entitlements. In *R v MA* [2001] NSWCCA 30 the Court of Criminal Appeal (Hulme J with whom Grove J agreed) found that the sentencing process miscarried to some degree because the sentencing judge had regard to a counsellor’s report annexed to the victim impact statement. The report

³⁰ Per Hidden J at p 4 of the electronic version of the judgment on AustLII (the database of the Australasian Legal Information Institute) at <www.austlii.edu.au>

³¹ Per Abadee J at p 7 of the judgment on the AustLII database.

³² Pages 2-3 of the electronic version of the judgment on the AustLII database at <www.austlii.edu.au>

showed ‘obvious partisanship’ and referred to matters that went beyond the charges against the offender.³³

Comments

An examination of case law since the statutory provisions on victim impact statements commenced in 1997 suggests that the Supreme Court has preferred a more restrictive use of victim impact statements than the scope permitted by the legislation.

Many legal academics also support this approach. For example, Tracey Booth, Lecturer in Law at the University of Western Sydney, maintains:

A VIS from a family victim adds a dimension to the sentencing process that relates to purely personal circumstances introduced by the family victim and far removed from the objective circumstances of the offence. As has been argued, these subjective constraints have the potential to impact in a discriminatory and unjust manner upon sentence outcomes.³⁴

However, it can also be argued that there seems to be an element of disparity between the latitude given to defendants in the sentencing process, and the belief of many judges that to take victim impact statements into account at sentence would grant some victims’ lives more worth than others. Defendants are free to submit the most favourable testimonials they can marshal for the sentence hearing. Those defendants who are wealthy or prominent are often better placed to produce impressive character references than homeless, unemployed or unrepresented defendants. These references are explicitly taken into account by sentencing judges. In other words, defendants are not all treated the same, as if their lives are of equal importance. Therefore, it could be seen as inconsistent to impose such a standard on victims.

3.4 Other States and Territories

In 1988, South Australia was the first Australian jurisdiction to enact legislation for the admissibility of victim impact statements: see s 7A of the *Criminal Law (Sentencing) Act 1988* (SA). Other jurisdictions which grant statutory recognition to victim impact statements are Victoria (Part 6, Division 1A of the *Sentencing Act 1991*), Western Australia (Part 3, Division 4 of the *Sentencing Act 1995*), the Australian Capital Territory (Part 12, Division 1 of the *Crimes Act 1900*), and the Northern Territory (ss 106A-106B of the *Sentencing Act 1995*). Queensland and Tasmania do not have explicit statutory provisions on victim impact statements. However, s 15 of the *Penalties and Sentences Act 1992* (Qld) authorises the court to receive any information it considers appropriate in imposing the proper sentence on the offender. Similarly, s 81 of the *Sentencing Act 1997* (Tas) grants the

³³ Paras 17, 20, 26. Notwithstanding this finding, the court held that the sentences in the case were ‘by no means excessive’ and dismissed the appeal.

³⁴ T Booth ‘The Dead Victim, the Family Victim and Victim Impact Statements in New South Wales’ (2000) 11(3) *Current Issues in Criminal Justice* 292 at 306.

court the general power to receive any documentary or oral information on sentence, unrestricted by the rules of evidence.

There is little uniformity between the States in the definition of a victim, the degree to which the statement can be taken into account, and whether the victim has the choice of delivering the statement orally or in writing.³⁵ For example, in **Victoria**, unlike in New South Wales:

- a victim impact statement can be made **orally or in writing**;
- the statement must either take the form of a **statutory declaration, or sworn evidence** accompanied by a written statutory declaration;
- a victim may make an impact statement to the court **‘for the purpose of assisting the court in determining sentence’**;
- the victim may be **cross-examined** on the statement: ss 95A, 95D of the *Sentencing Act 1991* (Vic).

The **Western Australian** provisions also allow the victim impact statement to be in oral or written form, but stipulate that the statement ‘is not to address the way in which or the extent to which the offender ought to be sentenced’: s 25 of the *Sentencing Act 1995* (WA).

The **Northern Territory** *Sentencing Act 1995* gives victim impact statements a potentially strong role in the proceedings. Section 106B(5A) provides that they ‘may contain a statement as to the victim’s wishes in respect of the order that the court may make in relation to the offence’.

³⁵ See T Booth ‘The Dead Victim, the Family Victim and Victim Impact Statements in New South Wales’ (2000) 11(3) *Current Issues in Criminal Justice* 292 at pp 293-296, for a relatively recent comparative analysis. Also of note is the NSW Law Reform Commission’s Discussion Paper 33 on *Sentencing*, April 1996, at paras 11.23-11.28.

4. STATUTORY COMPENSATION AND COUNSELLING SCHEMES

Compensation and counselling are both statutory entitlements of victims of violent offences. Victims compensation has a long history, whereas counselling was introduced relatively recently in 1996. But they are related concepts, particularly as eligibility for counselling initially depended on qualifying for compensation. In recent years, the Legislature has adopted the approach that monetary compensation alone is of limited rehabilitative benefit to victims, and that counselling and other strategies should be fostered.

The victims compensation scheme in New South Wales is said to be ‘financially generous in comparison to its interstate and overseas counterparts.’³⁶ In 2001-2002 the Victims Compensation Tribunal paid out more than \$88 million, while \$3.5 million was recovered from convicted offenders.³⁷ The disparity between payouts and incoming funds has been one of the concerns raised during regular reassessments of the scheme.

4.1 Chronology of statutory compensation and counselling in NSW

Pre 1967: From its enactment, the *Crimes Act 1900* made provision for judges to direct that compensation for injury or loss be paid to a victim out of the property of the offender. Initially, s 437 set a limit of £500 and applied to offenders convicted of a felony.³⁸ The maximum payment rose to £1000 in 1951.³⁹

1967: A statutory, government-funded compensation scheme for victims injured in criminal offences was introduced in New South Wales by the *Criminal Injuries Compensation Act 1967* No 14. The Act enabled an aggrieved person to apply to the Consolidated Revenue Fund for payment of the sum determined by the court.

1970s-1980s: The maximum amount that could be awarded by a court was increased to \$4000 in 1974, to \$10,000 in 1979, and to \$20,000 in 1984.⁴⁰

³⁶ New South Wales Parliament, Joint Select Committee on Victims Compensation, *Second Interim Report: The Long Term Financial Viability of the Victims Compensation Fund*, December 1997, p 9.

³⁷ *Victims Services Key Facts 2001/2002*, from the Victims Services’ website at <www.lawlink.nsw.gov.au/vs> Go to ‘About Victims Services’. These figures are the same as for 2000-2001: Attorney General’s Department of NSW, *Annual Report 2000-2001*, p 55.

³⁸ Misdemeanours were added by the *Crimes (Amendment) Act 1924* No 10. That Act also created an equivalent power for courts of summary jurisdiction to direct under s 558(3) that a maximum of £50 be paid out of the property of a convicted offender as compensation to an aggrieved person.

³⁹ *Motor Traffic (Amendment) Act 1951* No 59.

⁴⁰ The amending Acts were the *Crimes and Other Acts (Amendment) Act 1974* No 50, the *Crimes (Compensation) Amendment Act 1979* No 101, and the *Crimes (Compensation) Amendment Act 1984* No 70.

1987-1988: A revitalised victims compensation scheme commenced operation on 15 February 1988, pursuant to the *Victims Compensation Act 1987* No 237. The Victims Compensation Tribunal (VCT) was established as an independent body to consider applications for victims compensation and to make awards to victims from the Victims Compensation Fund. Some features of the original scheme were:

- the maximum amount payable by the VCT was \$50,000, more than double the sum that could previously be awarded by the courts;
- the award was calculated on a case by case basis, not by a table of injuries;
- each application was considered by the VCT before deciding whether or not a hearing needed to be held;
- the VCT had to be satisfied on the balance of probabilities that the applicant was an eligible victim of an act of violence;
- an ‘act of violence’ was defined broadly to include an act or related acts that occurred in the course of the commission of an offence and resulted in injury or death;
- 4 categories of victims could apply for compensation: (i) primary victims, (ii) secondary victims, (iii) close relatives of deceased victims, and (iv) law enforcement victims.

1993: A review of the *Victims Compensation Act 1987* was conducted by the Deputy Chief Magistrate, Cec Brahe. The report was published in March 1993 and among its recommendations, it suggested that the concepts of ‘act of violence’, ‘secondary victims’ and ‘close relatives’ be tightened. The report also advocated that a series of acts which amounted to a course of conduct should only give rise to one claim, as distinct from separate acts which resulted in separate injuries.

1994: The Auditor-General reported to Parliament on victims compensation in 1994 and concluded that reform of the statutory scheme needed to be urgently considered to prevent the scheme becoming unaffordable.⁴¹ Both the Brahe Review and the Auditor-General’s report recommended that the common law principles of compensation should not apply under the statutory scheme because of the risk of inconsistency in the amounts awarded.

1996: The influence of the aforementioned inquiries was acknowledged when the Government announced its plans to overhaul victims compensation:

The reforms proposed for the victims compensation scheme have been developed in the light of the Government’s election commitments and the recommendations arising from the reports of the Auditor-General and the Brahe review. The Government is convinced that there is a need to act decisively to address the problems which face the present scheme. 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

⁴¹ Victims Rights Bill, Victims Compensation Bill, Sentencing Amendment (Parole) Bill, Second Reading Speech, Hon. J.W. Shaw, Attorney General, *NSWPD(LC)*, 15 May 1996, p 974.

unaffordable drain on public funds. The Government is equally committed to ensuring that genuine victims seriously injured by the violent criminal conduct of offenders have ready access to a fair, equitable and efficient victims compensation scheme.⁴²

Financial concerns were reflected in many of the amendments introduced by the *Victims Compensation Act 1996* No 115,⁴³ including:

- raising the minimum threshold for claims from \$200 to \$2400;
- formulation of a schedule of injuries which set maximum amounts payable for injuries;
- defining an ‘act of violence’ more narrowly than previously, to require ‘violent conduct’ resulting in injury or death;
- reorganisation of victims into 3 categories: (i) primary victims, (ii) secondary victims, and (iii) family victims;
- initial assessment of applications by compensation assessors, not the VCT;
- excluding compensation for injuries sustained by criminals during the commission of crimes;
- prevention of double dipping in compensation matters;
- streamlining the procedures for the recovery of compensation from offenders;
- introduction of payments for counselling – see commentary below on p 35.

1996-1999: On 27 November 1996, the Legislative Assembly resolved that a Joint Select Committee be appointed to inquire into and report on:

- (a) alternative methods of providing for the needs of victims of crime, in particular through counselling and other services;
- (b) the long term financial viability of the Victims Compensation Fund.

On 5 December 1996 the Legislative Council agreed to the appointment of the Joint Select Committee on Victims Compensation. It produced a series of publications,⁴⁴ including the *Second Interim Report: The Long Term Financial Viability of the Victims Compensation Fund* which was tabled in December 1997. Among its 22 recommendations, the report

⁴² Victims Rights Bill, Victims Compensation Bill, Sentencing Amendment (Parole) Bill, Second Reading Speech, Hon. J.W. Shaw, Attorney General, *NSWPD(LC)*, 15 May 1996, p 974.

⁴³ The Act received assent on 2 December 1996 and had fully commenced by 2 April 1997: *Government Gazette*, No 31 of 27 March 1997, p 1667.

⁴⁴ Parliament of New South Wales, Joint Select Committee on Victims Compensation, *First Interim Report: Alternative Methods of Providing For the Needs of Victims of Crime*, May 1997; *Report of the Study Tour of Interstate and Overseas Jurisdictions*, October 1997; *Survey of Victims Compensation Cost Saving Measures in Other Jurisdictions*, October 1997; *Second Interim Report: The Long Term Financial Viability of the Victims Compensation Fund*, December 1997; *Third Interim Report: Complaint by the Walsh Family Concerning Rakus Solicitors*, June 1998; *The Collection of Restitution from Convicted Offenders: A Discussion Paper*, June 1998; *Fourth Interim Report: The Collection of Restitution from Convicted Offenders*, September 1998; *Report on the Inquiry into Psychological Injury – Shock*, December 1998.

suggested that ‘consideration be given to deleting the categories of Shock other than for permanent injuries, homicide and sexual assault’ and that ‘consideration be given to establishing a separate category for victims of domestic violence.’⁴⁵ These modifications were meant to counteract the practice of claiming shock as the major injury in order to gain compensation for minor physical injuries that were not eligible under the Act.⁴⁶

The Second Interim Report’s approach to shock was adopted in the *Victims Compensation Amendment Act 1998* No 134, which received assent on 30 November 1998 and had commenced in full by 7 April 1999.⁴⁷ The previous category of shock in the table of injuries comprised 4 subdivisions based on the length of time that the shock lasted: 6-13 weeks, 14-28 weeks, over 28 weeks, and permanently. This was replaced with a concept of ‘chronic psychological or psychiatric disorder’ that was either moderately disabling (Category 1) or severely disabling (Category 2). The amended cl 5 of Schedule 1 required claims for psychological injuries to be accompanied by a report from a psychologist or psychiatrist approved by the VCT. In addition, a specific compensable injury of domestic violence was created.

2000: The Joint Select Committee on Victims Compensation was re-established after the State election of 1999. Its new Terms of Reference stated in part that the Committee was to inquire into and report on:

- (a) the effectiveness and efficiency of the New South Wales Victims Compensation scheme in providing assistance to genuine victims of crime,
- (b) the current state of the provision of counselling and associated support services for victims of crime, and
- (c) other relevant matters.

The Committee released a report in February 2000 entitled *Ongoing Issues Concerning the NSW Victims Compensation Scheme*. Some of the report’s recommendations were:

- the name of the *Victims Compensation Act* should be changed to reflect a greater emphasis on the rehabilitation of victims;
- payment for psychological injury of a non-permanent nature be deleted from the Schedule of Injuries except in the protected categories of homicide, sexual assault and domestic violence;
- consideration be given to raising the threshold of compensation;
- homicide victims be automatically entitled to 20 counselling sessions upon application;
- compensation payments for families of homicide victims be increased to \$75,000 per

⁴⁵ Pages 7, 44-45.

⁴⁶ Page 41.

⁴⁷ *Government Gazette*, No 39 of 1 April 1999, p 2575. The influence of the Second Interim Report was acknowledged in the Second Reading Speech on the Victims Compensation Amendment Bill, *NSWPD(LC)*, 22 October 1998, pp 8854-8855.

homicide.⁴⁸

Several of the Committee's recommendations were incorporated into the *Victims Compensation Amendment Act 2000* No 41, which received assent on 26 June 2000 and had commenced in its entirety by 14 July 2000.⁴⁹ The main provisions of the legislation were:

- the *Victims Compensation Act 1996* was renamed the *Victims Support and Rehabilitation Act 1996*;
- monetary compensation for psychological injury was restricted to applicants who could demonstrate a chronic psychological or psychiatric disorder that was severely disabling, except for victims of armed robbery, abduction or kidnapping. In those cases, the chronic psychological condition could be moderately disabling;
- compensation assessors were empowered to reduce the standard amount of compensation for an injury when the victim failed to mitigate the extent of the injury, for example, by not seeking medical attention;
- counselling was made available to relatives of deceased primary victims, irrespective of whether they qualified for monetary compensation as a 'family victim' under the Act;
- assessors were permitted to assume that no other family victims were likely to come forward if 3 months had elapsed since the first family victim's application;
- awards to family victims were not to be affected by other payments they might receive such as civil damages, workers compensation or insurance;
- funeral expenses could be reimbursed to a person who was not eligible for compensation as a family victim.

In addition, the threshold amount of compensation was increased from \$2400 to \$7500 by proclamation, also effective on 14 July 2000.⁵⁰

2000-2001: The number of applications received by the VCT fell from 8376 in 1999-2000, to 6600 in 2000-2001, and 6000 in 2001-2002. The Chairperson of the VCT attributed the decline to the impact of the *Victims Compensation Amendment Act 2000*, specifically the restricting of eligible psychological injuries and raising the threshold for compensation.⁵¹ 10,833 applications were determined in 2000-2001, a substantial increase over the 5015 applications determined in the previous year. This resulted from the appointment of additional compensation assessors.⁵²

⁴⁸ Joint Select Committee on Victims Compensation, *Report: Ongoing Issues Concerning the NSW Victims Compensation Scheme*, February 2000, pp 7-8.

⁴⁹ *Government Gazette*, No 88 of 14 July 2000, p 6233.

⁵⁰ *Ibid*, p 6232.

⁵¹ Information in this paragraph is from: Victims Compensation Tribunal, *Chairperson's Report 2000/2001*, p 7, except for the 2001-2002 statistics which are cited from: *Victims Services Key Facts 2000/2002*, available on the Victims Services' website at <www.lawlink.nsw.gov.au/vs> Go to 'About Victims Services'.

⁵² Victims Compensation Tribunal, *Chairperson's Report 2000/2001*, p 6. The *Victims Services*

4.2 Features of the current compensation scheme

The victims compensation scheme is presently governed by the *Victims Support and Rehabilitation Act 1996*. The main components were inherited from the repealed *Victims Compensation Act 1987*, with significant modifications occurring in 1996. The provisions described below reflect all amendments up to the publication date of this briefing paper.

(i) Act of violence

The payment of victims compensation pursuant to the *Victims Support and Rehabilitation Act 1996* depends on an 'act of violence' happening during the commission of the crime. The phrase 'act of violence' is defined in s 5(1) to mean:

- ...an act or series of related acts, whether committed by one or more persons that has:
- (a) apparently occurred in the course of the commission of an offence, and
 - (b) involved violent conduct against one or more persons, and
 - (c) resulted in injury or death to one or more of those persons.

Sexual assault and domestic violence are explicitly included as acts of violence by s 5(2) and are further explained in the 'Dictionary' at the end of the Act.

The notion of 'injury' is defined in the Dictionary to the Act as:

- actual physical bodily harm, or
- psychological or psychiatric disorder,
- but not injury arising from loss or damage to property.

By contrast, the definition of 'act of violence' in the *Victims Compensation Act 1987* did not refer to violent conduct and had 'resulted in awards of victims compensation for injuries occurring in the course of the commission of non-violent offences.'⁵³ The concept of 'injury' was also less strict, meaning actual physical bodily harm, nervous shock, pregnancy, mental illness or disorder, with the same exclusion of loss or damage to property.

(ii) Related acts

Section 5(4) of the *Victims Support and Rehabilitation Act 1996* clarifies that 'a series of related acts, whether committed by one or more persons, constitutes a single act of violence.' This statement was added because:

...the existing [1987] provision has been interpreted broadly in some decisions

Key Facts 2001/2002 (see previous footnote) states that 'nearly 11,000' applications were determined in 2001-2002.

⁵³ Victims Rights Bill, Victims Compensation Bill, Sentencing Amendment (Parole) Bill, Second Reading Speech, Hon. J.W. Shaw, Attorney General, *NSWPD(LC)*, 15 May 1996, p 977.

of the District Court on matters on appeal from tribunal determinations. Such interpretation has enabled an award to be made in respect of every single act of violence occurring during a series of acts of violence...It was never intended by the architects of the scheme that a victim in this circumstance should receive an award for each act of violence.⁵⁴

According to s 5(3), an act is treated as related to another act if both acts were, in the opinion of the Tribunal, committed against the same person at approximately the same time or were for any other reason related to each other.

(iii) Eligibility of applicants

There are 3 categories of victims eligible for compensation:

- ***Primary victims*** – are persons who sustain a compensable injury or die as a direct result of an act of violence. This includes an extended category of primary victims under s 7(2), being those injured or killed as a direct result of:
 - trying to prevent another person from committing the act of violence;
 - trying to help or rescue another person against whom the act is being committed;
 - trying to arrest another person who is committing, or has just committed, the act.

Police officers are covered by the last category but must experience an act of violence, whereas under s 10(1) of the *Victims Compensation Act 1987* they occupied a separate category of ‘law enforcement victims’ and qualified if they sustained injury ‘in the course of law enforcement’ generally.

Primary victims are eligible to be compensated for:

- compensable injuries (ie. injuries listed in Schedule 1 of the *Victims Support and Rehabilitation Act 1996*) received as a direct result of the act of violence;
 - financial loss incurred as a direct result of the compensable injury: s 14(1).
- ***Secondary victims*** – are persons who suffer a compensable injury as a direct result of witnessing the act of violence that resulted in the injury or death of the primary victim (but not the extended type of primary victim in s 7(2)). Parents or guardians of primary victims younger than 18 years of age are taken to have witnessed the act of violence by ‘subsequently becoming aware’ of it: s 8(2). The concept of a secondary victim was broader under the *Victims Compensation Act 1987*.⁵⁵

Secondary victims are eligible to be compensated for compensable injuries and financial

⁵⁴ Ibid, p 977.

⁵⁵ Section 10(1) defined a secondary victim as ‘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’.

loss: s 15.

- **Family victims** – are members of the immediate family (at the time the offence was committed) of a primary victim who died as a direct result of the act of violence. This category includes:
 - the victim's spouse, de facto spouse, or same sex partner who has cohabited with the victim for at least two years;⁵⁶
 - the victim's parent, guardian or step-parent;
 - the child, step-child or ward of the victim;
 - the brother, sister, step-brother or step-sister of the victim: s 9(3).

This list omits grandparents and grandchildren, who were covered by the *Victims Compensation Act 1987*, but adds siblings.

Family victims need only meet the criteria of being a member of the immediate family of a primary victim. It is immaterial whether or not they have suffered a compensable injury: s 9(2). The standard amount of compensation that family victims are granted in total is \$50,000: s 16(1). Two or more family victims receive equal shares except when claims are made by both dependants and non-dependants. In that situation, compensation is awarded to dependants only: s 16(2). Therefore, a spouse and child who apply for compensation will each receive \$25,000 to the exclusion of non-dependant relatives.

Further restrictions on awards for family and secondary victims are detailed in ss 22-23.

(iv) Maximum and minimum amounts of compensation

The maximum amount of compensation payable to a single person is \$50,000: s 19(1). The same maximum applies collectively to a primary victim and all secondary victims and family victims claiming through that primary victim. The entitlement of any family victim(s) to the whole \$50,000 will preclude a witness (ie. a secondary victim) from receiving compensation. More information on proportions between multiple claimants is outlined at s 19(3)-(4).

A minimum threshold must also be observed by primary and secondary victims. Section 20 provides that compensation is not payable unless the total value of compensable injuries is at least \$2,400, or an amount fixed by proclamation. In July 2000, a threshold of \$7500

⁵⁶ The two year cohabitation period seems to apply only to same sex partners. This is not distinctly stated in the Second Reading Speech on the Victims Rights Bill, *NSWPD(LC)*, 15 May 1996, but is suggested by the fact that the equivalent category of 'close relative' in the *Victims Compensation Act 1987* did not mention either cohabitation periods or same sex partners. Rather, the definition of 'close relative' in s 10(1) granted eligibility to a 'deceased victim's spouse or...a person who was living with the deceased victim as the deceased victim's spouse'. This issue is clearer in the victim impact statement provisions of the *Crimes (Sentencing Procedure) Act 1999*. The definition of 'member of the primary victim's immediate family' in s 26 requires same sex partners and de facto spouses to have cohabited with the victim for two years.

was proclaimed.⁵⁷ The purpose of having a sizeable statutory minimum was explained by the Attorney General in 1996:

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 [\$2400 at that time] 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.⁵⁸

(v) Types of compensation

Compensation may be claimed for:

- **Compensable injuries** (primary and secondary victims): these are listed in Schedule 1 and include physical injuries, sexual and indecent assault, domestic violence, psychological or psychiatric disorders, and diseases causing disability. Each item is accompanied by a prescribed sum of money, expressed as either a standard amount or a range. This effectively precludes calculation of compensation with reference to common law principles of damages. In addition, Schedule 1 contains guidance on calculating compensation where there are multiple injuries, and reducing the standard amount because of an applicant's existing condition.

The schedule of compensable injuries was introduced in 1996 with the intention of improving the consistency of awards, directing compensation towards the victims with the most serious injuries, and giving greater attention to the duration of the disability caused by an injury.⁵⁹ Prescribing a schedule of injuries was also intended 'to streamline the claim handling process by bringing the entire system in-house, with internal assessors rather than magistrates making awards.'⁶⁰

- **Financial loss** (primary and secondary victims): the maximum amount of compensation for financial loss is \$10,000: s 18(4). Compensation for financial loss is not payable to the extent that the applicant is entitled to receive payment from insurance or pursuant to any other law or agreement. Compensation for financial loss includes:
 - actual expenses – distinct from future expenses, which are not compensable under the Act;

⁵⁷ Effective from 14 July 2000: *Government Gazette*, No 88 of 14 July 2000, p 6232.

⁵⁸ Victims Rights Bill, Victims Compensation Bill, Sentencing Amendment (Parole) Bill, Second Reading Speech, Hon. J.W. Shaw, Attorney General, *NSWPD(LC)*, 15 May 1996, p 975.

⁵⁹ Victims Rights Bill, Victims Compensation Bill, Sentencing Amendment (Parole) Bill, Second Reading Speech, Hon. J.W. Shaw, Attorney General, *NSWPD(LC)*, 15 May 1996, pp 975-976.

⁶⁰ Parliament of New South Wales, Joint Select Committee on Victims Compensation, *Report: Ongoing Issues Concerning the NSW Victims Compensation Scheme*, February 2000, p9.

- actual loss of earnings – to be calculated at the rate of weekly payment of compensation under the *Workers Compensation Act 1987* after the first 26 weeks of incapacity within the meaning of that Act;
- loss of personal effects – payable only to primary victims who were wearing or carrying personal items that were lost or damaged as a direct result of the act of violence. The maximum amount payable is \$1000.
- **Costs:** an applicant may also be awarded the legal costs associated with the application or with proceedings before the VCT: s 35. A scale of costs is provided under cl 12 of the *Victims Compensation Rule 1997*.
- **Interim awards:** a compensation assessor may make an interim award to an applicant in severe financial hardship or other appropriate circumstances, if the assessor is satisfied that the applicant will be entitled to receive compensation when the application is determined: s 33.
- **Funeral expenses:** a person who is not eligible for compensation as a family victim (eg. a grandparent) may apply for reimbursement of ‘reasonable expenses’ incurred in relation to the funeral of a primary victim. This option is only available where one or more family victims are eligible for compensation. The payment of funeral expenses is to be deducted from the compensation for which the family victims are eligible: s 33A.

(vi) Psychological or psychiatric disorder

A psychological or psychiatric disorder suffered by an applicant may amount to a compensable injury if it is either:

- a chronic disorder that is moderately disabling and arose from an act of violence that occurred in the course of an armed robbery, abduction or kidnapping (Category 1); or
- a chronic disorder that is severely disabling (Category 2): Table of injuries and cl 5(3) in Schedule 1 to the *Victims Support and Rehabilitation Act 1996*.⁶¹

To establish the status of a psychological or psychiatric disorder, an application must be accompanied by a written assessment of the applicant’s condition by a qualified person from the list designated by the Director of Victims Services: cl 5(1) of Schedule 1.

(vii) Exemptions to eligibility

When the present version of the scheme was introduced in 1996, the Government advocated that victims compensation funds should not be available to criminal offenders

⁶¹ The restriction of Category 1 to only three offences was a relatively recent development, pursuant to the *Victims Compensation Amendment Act 2000* No 41.

or in situations where a victim had recourse to some other avenue of compensation for their injury or financial loss.⁶² The explicit exclusions from the *Victims Support and Rehabilitation Act 1996* are:

- ***Claimants for court compensation*** – a person is not eligible for victims compensation if the person is entitled to be paid compensation awarded by a court under Part 4 of the Act. Part 4 enables a court to direct that a sum not exceeding \$50,000 be paid to an aggrieved person out of the property of a convicted offender.⁶³ The definition of an ‘aggrieved person’ in s 70 does not require an act of violence to have taken place, rather, that the victim has ‘sustained injury’ by reason of the offence. If the victim is deceased, a member of their immediate family is entitled to lodge a claim.

In 1996, the then Attorney General described the court option as:

...an alternative to the statutory scheme. Whilst a victim may choose to take such action the Government would envisage that most seriously injured crime victims will choose to make their compensation claim through the statutory scheme.

A claim through the court against any property of the offender is however an option those victims who are not eligible to make a claim under the statutory scheme may well pursue.⁶⁴

- ***Motor accidents*** – s 24(2) confirms that a person cannot receive victims compensation for an injury that arose as a result of a motor vehicle accident within the meaning of the *Motor Accidents Compensation Act 1999*. Consequently, family victims cannot claim victims compensation when the primary victim’s death is caused by a dangerous or negligent driver.
- ***Work-related injuries*** – if an applicant for victims compensation was injured by an act of violence in the course of employment and the compensation assessor is satisfied that the applicant may be entitled to workers compensation, the determination of victims compensation will be postponed until the workers compensation issue has been decided: s 30(4).
- ***Engaging in criminal conduct*** – a person cannot claim compensation in respect of an

⁶² Victims Rights Bill, Victims Compensation Bill, Sentencing Amendment (Parole) Bill, Second Reading Speech, Hon. J.W. Shaw, Attorney General, *NSWPD(LC)*, 15 May 1996, p 977.

⁶³ The same capacity to obtain compensation from the offender’s property formerly existed under the *Crimes Act 1900* until the relevant provisions were transferred to Part 6 of the *Victims Compensation Act 1987* ‘to consolidate all relevant legislation concerning victims’ compensation’: Victims Compensation Bill, Miscellaneous Acts (Victims Compensation) Repeal and Amendment Bill, Second Reading Speech, Mr T. Sheahan, Attorney General, *NSWPD(LA)*, 18 November 1987, p 16272.

⁶⁴ Victims Rights Bill, Victims Compensation Bill, Sentencing Amendment (Parole) Bill, Second Reading Speech, Hon. J.W. Shaw, Attorney General, *NSWPD(LC)*, 15 May 1996, p 979.

act of violence that occurred while the person was engaged in behaviour constituting an offence: s 24(3).

- ***Convicted inmates*** – the basic rule is that prisoners who experience acts of violence while incarcerated are not eligible for victims compensation. However, an exception can be made if the applicant is only in prison because of an inability to pay a pecuniary penalty (often referred to as a fine defaulter) or if the VCT is satisfied that ‘special circumstances’ justify awarding compensation: s 24. Without limiting the concept of special circumstances, s 24(5) states that such circumstances may exist if the inmate is ‘seriously and permanently injured’ as a result of the act of violence.

(viii) Determination of applications

Generally, applications for victims compensation must be lodged within two years after the relevant act of violence occurred: s 26. Each application is considered by a compensation assessor, usually without a hearing being conducted into the matter. The assessor is authorised by s 65A to make such inquiries and investigations as he or she thinks necessary. If the assessor considers that the determination of an application requires a hearing, the Director of Victims Services may refer the matter to the VCT to hear and determine: s 37(1).

An award must not be made unless the assessor is satisfied, on the balance of probabilities, that the applicant is a primary victim, secondary victim, or family victim of an act of violence, and is eligible to receive compensation. In evaluating whether or not to make an award and the amount of compensation, the assessor must consider a range of factors under s 30 such as:

- any sum that has been paid to the applicant or that in the opinion of the assessor is likely to be received from another source, including workers compensation, insurance, and damages awarded in civil proceedings;
- whether the act of violence was reported to the police within a reasonable time;
- any behaviour (including past criminal activity), condition, attitude or disposition of the primary or secondary victim that directly or indirectly contributed to their injury or death;
- whether the victim participated in the commission of the act of violence, or encouraged or assisted another person to commit the act;
- whether the victim has failed to provide reasonable assistance in the investigation or prosecution of the offence;
- whether the victim failed to take reasonable steps to mitigate the extent of the injury sustained as soon as practicable after the offence was committed. Reasonable steps may entail seeking appropriate medical advice, treatment or counselling.

In addition, s 65 requires the assessor to have regard to any guidelines issued by the VCT. A written notice of the determination of the application must be issued to the applicant, stating the reasons for the decision: s 29(4)-(6).

(ix) Appeals

An applicant who is aggrieved by the assessor's determination may appeal to the VCT under s 36(1). Applicants can also appeal to the VCT against a refusal to allow lodgment of a late application.

An appeal from the VCT to the District Court is by leave and must concern a question of law. Section 39 clarifies that a question of law does not extend to: disputes about the interpretation of the injury schedule; the issue of whether acts of violence are related; or a refusal to accept a late application. On appeal, the District Court may only affirm the decision of the VCT or set it aside and remit the matter for reconsideration to the VCT. By contrast, the *Victims Compensation Act 1987* allowed a *de novo* hearing by the District Court.

Appeals to the VCT or the District Court may be instituted within 3 months of notification of the determination being served on the applicant, or longer in exceptional circumstances: ss 36(3), 39(2).

(x) Recovery from offenders

Restitution of victims compensation from offenders is outlined by Part 2, Division 8 of the *Victims Support and Rehabilitation Act 1996*. An order for restitution is initially a provisional order. The offender reserves the right to object to the order, in which case the VCT must conduct a hearing to determine whether the order should be confirmed: s 49. If an offender does not comply with the arrangements for payment of restitution, the VCT has the same powers as the Local Court to take action to recover the amount payable.

In addition, under Part 5 of the Act, all offenders who are convicted of an offence punishable by imprisonment are liable to pay a levy towards the Victims Compensation Fund. This is on top of any pecuniary penalty or order for payment of compensation imposed in respect of the same offence. The purpose of the victims compensation levy is 'to force those persons committing criminal offences to make a personal contribution to the compensation of victims of crime.'⁶⁵ The sum payable is \$70 if the offender is convicted on indictment, or \$30 otherwise: s 79. The concept of a levy was introduced by the *Victims Compensation (Amendment) Act 1989* No 217.⁶⁶

(xi) Administration and powers of the Victims Compensation Tribunal

The VCT was established by the *Victims Compensation Act 1987*. It consists of a Chairperson and members appointed by the Governor on the recommendation of the Attorney General. Only Magistrates are eligible to be appointed as members of the

⁶⁵ Victims Rights Bill, Victims Compensation Bill, Sentencing Amendment (Parole) Bill, Second Reading Speech, Hon. J.W. Shaw, Attorney General, *NSWPD(LC)*, 15 May 1996, p 978.

⁶⁶ The Amendment Act inserted 'Part 6A – Compensation Levies' into the *Victims Compensation Act 1987*.

Tribunal.

Applications for victims compensation may come before the VCT in a variety of ways:

- the Director of Victims Services may refer an application for hearing at the request of the compensation assessor who initially examined the matter – s 37(1);
- the Director can also refer an application for redetermination if the Chairperson of the VCT believes that a compensation assessor's decision should be reviewed – s 37(2);
- applicants may appeal to the VCT against the determination of an assessor, or the refusal of the Director to grant leave for a late application – s 36.

The powers of the VCT include compelling the attendance of witnesses at hearings and the production of documents that are relevant to an application. Procedural details in relation to members, hearings, witnesses and so on, are outlined in Schedule 2 of the *Victims Support and Rehabilitation Act 1996*. As described above, the VCT may also make orders for recovery of compensation from offenders.

The Chairperson of the VCT produces Practice Notes which can be used by applicants for guidance. Practice Notes were issued in 2000-2001 on topics such as 'Appeals to the District Court from the Victims Compensation Tribunal' and 'Matters Affecting the Quantum of the Award'.⁶⁷

(xii) Victims Compensation Fund

The Victims Compensation Fund receives finance from a range of sources, such as:

- money recovered from offenders and victims compensation levies under the *Victims Support and Rehabilitation Act 1996*;
- proceeds or profits confiscated in accordance with the *Confiscation of Proceeds of Crime Act 1989*;
- money credited to the Fund pursuant to the *Drug Trafficking (Civil Proceedings) Act 1990*;
- money advanced to the Fund by the Treasurer or appropriated by Parliament.

Money from the Fund is used to pay for:

- awards of compensation, costs, and approved counselling pursuant to the *Victims Support and Rehabilitation Act 1996*;
- expenses incurred by the VCT, the Director of Victims Services, compensation assessors and other staff in the exercise of their functions under the Act;
- expenses incurred by the Victims of Crime Bureau and the Victims Advisory Board under the *Victims Rights Act 1996*, and in the provision of other victims support

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Attorney General's Department of NSW, *Annual Report 2000-2001*, p 55. These and other Practice Notes are available as part of the 'Chairperson's Guide' on the Victims Services website at <www.lawlink.nsw.gov.au/vs> Choose the category 'Legal'.

- services approved by the Minister;
- expenses incurred in the administration of the Victims Compensation Fund.

4.3 Approved counselling scheme

Counselling is available to victims free of charge under the *Victims Support and Rehabilitation Act 1996*. Statistics suggest that this service is being utilised at a significant level. In 2001-2002, over 6,500 applications for counselling were received and approximately 20,000 counselling hours were approved. Payments to counsellors to provide the counselling cost over \$1.9 million.⁶⁸

4.3.1 Development of the scheme

A statutory entitlement to counselling was introduced by the *Victims Compensation Act 1996* No 115.⁶⁹ The purpose of the initiative was explained by the Attorney General:

...there is a need for the victims compensation scheme to provide a greater focus on the rehabilitation of crime victims. Accordingly, the reform proposal provides access to counselling for victims eligible for an award of compensation to help address the trauma and psychological impacts often experienced by victims of serious violent crime. This access to counselling will be available in addition to the award of compensation.⁷⁰

The main features of the original scheme included:

- victims who were eligible for statutory compensation were entitled to an initial period of two hours of counselling;
- additional amounts of counselling up to 20 hours, and exceeding 20 hours, could be granted subject to approval;
- the entitlement to counselling was not affected by the payment of workers compensation or damages ordered by a court;
- victims could choose a counsellor from an approved list of professional service providers.

The *Victims Compensation Amendment Act 2000* No 41 enabled payments for counselling to be extended to those relatives of a deceased primary victim who were not eligible for compensation. Such relatives were granted counselling entitlements equal to family victims, namely up to 20 hours of counselling and further periods if approved.

⁶⁸ *Victims Services Key Facts 2001/2002*, from the Victims Services' website at <www.lawlink.nsw.gov.au/vs> Go to 'About Victims Services'.

⁶⁹ The counselling provisions commenced on 2 April 1997 and appeared at s 21 of the Act. Their location did not change in the renamed *Victims Support and Rehabilitation Act 1996*.

⁷⁰ Victims Rights Bill, Victims Compensation Bill, Sentencing Amendment (Parole) Bill, Second Reading Speech, Hon. J.W. Shaw, Attorney General, *NSWPD(LC)*, 15 May 1996, p 975.

4.3.2 Current provisions

The current provisions are found in Part 2, Division 3A of the *Victims Support and Rehabilitation 1996*. Specific meanings apply to ‘victim’ and other terms in Division 3A:

- **victim** – is defined more leniently than in the compensation provisions, to cover:
 - a primary victim, secondary victim or family victim, as defined in ss 7-9 of the Act (see commentary at pp 27-28 of this briefing paper);
 - a person who is a victim of an act of violence but did not sustain a compensable injury within the meaning of the Act (and therefore does not qualify as a primary or secondary victim);
 - a relevant family member (see next entry).Excluded are victims who incurred injuries from criminal behaviour, imprisonment as a convicted inmate, or a motor vehicle accident.
- **relevant family member** – a relative of a primary victim who has died as a result of an act of violence, but not a family victim within the meaning of the Act.
- **approved counselling services** – services provided by a professional counsellor selected by the victim from a list of counsellors designated by the Director of Victims Services.

Payments for approved counselling services for family victims or relevant family members may be made:

- for a period of up to 20 hours of counselling, and
- for such further periods of counselling as may be requested by the family victim or relevant family member: s 21(4).

Payments for counselling may be made to persons other than family victims or relevant family members:

- for an initial period of two hours (including counselling for the purposes of an application for continued counselling), and
- for such further periods (not exceeding 20 hours) as may be considered appropriate by a compensation assessor: s 21(3).

Approval can be granted by a compensation assessor for up to 20 hours counselling, but must be obtained by the Director of Victims Services for more than 20 hours: s 21(6).

Payments may be made for approved counselling services even though the victim is entitled to workers compensation in respect of the act of violence concerned or is awarded compensation by a court under Part 4 of the Act.

An appeal does not lie directly to the VCT against a decision of a compensation assessor or the Director with regard to counselling. However, a decision of a compensation assessor may be reviewed by the Director, and a refusal by the Director to grant counselling exceeding 20 hours may be reviewed by a member of the VCT.

*4.3.3 Comments and interpretations*⁷¹

A victim of an act of violence who does not qualify for compensation is likely to still be eligible for counselling. Many victims are able to obtain both compensation and counselling: currently about 60% of victims compensation applicants also access the counselling scheme.

The concept of a relevant family member of a primary victim is defined very broadly by the legislation for counselling purposes. In practice, any person related to the victim by blood or marriage (where marriage also includes de facto status) is treated as a relative.

The two hours of counselling initially allocated to primary and secondary victims may seem low compared to the period of up to 20 hours automatically available to relatives of deceased victims. But the two hour period usually serves as a preliminary assessment and, on average, 6-8 hours of extra counselling is sought.

⁷¹ Information in this subsection was obtained by the author through personal communication with Claire Vernon, the Director, Victims Services.

5. SEXUAL ASSAULT COMMUNICATIONS PRIVILEGE

5.1 Development of the sexual assault communications privilege

Victims of sexual assault are particularly vulnerable to feeling humiliated or intimidated when information they confided to a counsellor is revealed in court.

One of the protections which is available to alleged sexual assault victims under the law is the sexual assault communications privilege. The purpose of the privilege is to prevent communications made in the course of counselling a sexual assault victim from being disclosed in court, or documents recording such communications from being produced for inspection, except in specific circumstances at the discretion of the judge.

5.1.1 Introduction of the privilege in 1997

In its original form, the *Evidence Act 1995* contained various privileges under Part 3.10 including client legal privilege, the privilege against self-incrimination, and public interest immunity. The Carr Government introduced two new forms of privilege in the Evidence Amendment (Confidential Communications) Bill 1997: professional confidential relationship privilege and sexual assault communications privilege. In the Second Reading Speech on the Bill, the Attorney General explained the importance of confidentiality when counselling sexual assault victims:

The counselling relationship, built on confidentiality, privacy and trust, enables a victim to explore major issues concerning her sense of safety, privacy and self-esteem. The knowledge that details of a victim's conversations with her therapist may be used against her in subsequent criminal proceedings can inhibit the counselling process and undermine its efficacy.⁷²

The Attorney General advocated a specialised privilege for sexual assault victims for 5 reasons:

- (i) it would be difficult for sexual assault complainants to successfully claim the proposed professional privilege, because that privilege treated as a factor in favour of disclosure that the evidence was sought to be adduced by the defence in a criminal trial;
- (ii) the primary purpose of counselling is therapeutic, not investigative. The complainant is encouraged to release emotions, talk unhindered, and has no legal right to review a counsellor's notes for their accuracy. Nevertheless, the defence could use the notes to claim that the complainant had made prior inconsistent statements or had feelings which were consistent with a motive to lie;

⁷² Evidence Amendment (Confidential Communications) Bill, Second Reading Speech, Hon. J.W. Shaw, Attorney General, *NSWPD(LC)*, 22 October 1997, p 1120.

- (iii) the lack of a privileged status for counselling records caused negative consequences for victims such as making them guarded about what they said to counsellors or reluctant to give evidence for the prosecution;
- (iv) defence counsel could use subpoenas for the production of counselling records as a weapon to intimidate the complainant;
- (v) allowing the defence to have access to the victim's recollections as revealed in counselling sessions could exacerbate the trauma of the sexual assault.⁷³

The *Evidence Amendment (Confidential Communications) Act 1997* No 122 commenced on 1 January 1998,⁷⁴ inserting Division 1B into the privileges section (Part 3.10) of the *Evidence Act 1995*. Division 1B created a presumption that comments made in confidence by a victim of sexual assault to a counsellor, and notes of such communications, were inadmissible as evidence in a court proceeding. The court was precluded from granting leave to adduce evidence of a 'protected confidence' unless the court was satisfied that:

- (a) the evidence had substantial probative value; and
- (b) other evidence of the protected confidence was not available; and
- (c) the public interest in preserving protected confidences and protecting the alleged victim from harm was substantially outweighed by the public interest in admitting the evidence.

'Protected confidence' at that time was defined as: 'a protected counselling communication made by a person against whom a sexual assault offence has been, or is alleged to have been, committed, whether before or after the acts constituting the offence occurred or are alleged to have occurred.' In turn, a 'protected counselling communication' meant: 'a communication made by a person in confidence to another person (...called the *counsellor*) in the course of a relationship in which the counsellor is treating the person for any emotional or psychological condition suffered by the person.'

5.1.2 *R v Young (1999) and the Government's response*

The application of the privilege was questioned in *R v Young* (1999) 46 NSWLR 681. The Court of Criminal Appeal quashed an interlocutory order by a District Court judge who declined to grant the appellant access to notes, records and files produced on subpoena by a psychiatrist and a sexual assault service attached to a hospital. The Court of Criminal Appeal held that the sexual assault communications privilege in Division 1B of Part 3.10 of the *Evidence Act 1995* only covered evidence adduced in court, not documents produced on subpoena. This meant that the defence could inspect sexual assault counsellors' notes obtained on subpoena unless the court took the view that there was no legitimate forensic purpose in allowing such access.

⁷³ Evidence Amendment (Confidential Communications) Bill, Second Reading Speech, Hon. J.W.Shaw, Attorney General, *NSWPD(LC)*, 22 October 1997, p 1121.

⁷⁴ *Government Gazette*, No 149 of 19 December 1997, p 10091.

In response to *R v Young*, the Carr Government amended the sexual assault communications privilege to enable it to be utilised in pre-trial procedures. Commencing on 5 November 1999,⁷⁵ the *Criminal Procedure Amendment (Sexual Assault Communications Privilege) Act 1999* No 48 re-enacted, with amendments, the bulk of the sexual assault privilege provisions from Part 3.10 of the *Evidence Act 1995* to Part 13 (initially) of the *Criminal Procedure Act 1986*. The relocation reflected the fact that the privilege is primarily invoked in the course of criminal trials. Some of the key amendments were:

- The privilege was extended to the **production of documents** containing protected confidences, whether production was by subpoena or any other procedure. A person who objected could not be required to produce such a document in connection with criminal proceedings unless the court gave leave. The criteria for granting leave were the same as those which applied to adducing evidence in court of protected confidences, ie. the contents of the document had substantial probative value, other evidence was not available, and inspection was in the public interest.
- Evidence of sexual assault communications was precluded from being adduced or produced in connection with **‘preliminary criminal proceedings’**, defined as committal proceedings and any bail proceedings. This amendment reflected the fact that it ‘will not generally be possible for the court to have enough information about the case which will be presented at preliminary criminal proceedings...to determine whether maintenance of the sexual assault communications privilege should be allowed.’⁷⁶
- The definition of **‘counselling communication’** was expanded to incorporate all communications made in the course of counselling, not just those made by the victim. This amendment was formulated because ‘potential access by defendants to the views of others involved in the process of sexual assault counselling...will result in the therapeutic basis for the counselling being undermined in just the same way as if the protected confider’s own ruminations were accessible.’⁷⁷

5.1.3 Interpretation of ‘counselling’ in *R v Lee* (2000)

The decision of the Court of Criminal Appeal in *R v Lee* (2000) 50 NSWLR 289 prompted the Government to revisit the area of sexual assault communications. Lee was charged with indecent assault offences against one of his former primary school pupils, and a trial was listed in the District Court. He sought the production of all counselling notes, reports and

⁷⁵ *Government Gazette*, No 126 of 5 November 1999, p 10403.

⁷⁶ Criminal Procedure Amendment (Sexual Assault Communications Privilege) Bill, Second Reading Speech, Hon. J.W. Shaw, Attorney General, *NSWPD(LC)*, 20 October 1999, p 1595.

⁷⁷ *Ibid*, p 1595.

other documents held by Mission Australia with respect to the complainant. The judge denied the request, finding that the documents contained protected confidences between the complainant and counsellors of Mission Australia.

At the time of the case, s 148 of the *Criminal Procedure Act 1986* specified that:

- **protected confidence** meant ‘a counselling communication that is made by, to or about a victim or alleged victim of a sexual assault offence’;
- **counselling communication** meant (in part) a communication ‘made in confidence by a person (the counselled person) to another person (the counsellor) in the course of a relationship in which the counsellor is counselling, giving therapy to or treating the counselled person for any emotional or psychological condition...’

On appeal, the Court of Criminal Appeal favoured a restrictive interpretation of the concept of counselling. Heydon JA (with whom Mason P and Wood CJ at CL agreed) held that the expression ‘counselling, giving therapy to or treating the counselled person for any emotional or psychological condition’ in s 148(4)(a):

...refers to the provision of expert advice and procedures by persons skilled, by training or experience, in the treatment of mental or emotional disease or trouble. The expression does not include persons who merely seek to assist others suffering from an emotional or psychological condition.⁷⁸

[Emphasis added]

The Court concluded that the complainant had not discharged the burden of demonstrating that the relevant documents contained protected confidences. The decision of the District Court judge was set aside and Mission Australia was ordered to produce the documents.

5.2 Strengthening the privilege in 2002

The decision of the Court of Criminal Appeal in *R v Lee* (2000) 50 NSWLR 289 concerned the Carr Government for three reasons:

First, it suggested that the sexual assault communications privilege may only protect counselled persons who suffer from a recognisable psychiatric illness. This was clearly not the intent of the legislation. Sexual assault counselling typically seeks to address feelings of shame, humiliation, and fear, which are a perfectly normal reaction to such an attack. Most sexual assault victims probably do not suffer from a recognised psychiatric illness. Second, the decision paved the way for a later court to decide that the sexual assault communications privilege only applies to counselling provided by a psychiatrist or other specialist who is qualified in the diagnosis of mental illness. This would exclude social workers, who presently provide the great bulk of sexual

⁷⁸

Para 23. Emphasis added.

assault counselling in New South Wales. Third, by characterising counselling as the provision of expert advice, the decision misunderstood the role of a sexual assault counsellor, which is essentially to listen to the thoughts and feelings of the victim and provide verbal and other support and encouragement.⁷⁹

The introduction of the *Criminal Procedure Amendment (Sexual Assault Communications Privilege) Act 2002* No 13 is intended to avoid these consequences. The Act was assented to on 15 May 2002 and will commence on 22 July 2002.⁸⁰ The principal purpose of the Act is:

...to ensure that the sexual assault communications privilege is capable of protecting confidential communications made in connection with counselling provided by counsellors who lack formal training or qualifications in the diagnosis of psychiatric and/or psychological conditions and which takes the form of listening to the thoughts and feelings of the alleged sexual assault victim and providing verbal or other support, rather than providing expert advice.⁸¹

The definition of ‘counselling communication’ in s 148(4)(a) of the *Criminal Procedure Act 1986* is widened to mean a communication:

...made in confidence by a person (the *counselled person*) to another person (the *counsellor*) who is counselling the person in relation to any harm the person may have suffered.

This removes the mention of ‘treating’ and ‘emotional or psychological condition’ from the subsection, with their implications of defect, disease or illness.

Subsection 148(5) is inserted to clarify that the ability to ‘counsel’ is not restricted to mental health professionals:

- (5) For the purposes of this section, a person *counsels* another person if:
- (a) the person has undertaken training or study or has experience that is relevant to the process of counselling persons who have suffered harm, and
 - (b) the person:
 - (i) listens to and gives verbal or other support or encouragement to the other person, or
 - (ii) advises, gives therapy to or treats the other person,whether or not for fee or reward.

⁷⁹ Criminal Procedure Amendment (Sexual Assault Communications Privilege) Bill, Second Reading Speech, Mr R. Debus, Attorney General, *NSWPD(LA)*, 21 March 2002, p 976.

⁸⁰ *Government Gazette*, No 89 of 24 May 2002, p 3173 (assent); *Government Gazette*, No 119 of 19 July 2002, p 5430 (commencement).

⁸¹ Criminal Procedure Amendment (Sexual Assault Communications Privilege) Bill, Second Reading Speech, Mr R. Debus, Attorney General, *NSWPD(LA)*, 21 March 2002, p 976.

This new definition is 'designed to ensure the legislation reflects the realities of sexual assault counselling, and to prevent technical legal argument going to the mental state of the alleged victim.'⁸²

In debate on the Second Reading, the Attorney General asserted that the requirement in s 148(5) for a counsellor to have training, study, or experience relevant to counselling persons who have suffered harm 'will not be satisfied merely by a discussion with friends and relatives. The definition is wide enough to include an Aboriginal elder, for instance, who might act as a counsellor or a school counsellor who has not received formal psychological training.'⁸³

The application of the privilege remains discretionary:

Trial judges will continue to inspect material that is subject to a privilege claim and to determine whether to order its production or permit its introduction in evidence in accordance with a statutory balancing exercise. A defendant's right of appeal will be unaffected.⁸⁴

⁸² Ibid, p 976.

⁸³ Criminal Procedure Amendment (Sexual Assault Communications Privilege) Bill, Debate on the Second Reading, Mr R. Debus, Attorney General, *NSWPD(LA)*, 10 April 2002, p 1345.

⁸⁴ Ibid, p 1345.

6. VICTIM PARTICIPATION IN THE PAROLE PROCESS

Victims have been authorised since the commencement of the *Sentencing Amendment (Parole) Act 1996* to make submissions concerning the potential release on parole of serious offenders, or any change in security classification that would result in a serious offender being eligible for work release or other types of unescorted absences from custody. These entitlements conform with the expectations of the Charter of Victims Rights, at s 6.16 of the *Victims Rights Act 1996*.

Before examining the provisions that enable victims to make submissions, some brief background on the parole system is necessary.

6.1 Introduction to parole principles

Parole provisions are found mainly in Part 4 of the *Crimes (Sentencing Procedure) Act 1999* and Parts 6-8 and Schedule 1 of the *Crimes (Administration of Sentences) Act 1999*. Additional details are set out in Chapters 6 and 7 of the *Crimes (Administration of Sentences) Regulation 2001*.

The non-parole period of a sentence is the period that the offender must actually serve in custody. Parole involves the offender being released from custody under the supervision of the Probation and Parole Service.

Courts that impose a total sentence of imprisonment of 3 years or less, with a specified non-parole period, must direct the release of an offender on parole at the end of the non-parole period: s 50 of the *Crimes (Sentencing Procedure) Act 1999*.

For sentences with a total term of more than 3 years, the court has no power to order the release of the offender on parole. Rather, the Parole Board determines whether to release such offenders. The Board must not make a parole order unless it has decided that the release of the offender is appropriate, having regard to the principle that the public interest is of primary importance: s 135(1) of the *Crimes (Administration of Sentences) Act 1999*. Other factors that the Board is required to consider are listed under s 135(2), including:

- any relevant comments made by the sentencing court;
- the offender's criminal history;
- the offender's conduct while in custody;
- reports concerning parole;
- the likely effect on the victim and the victim's family of the offender being released;
- the availability of family, community or government support to the offender;
- the likelihood that, if granted parole, the offender will be able to benefit from participation in a rehabilitation program and adapt to 'normal lawful community life'.

The Parole Board consists of between 10 and 22 members who represent the judiciary, the police, the Probation and Parole Service, and the community: s 183.

6.2 Entitlement of victims to make submissions on parole and unsupervised leave

The practice of allowing victims to make submissions about the release of serious offenders on parole or unsupervised leave was initiated as part of a package of reforms by the *Sentencing Amendment (Parole) Act 1996* No 144. The Act commenced on 20 December 1996.⁸⁵ Submissions on parole were to be directed to the Parole Board, while the Serious Offenders Review Council was responsible for receiving submissions in relation to the assessment of serious offenders for low security classification, which would give them access to work release, education leave and other programs.

Apart from granting victims the statutory right to make submissions, the *Sentencing Amendment (Parole) Act 1996* also:

- changed the name of the Offenders Review Board to the Parole Board;
- revised the procedures for considering the possible release of serious offenders by the Parole Board;
- established a Victims Register;
- stipulated victim notification procedures.

6.2.1 Concepts and terminology

Several preliminary concepts that are defined by the *Crimes (Administration of Sentences) Act 1999* are crucial to understanding the involvement of victims in parole and unsupervised leave determinations:

- **Victims Register** – the register that records the names of victims (as defined below) who have requested to be given notice of the possible parole of their offenders. The Register has been maintained so far by the Department of Corrective Services but there is authority under s 256(3) for the Minister to direct any government agency to do so. More information on the Victims Register is found at ‘**8.4 Department of Corrective Services**’ of this briefing paper.
- **victim of an offender** – for the purposes of the Victims Register this means:
 - a victim of the offence for which the offender was sentenced, or an offence taken into account when sentencing the principal offence, but not an offence for which the offender was previously sentenced;
 - a family representative of such a victim, if the victim is dead or incapacitated: s

⁸⁵ *Government Gazette*, No 150 of 20 December 1996, p 8529. In the Second Reading Speech on the Sentencing Amendment (Parole) Bill, the Labor Attorney General, Hon. J.W. Shaw MLC, acknowledged the influence of the Sentencing Legislation Amendment Bill 1994 which was introduced by the Liberal Attorney General, Hon. John Hannaford MLC. The 1994 Bill was passed by the Legislative Council on 22 November 1994 and was supported by the Labor Opposition, but it lapsed because of the 1995 State election.

256(5).⁸⁶

- **serious offender** – is defined by s 3 as an inmate who:
 - is serving a life sentence, or
 - has had their life sentence redetermined into a numerical amount, or
 - is serving a non-parole period of 12 years or more, or
 - is serving a sentence of any length for murder.⁸⁷
 In March 2002, approximately 544 people were classified as serious offenders in the correctional system.⁸⁸

- **violent offender** – this term can apply equally to serious offenders and offenders other than serious offenders. A violent offender is serving a sentence for an offence involving violence against a person, including any type of sexual assault referred to in clause 6 of Schedule 1 (the schedule of compensable injuries) to the *Victims Support and Rehabilitation Act 1996*. Basically, cl 6 covers every type of sexual assault and indecent assault in the *Crimes Act*, as well as attempted sexual assault where there was an assault with violence or an infliction of serious bodily injury in the course of the attempted offence.

The Department of Corrective Services and the Parole Board are not statutorily required to receive submissions from a victim of an offender other than those classified as ‘serious offenders’. However, the Department considers that **any** registered victim, or a registered family representative of a victim, should have an opportunity to make written submissions concerning an offender’s eligibility for release on parole or absence from custody.⁸⁹

About 200 registered victims per year are advised of an offender’s external leave or parole situation, and about two thirds of those express a wish to make some form of submission to the Parole Board or the Serious Offenders Review Council.⁹⁰

⁸⁶ Offences can be taken into account at the time of sentencing a principal offence pursuant to Part 3, Division 3 of the *Crimes (Sentencing Procedure) Act 1999*. Section 256(5) further states that a ‘victim of an offender’ includes a person who suffers actual physical bodily harm, mental illness or nervous shock, or whose property is deliberately taken, destroyed or damaged as a direct result of an act committed, or apparently committed, by the offender in the course of a criminal offence.

⁸⁷ The life sentence redetermination scheme is outlined in Schedule 1 of the *Crimes (Sentencing Procedure) Act 1999*.

⁸⁸ Questions Without Notice, ‘Department of Corrective Services Legislative Reform’, *NSWPD(LA)*, 13 March 2002, p 390.

⁸⁹ *Submissions Concerning Offenders in Custody*, Information Package, jointly produced by the Victims of Crime Bureau and the Department of Corrective Services, January 2001, pp 2, 4. Available electronically from the Department of Corrective Services website at <www.dcs.nsw.gov.au>. Select the restorative justice option.

⁹⁰ Crimes (Administration of Sentences) Amendment Bill, Second Reading Speech, Mr R. Amery MP, Minister for Corrective Services, *NSWPD(LA)*, 8 May 2002, p 1805.

6.2.2 Procedures for victims to participate in parole hearings

As already stated, victims of ‘serious offenders’ have the legal right to make written submissions to the Parole Board (in addition to which it is the Board’s policy to allow any registered victim to make written submissions). Parole submissions on the potential release of serious offenders are subject to procedural requirements set down in ss 145-150 of the *Crimes (Administration of Sentences) Act 1999*:

- At least 60 days before the offender’s non-parole period expires, the Parole Board must give preliminary consideration to whether a serious offender should be released on parole: s 143.
- The Board formulates an initial intention either to make or not make a parole order. If the Board’s initial intention is to grant parole, the Board notifies any victim whose name is recorded on the Victims Register of its intention. The victim has 14 days to lodge a notice of an intention to make a submission, and the Board reacts by notifying the offender and setting a date on which it will consider the victim’s and the offender’s submissions: s 145.
- If the Board’s initial intention is not to release the inmate on parole, the Board conveys this to the offender who has 14 days to notify the Board of an intention to make a submission. If the offender does so, the Board must notify any registered victims and set a hearing date: s 146.

Written submissions by the victim or the offender are presented to the Board either before or at the hearing: s 147(3)(a). The offender has the right to make oral submissions at the hearing but until recently under s 147(3)(b) the victim could only do so with the approval of the Board. The offender and their legal representative may have access to the victim’s submission, subject to a judicial member of the Board withholding all or part of it.⁹¹

The content of the submission is not specifically addressed by the *Crimes (Administration of Sentences) Act 1999* nor the *Crimes (Administration of Sentences) Regulation 2001*. An information package co-produced by the Department of Corrective Services and the Victims of Crime Bureau, entitled *Submissions Concerning Offenders in Custody*, provides some guidance:

The submission should state how you, as the victim, feel about the impending release of the offender. The submission should not include any additional evidence. It is important to understand that the purpose of the submission is to give the Parole Board information for its consideration. Any submission should be brief and to the point. The submission should reflect your own feelings.⁹²

⁹¹ *Submissions Concerning Offenders in Custody*, Information Package, Victims of Crime Bureau and Department of Corrective Services, January 2001, p 5.

⁹² *Ibid*, p 3.

Both the offender and the victim are entitled to attend parole hearings. Offenders usually exercise this right, while some victims consider attending to be an important step in the recovery process.⁹³ Victims may bring a relative, friend, or victims support group representative with them as Parole Board hearings are public hearings.

Normally a victim would not give sworn evidence at the parole hearing. If, however, the victim's submission contained evidence of matters such as significant events concerning the offender that have happened since conviction, or allegations of continuing harassment by the offender, the person making the submission would be open to cross-examination. Victims who wish to be represented by a lawyer must seek the permission of the Board for a lawyer to attend.⁹⁴

After reviewing the submissions, reports, documents and other information placed before it, the Board will decide whether or not to release the offender on parole.

6.2.3 Oral submissions at parole hearings – extending victims rights

Oral submissions from victims at parole hearings were traditionally only permissible at the discretion of the Parole Board for two major reasons:

One is regrettably that disputes occur from time to time within the families of victims – exacerbated no doubt by the tragedy they have experienced...The board needs to have discretion to balance the competing interests of the various members of the family and, if necessary, decline to allow oral submissions from a particular person.

The other major reason is that the parole hearing is not a retrial of the circumstances of the offence. From time to time victims will seek to introduce inflammatory or demonstrably false information about the history of various persons which runs the risk of reducing the hearing to a destructive and adversarial process.⁹⁵

The *Crimes (Administration of Sentences) Amendment Act 2002* No 36 dispenses with the need for victims to seek the leave of the Parole Board to make oral submissions. Introducing the Bill to the Act on 8 May 2002, the Minister for Corrective Services, Mr Richard Amery MP stated:

Often, victims prefer to make a personal approach at a parole hearing to explain their personal circumstances and concerns. Making a personal approach can often demonstrate a victim's concerns far more clearly than a written

⁹³ Ibid, p 4.

⁹⁴ Ibid, p 5.

⁹⁵ Sentencing Amendment (Parole) Bill, Second Reading Speech, Hon. J.W. Shaw, Attorney General, *NSWPD(LC)*, 15 May 1996, p 980.

submission.⁹⁶

The *Crimes (Administration of Sentences) Amendment Act 2002* No 36 was assented to on 25 June 2002 but had not commenced at the time of publication. It will amend ss 147 and 190 of the *Crimes (Administration of Sentences) Act 1999* with the effect of granting registered victims of serious offenders the right to make an oral submission at a parole hearing. This result is achieved by:

- omitting from s 147(3)(b) the words ‘but, in the case of victims submissions, only with the approval of the Parole Board’; and
- inserting s 190(3) to clarify that the victim of a serious offender is not required to obtain the approval of the Parole Board to make an oral submission under s 147(3).

In May 2002 the Minister for Corrective Services also announced that a new part-time position of Victims Support Officer will be established. The purpose of the position is to ‘develop and run information sessions for victims of crimes to help them understand the process and procedures involved in the victims rights and parole considerations.’⁹⁷

6.2.4 Security classifications and unsupervised external leave

The Serious Offenders Review Council is a body of 8 to 14 members from the Department of Corrective Services, the judiciary and the community. Among its functions, the Council makes recommendations to the Commissioner of Corrective Services with respect to: (i) the security classification of serious offenders, (ii) their placement, and (iii) providing developmental programs for them: s 197(2)(a).

Prisoners with C3 security classification, the lowest of the minimum security classifications, may be considered for unsupervised external leave, such as day leave, weekend leave, education leave, and work release.⁹⁸ An inmate will generally be within the last 18 months of their date of release and have served half their non-parole period to be eligible to apply for unsupervised external leave. Inmates serving a fixed or non-parole period of 12 months or less are ineligible to participate.⁹⁹

When a proposal is made to the Serious Offenders Review Council recommending a ‘low

⁹⁶ Crimes (Administration of Sentences) Amendment Bill, Second Reading Speech, Mr R. Amery MP, Minister for Corrective Services, *NSWPD(LA)*, 8 May 2002, p 1805.

⁹⁷ *Ibid*, p 1805.

⁹⁸ *Submissions Concerning Offenders in Custody*, Information Package, Victims of Crime Bureau and Department of Corrective Services, January 2001, p 2. Category C3 inmates are those male offenders who ‘in the opinion of the Commissioner, need not be confined by a physical barrier at all times and who need not be supervised’: cl 22 of the *Crimes (Administration of Sentences) Regulation 2001*. Female inmates have a separate system of classifications. Their lowest classification is Category 1.

⁹⁹ *Submissions Concerning Offenders in Custody*, Information Package, Victims of Crime Bureau and Department of Corrective Services, January 2001, p 2.

security classification' for a serious offender, enabling the offender to become eligible for unescorted leave of absence under a local or interstate leave permit¹⁰⁰, the Council is required to issue a preliminary notice of its intention to any victim who is recorded on the Victims Register. The preliminary notice must grant the victim the opportunity to make a submission in writing to the Council about the proposed recommendation and must give the victim at least 14 days to lodge a notice of intention to make submissions: cl 288 of the *Crimes (Administration of Sentences) Regulation 2001* and ss 67, 68 of the *Crimes (Administration of Sentences) Act 1999*.

There is currently no provision for victims to make oral submissions with respect to unsupervised external leave.

A person who is entitled to make submissions at a hearing before the Serious Offenders Review Council may be represented by a legal practitioner, may call and examine any witness, give evidence on oath, and produce documents and exhibits: s 204.

The Council must consider any submissions made by the victim and by the State before deciding whether to recommend a low security classification for a serious offender: s 198(2). In exercising its functions under s 197(2)(a) to make recommendations to the Commissioner of Corrective Services, the Council must consider 'the public interest and any other relevant matters'. Section 198(3) states that the protection of the public is paramount in determining the public interest, and nominates other relevant factors such as:

- the nature and circumstances of the offence;
- the reasons and recommendations of the sentencing court;
- the criminal history and family background of the offender;
- amount of the sentence served and time remaining;
- the offender's conduct in custody;
- the offender's attitude;
- the **consequences to the victim and the victim's family** of the Council exercising a function under s 197(2)(a);
- the rehabilitation of the offender;
- the availability to the offender of family, departmental, or other support.

6.3 Avoiding release on parole on the anniversary of the offence

In 2001, amendments were made to the parole provisions of the *Crimes (Administration of Sentences) Act 1999* with the intention of overcoming the distress caused to victims and their families when an offender is released from custody on the anniversary of the commission of a violent offence.¹⁰¹

¹⁰⁰ A local leave permit allows an inmate to be absent from a correctional centre for purposes such as those listed in s 26 of the *Crimes (Administration of Sentences) Act 1999*. An interstate leave permit grants an inmate leave to go to another State for a specified period, subject to the matters outlined in s 29.

¹⁰¹ Criminal Legislation Amendment Bill, Second Reading Speech, Mr R. Debus, Attorney General, *NSWPD(LA)*, 30 November 2001, p 19300.

The *Criminal Legislation Amendment Act 2001* No 117 created subsections 138(1A), 141(3A) and 151(1A), which came into effect on 21 December 2001.¹⁰² Each of these subsections provides that when determining the day of release of a violent offender ‘the Parole Board must take into account the potential trauma to a victim and the victim’s family if the offender is released on the anniversary of the commission of the offence against the victim.’

The definition of ‘violent offender’ is the same as described above at ‘**6.2.1 Concepts and terminology**’.

¹⁰²

Government Gazette, No 196 of 21 December 2001, p 10437.

7. VICTIMS AND PLEA BARGAINING

7.1 General principles of plea bargaining

7.1.1 *Introductory concepts*

Plea bargaining or charge bargaining is the process by which the prosecution agrees to reduce the charge(s) laid against an offender, in exchange for a plea of guilty. This may entail the prosecutor substituting the original charge selected by the police with a less serious charge or, when a defendant is accused of multiple offences, negotiating to withdraw some of the charges. Either side may initiate a plea bargain.

A mutually agreed statement of facts, omitting references to conduct that would support more serious charges, is presented to the court at sentence. Any other material before the court that contains information exceeding the agreed facts must be disregarded by the sentencing judge.

The most commonly cited **benefits** of plea bargaining are:

- that it spares victims and witnesses the trauma of having to testify and be cross-examined at a trial, particularly for children and sexual assault complainants;
- the State will be saved the expense of a trial;
- court backlogs and delays are alleviated if more defendants plead guilty;
- the Crown case may not be sufficiently strong to obtain a conviction if the matter proceeds to trial on the ‘higher’ charge. By allowing the offender to plead guilty to a lesser charge, at least the offender is penalised to some extent for their actions.

There is general agreement among those ‘with responsibility for the operation of the criminal justice system that charge bargaining, as the primary means of facilitating the disposal of indictable offences by a plea of guilty rather than by trial, [is] essential to the administration of justice. Without it, the system could not cope.’¹⁰³ For example, between January 1998 and 30 September 2001, of the 1890 cases committed to be tried in the District Court, 591 were negotiated as pleas of guilty by charge bargaining at the arraignment stage.¹⁰⁴

However, according to critics of plea bargaining, some of its **disadvantages** are:

- it can be regarded as effectively rewarding guilty people, or as punishing those who earnestly plead not guilty but are subsequently convicted and receive no discount;

¹⁰³ *Review of the New South Wales Director of Public Prosecutions’ Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts*, Report by the Honourable Gordon Samuels AC CVO QC, 29 May 2002, para 7.2.

¹⁰⁴ *Ibid*, para 7.3. Arraignment involves the formal presentation in court of the indictment setting out the charges and the entering of a plea by the accused in response.

- negotiations take place in private, contrary to expectations that justice should be conducted in public whenever possible. To non-lawyers, the process may seem like a deal done between the prosecution and defence lawyers to save them time, effort or resources;
- plea bargaining detracts from traditional sentencing principles like deterrence. Offenders are dealt with more leniently and therefore may not be sufficiently deterred from re-offending;
- victims often feel that their suffering has been trivialised when fact summaries and witness statements are edited as part of a plea bargain;
- the right to silence is undermined if police refer to incentives such as sentencing discounts to encourage a confession;
- the prospect of a discount may induce some defendants to plead guilty if the case against them looks strong, even though they did not commit the crime or a conviction is not appropriate.¹⁰⁵

7.1.2 Prosecution guidelines

The Office of the Director of Public Prosecutions (DPP) prosecutes indictable (serious) crimes against New South Wales law, such as murder, manslaughter, armed robbery, malicious wounding and sexual assault. The DPP operates with reference to the *Prosecution Policy and Guidelines*, which outlines certain criteria to be followed when negotiating plea bargains.¹⁰⁶ These principles have ramifications for the interests of victims.

- **Prosecution Policy No 6** ('Charge Bargaining'):
 - Prosecutors are actively to **encourage the entering of guilty pleas** to appropriate charges.
 - The **Director's approval** or the written consent of a Crown Prosecutor is required before accepting a plea of guilty to a charge other than that contained in the indictment, except where the proposed plea is to an alternative charge contemplated by statute and there is no substantial difference between the criminality of the two charges.
 - Approval will usually be forthcoming if the **public interest** is satisfied after considering whether:
 - (i) the alternative charge adequately reflects the essential criminality of the conduct;
 - (ii) the evidence available to support the Crown case is weak in any material aspect;
 - (iii) the saving of cost and time is great when weighed against the likely outcome

¹⁰⁵ Most of the arguments against plea bargaining were derived from: P Darbyshire, 'The Mischief of Plea Bargaining and Sentence Rewards' [2000] *Criminal Law Review* 895.

¹⁰⁶ At the time of writing (May 2002) the current version of the *Prosecution Policy and Guidelines* was dated March 1998. It was accessed on the DPP's website at <www.odpp.nsw.gov.au>

- of a trial; and/or
- (iv) a witness will be saved from the stress of testifying at trial, particularly a victim or vulnerable witness.
- An alternative plea will not be considered where its acceptance would produce a distortion of the facts or where facts essential to establishing the criminality of the conduct would not be able to be relied upon.
- **Prosecution Policy No 11** ('Victims of Crime'):
 - The **views of victims will be sought**, considered and taken into account when decisions are made about prosecutions, but those views will not alone be determinative. The public interest must be served.
 - Prosecutors must, to the extent that it is relevant and practicable to do so, have regard to the **Charter of Victims Rights** under s 6 of the *Victims Rights Act 1996*. In turn, paragraph 5(b) of the Charter states that, **on request, a victim should be informed** of any decision of the prosecution to modify or not proceed with charges laid against the accused, and specifically any decision enabling the accused to accept a plea of guilty to a lesser charge.
 - **Guideline 5** ('Conferences with Witnesses') conveys the importance of prosecutors conferring with witnesses at the earliest available opportunity before court hearings, while **Guideline 28** ('Communications') provides that 'If they so request, witnesses, victims of crime and concerned relatives of deceased victims must be kept informed of the progress of proceedings in which they are interested and of important decisions made in relation to them.' But neither guideline refers overtly to charge bargaining.
 - **Guarantee of Service** ('Appendix O' to the *Prosecution Policy and Guidelines*): Under the subheading of 'Charter of Victims Rights', the Guarantee of Service states that, 'The victim should be consulted if consideration is being given to lessening or withdrawing the charges(s) in the Local Court.' It is not clear if the absence of reference to the District Court or Supreme Court is intentional.

7.1.3 Comments

At present there is no statutory duty upon the prosecution to inform or consult with the victim in the plea bargaining process.

Neither the *Prosecution Policy and Guidelines*, the Guarantee of Service, nor the Charter of Victims Rights requires the permission of the victim to be obtained before a plea bargain is entered into with an offender. The Charter, at paragraph 5(b), states that the victim should be informed about a plea bargain, but only on request and not necessarily before the bargain is agreed to by the prosecution. The strongest provision, although it is very broad, appears to be the statement in Prosecution Policy 11 that 'The views of victims will be sought, considered and taken into account when decisions are made about prosecutions...'

It is clear from Policy 6 that a prosecuting officer cannot automatically or casually agree to

a plea to a lesser charge. Rather, the proposal must be referred to a higher authority within the DPP.

It should also be noted that the provisions of the *Prosecution Policy and Guidelines* are supplemented by instructions and reminders issued by the Director and others in managerial positions. For example, in a memorandum on the subject of plea negotiations, dated 17 April 2001, the Director advised all Crown Prosecutors and DPP lawyers:

The views of the police OIC [Officer In Charge of the case] and victim must be sought at the outset of discussions and recorded on the file - and in any event before any formal position is communicated to the defence.¹⁰⁷

This is a more forceful statement than appears in any of the published policies and guidelines.

7.2 Plea bargaining debate in 2001-2002

7.2.1 Plea bargain in *R v AEM (jnr) & AEM (snr) & KEM*

Controversy over the treatment of victims in the plea bargaining process was sparked by the sentencing case of *Regina v AEM (jnr) & AEM (snr) & KEM* (District Court of NSW, Sydney, 23 August 2001). The defendants were young males who approached two 16 year old girls, DB and JH, at Beverley Hills railway station and drove them to a house in Villawood, where the girls were repeatedly sexually assaulted during a 5 hour period. For commentary on the case, a copy of the judgment, and media coverage at the time, see NSW Parliamentary Library Research Service, Briefing Paper No 12/2001, *Sentencing "Gang Rapists": The Crimes Amendment (Aggravated Sexual Assault in Company) Bill 2001*.

AEM (snr) and KEM each pleaded guilty to two counts of aggravated sexual assault under s 61J of the *Crimes Act 1900*.¹⁰⁸ AEM (jnr) pleaded to an offence of detaining for advantage. In determining the sentences, Judge Latham was confined by the set of facts which the prosecution and defence had negotiated in order to obtain the guilty pleas. According to this version of the facts, the victims went voluntarily with the offenders and no knife was produced or threats were made in transit to the premises where the offences occurred. A victim impact statement was tendered on behalf of DB but Judge Latham was obliged to disregard the content that went beyond the agreed facts.

AEM (snr) was sentenced to 6 years imprisonment with a non-parole period of 4 years, while KEM received 5 years and 7 months imprisonment with a non-parole period of 3½

¹⁰⁷ The memorandum is quoted from: *Review of the New South Wales Director of Public Prosecutions' Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts*, Report by the Honourable Gordon Samuels AC CVO QC, 29 May 2002, para 11.7.

¹⁰⁸ Additional offences committed against the same victims were taken into account pursuant to the provisions of s 33 of the *Crimes (Sentencing Procedure) Act 1999* (known as a Form 1 procedure).

years. AEM (jnr) was sentenced to 18 months with a non-parole period of 12 months. A fourth co-offender, MM, was sentenced separately on 2 November 2001 by the same judge. He pleaded guilty to two counts of aggravated sexual assault, and received a sentence of the same overall duration as AEM (snr).

After the sentences were passed, media reports revealed the disparities between the agreed facts and the victims' original allegations. DB and JH had told the police that the offenders forced them into the car, a knife was produced prior to arriving at the house, and the offenders (who were of Lebanese background) taunted the girls during the ordeal with racial remarks such as 'You deserve it because you're an Australian.'¹⁰⁹ Subsequently, the inquiry into plea bargaining by Hon. Gordon Samuels AC CVO QC confirmed that the victims, in their original statements to the police, had asserted that they did not voluntarily go with the offenders and that a knife was displayed in the car. Mr Samuels deduced that those 'two important allegations ... were no doubt omitted to dispose of any charge of kidnapping, under s 86 of the *Crimes Act*.'¹¹⁰

The two victims appeared on the television current affairs program '60 Minutes' on 2 September 2001. One of the girls, who was given the pseudonym 'Sue', acknowledged that she had been advised by lawyers that to get the offenders to plead guilty 'little things, like the slap on the face, the taking of your personal belongings' would be omitted from the evidence. But she maintained that she was led to believe that her allegations of being forced into the car, shown a knife and threatened during the drive would be retained as they were the basis of one of the main charges. 'Sue' claimed she only learned otherwise through media reports on the night of the sentence. She expressed dissatisfaction with the lack of choice or control she had in the process:

They could have told us at least that they were going to change it [the story] and then let us decide what we wanted to do from there. But they didn't. Personally, I would rather go through the process of court because at least my story is getting told and they are actually sentenced on what they did and not what they didn't do.

...

I did expect the sentencing to give me some sort of closure so I could start getting on with my life. But it's been the exact opposite. It's just made things worse because it's like, now my story has been changed by the legal system... The facts were changed and I want to stop that. My story should be told the way it happened.¹¹¹

¹⁰⁹ 'Mother's plea: give victims a voice', *The Sydney Morning Herald*, 25 August 2001, p 2.

¹¹⁰ *Review of the New South Wales Director of Public Prosecutions' Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts*, Report by the Honourable Gordon Samuels AC CVO QC, 29 May 2002, Annexure A, pp 3-4.

¹¹¹ The transcript of the program was accessed on the '60 Minutes' website on 11 September 2001: <www.news.ninemsn.com.au/sixtyminutes/stories/2001_09_02/story_402.asp>

7.2.2 Consequences of the case

The Attorney General, Hon. Bob Debus MP, requested a report from the Director of Public Prosecutions, Nicholas Cowdery QC, on the charge bargaining procedures in the case. After receiving the report, the Attorney informed the Legislative Assembly that the Director had conceded that the prosecution guidelines were not followed adequately in the matter but had rejected that there was any general or widespread failure by the Office to comply with the guidelines.¹¹² The Attorney General also announced that he had commissioned Hon. Gordon Samuels QC, who had formerly held the positions of Governor, Supreme Court judge and Director of the Law Reform Commission of New South Wales, to conduct a review of charge bargaining and its application by the DPP:

...the review will focus particularly upon the necessity of ensuring adequate consultation with victims. Mr Samuels will also report upon the adequacy of safeguards to ensure that charges and agreed facts reflect the criminality of relevant offences and that they permit a sentencing judge to be satisfied that the policy and the guidelines [the DPP's *Prosecution Policy and Guidelines*] have been complied with.

The report will, of course, include recommendations for any necessary amendments to current practices. If the former Governor concludes that legislation is needed, of course the Government will introduce it.¹¹³

The review is examined in the next subsection: '**7.3 Samuels Review**'.

The Director of Public Prosecutions appealed the sentences of AEM (snr), KEM and MM to the Court of Criminal Appeal, which allowed the appeals on 13 March 2002: *R v AEM Snr; R v KEM; R v MM* [2002] NSWCCA 58. The Court resented AEM (snr) to 13 years with a non-parole period of 9 years, KEM to 14 years with 10 years non-parole, and MM to 13 years with 10 years non-parole. These amounts were more than double the sentences initially imposed on AEM (snr) and MM, and nearly triple for KEM.

The case influenced a number of other reform initiatives. The Government introduced the *Crimes Amendment (Aggravated Sexual Assault in Company) Act 2001* No 62, creating a separate offence of aggravated sexual assault in company at s 61JA of the *Crimes Act*. The new offence carries a maximum penalty of life imprisonment and commenced on 1 October 2001.¹¹⁴ During the Second Reading debate on the Bill in the Legislative Assembly on 5 September 2001 and in the Legislative Council on 18 September 2001, several Members referred to the judgment of Latham DCJ in *R v AEM (jnr) & AEM (snr) & KEM*.

The Attorney General lodged an application on 13 September 2001 for a sentencing

¹¹² Questions Without Notice, 'Charge Bargaining', Hon. Bob Debus MP, Attorney General, *NSWPD(LA)*, 20 September 2001, pp 16993-16994.

¹¹³ *Ibid*, p 16994.

¹¹⁴ *Government Gazette*, No 146 of 2001, p 8182.

guideline judgment on sexual assault and aggravated sexual assault. The guideline judgment was listed before the Court of Criminal Appeal on 15 March 2002 but was withdrawn by the Attorney's representative, the Crown Advocate, due to a variety of obstacles. The judges did not wish to proceed until after the commencement of the *Crimes (Sentencing Procedure) Amendment (General Sentencing Principles) Act 2002* No 5, which stipulates factors that judges are to take into account when determining sentences. The Amendment Act commenced on 15 April 2002: see '**2.5 Codification of general sentencing principles in 2002**' on p 7 of this briefing paper. The guideline also had constitutional ramifications, requiring notice to be given to all Attorneys General in Australia.¹¹⁵

7.3 Samuels Review

7.3.1 Introduction

On 18 September 2001 the Honourable Gordon Samuels AC CVO QC was appointed to conduct the Review of the New South Wales Director of Public Prosecutions' Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts. The report of the review was dated 29 May 2002 and released on 6 June.

The Terms of Reference were:

To review and report on the adequacy of the New South Wales Director of Public Prosecutions' policy and guidelines in relation to charge bargaining and the tendering of agreed facts.

The review shall have particular regard to whether the policy and guidelines:

- (i) ensure adequate consultation with victims.
- (ii) ensure that the charges and agreed facts reflect the criminality of relevant offences.
- (iii) should permit a sentencing judge to be satisfied that the policy and guidelines have been complied with.

The report on the review should also include recommendations for any necessary amendments to the policy and guidelines and any related matter.¹¹⁶

In total, 27 written submissions were received and 18 persons were interviewed. Mr Samuels adopted the 'premise that the current view of Australia's senior law officers is that charge bargaining...is acceptable in principle and beneficial in practice.'¹¹⁷

¹¹⁵ 'Sex crime sentencing guide under threat', *The Sydney Morning Herald*, 16 March 2002, p 3.

¹¹⁶ *Review of the New South Wales Director of Public Prosecutions' Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts*, Report by the Honourable Gordon Samuels AC CVO QC, 29 May 2002, paragraph 2.1.

¹¹⁷ *Ibid*, paragraph 4.3.

7.3.2 Findings and observations

The report found that the DPP's *Prosecution Policy and Guidelines* in their present state:

- do require adequate consultation with victims;
- do require that the charges and agreed facts reflect the criminality of relevant offences;
- do not and should not allot any role to the sentencing judge in the charge bargaining process.¹¹⁸

Some other important observations of the report were:

- *Charter of Victims Rights* – paragraph 5(b) is inadequate because it only obliges the prosecution to inform the victim of its decision to accept a plea to a less serious charge at the victim's request, and not necessarily before the event.¹¹⁹
- *Statements of agreed facts* – the *Prosecution Policy and Guidelines* does not require a statement of agreed facts to be shown to a victim and the victim's views ascertained before the statement is adopted by both sides. Nor is there a specific provision to direct that agreed facts should comply with the 'criminality principle', namely, that the charge should represent the criminality revealed by the facts which can be proved beyond reasonable doubt and which give the sentencer a sufficient range of penalty. However, the report was satisfied 'that prosecutors are well aware that a statement of agreed facts..., as well as the charge itself, must satisfy the criminality principle.'¹²⁰
- *Importance of early consultation* – The report stated: '...It is beyond question that a victim should be informed when any charge bargain is initiated, and the views of the victim must be obtained before any formal decision about guilty pleas, for example, is made by the prosecution. The victim must not only be informed that any negotiation of this sort is contemplated. The victim's views as to the acceptance of a contemplated plea to a particular charge must also be ascertained.'¹²¹
- *Role of judiciary in charge bargaining* – it would tend to compromise judicial independence and integrity to involve judges in the selection of charges or in the vetting of statements of agreed facts.¹²² The report followed the reasoning of *Maxwell v The Queen* (1995) 184 CLR 501, in which the High Court held that a judge has no power to review the decision of a prosecutor to accept a plea of guilty to a lesser offence or to reject the plea, provided it is genuine.

¹¹⁸ Ibid, Summary of Conclusions and Recommendations.

¹¹⁹ Paragraph 10.3.

¹²⁰ Paragraph 11.14.

¹²¹ Paragraph 10.4.

¹²² Paragraphs 12.2-12.5.

- *Presenting documentation of charge bargain in court* – tendering a written explanation of the charge bargain, or written confirmation that a prosecutor had consulted the victim before formalising the plea, is ‘not necessary to remedy current flaws in the system, and...involves the sentencing judge in what is not judicial business.’¹²³ Legislative changes should not be made to confer additional power on judges to explore or reject a charge bargain.

7.3.3 Recommendations

Notwithstanding the finding that the DPP’s *Prosecution Policy and Guidelines* were adequate, the recommendations of the report included suggestions for improvements to several key provisions. The Report’s full recommendations were:¹²⁴

- The terms ‘**charge bargaining**’ and ‘**charge bargain**’ create a ‘pejorative or disreputable image of the process’ and should be abandoned in favour of ‘charge negotiation’ and ‘charge agreement’.
- **DPP Policy 6 (‘Charge bargaining’)** should be amended to constitute a complete and self-sufficient prescription for the prosecutor’s conduct of charge negotiations.
 - The substance of the Director’s memorandum of 17 April 2001, which required the views of the victim and the police officer in charge (OIC) to be sought at the outset of any charge discussions, should be inserted in Policy 6.
 - The views of the OIC and victim must be sought with regard to any statement of agreed facts before it is adopted.
 - The policy should confirm that the views of the victim about the acceptance of a guilty plea and a statement of agreed facts are not determinative but will be taken into account before final decisions are made.
- **Guideline 24 (‘Victims of Crime’)** is adequate but the importance of observing it, especially in relation to explaining to victims their role in the prosecution process, should be emphasised to Crown Prosecutors and DPP staff.
- **Guideline 28 (‘Communications’)** should be amended to provide that: ‘Witnesses and victims of crime (as defined by section 5 of the Victims Rights Act, 1996) must be kept informed of the progress of proceedings in which they are interested and victims must be consulted about important decisions proposed to be made in relation to them.’
- The relevant **regulations of the Supreme, District and Local Courts** should be amended to permit victims to have copies of judgments and written evidence free of charge in those cases in which they are concerned.

¹²³ Paragraph 12.16.

¹²⁴ Paragraphs 14.1-14.8. The recommendations are paraphrased here, not quoted directly.

7.3.4 Cases in point

The report examined two cases in which the victims alleged that the DPP had not adequately consulted them about plea bargaining.

The first case was *R v AEM (jnr) & AEM (snr) & KEM* (District Court of NSW, Sydney, 23 August 2001), which prompted a sentence appeal by the Crown in *R v AEM Snr; R v KEM; R v MM* [2002] NSWCCA 58. These cases are discussed above at pp 55-57.

The report concluded that:

- There was a serious failure to maintain adequate communication with the victim JH. Nor was the proposed charge bargain or the agreed statement of facts sufficiently explained to her.
- The agreed facts were contrary to both victims' original statements to the police.
- However, the statement of agreed facts did not create an artificial basis for the sentencing. It adequately reflected the criminality involved and enabled the Court of Criminal Appeal to impose appropriate sentences.¹²⁵

The second case involving a contentious plea bargain was *R v Laupama* [2001] NSWSC 1082. Laupama had killed the 5 year old daughter of his former de facto partner, Kelly Parker, by hanging the child from a pergola during a visit to Ms Parker's residence. Laupama was charged with murder but the Crown accepted a plea to manslaughter on the basis of psychological reports that found that at the time of the offence he was suffering from an 'abnormality of mind' such as to warrant his liability for murder being reduced to manslaughter, pursuant to s 23A of the *Crimes Act*.¹²⁶ On 7 December 2001, Laupama was sentenced in the Supreme Court by Justice Bell to 12 years imprisonment, with a non-parole period of 8 years.

Prior to the sentence date, Kelly Parker complained to the Director of Public Prosecutions, Nicholas Cowdery QC, about the lack of information received from his staff and in particular that she had not been advised before the prosecution accepted the plea to manslaughter. After the sentencing, Ms Parker unsuccessfully urged the Director to lodge a Crown appeal against the leniency of the sentence, and pursued the matter with the Attorney General's Department.

The report found that:

- The acceptance of the plea to manslaughter was justified by the psychiatric evidence and was consistent with the requirements of s 23A(1)(b) of the *Crimes Act*.

¹²⁵ Annexure A, pp 12-13.

¹²⁶ This doctrine is commonly known as diminished responsibility.

- The communication maintained by the DPP with Ms Parker was inadequate.
- The DPP's failure to consult Ms Parker before the plea to manslaughter was accepted was a serious breach of the policy and guidelines.¹²⁷

7.3.5 Responses to the report

On 6 June 2002, Nicholas Cowdery QC issued a statement accepting Mr Samuels' recommendations and agreeing to implement all of them. The relevant sections of the *Prosecution Policy and Guidelines* were to be redrafted as part of a comprehensive review that was already underway. A Director's memorandum would also be issued to staff to emphasise the requirements of the *Prosecution Policy and Guidelines*.

Mr Cowdery stated:

In all cases drawn to my attention in which there has been a failure to carry out the requirements of the Policy and Guidelines, appropriate and stern internal action has been taken with the staff involved. Victims and others affected by such default have been contacted. That will continue to occur if such individual failures are experienced again.

...

In all such cases I regret very deeply the failure of this Office to deliver appropriate services to members of the community and apologise for lapses on the part of individual staff members. All steps are taken to ensure that such failures are rare events in the conduct of the thousands of prosecutions undertaken by my officers every year.¹²⁸

The recommendations of the Samuels report were forwarded to the Victims Advisory Board of the Attorney General's Department.¹²⁹ Victims groups such as the Victims of Crime Assistance League and the Homicide Victims Support Group welcomed the recommendations.¹³⁰

7.4 Opposition's proposal for plea bargaining legislation

A Private Member's Bill introduced by the Deputy Opposition Leader, Mr C. Hartcher MP,

¹²⁷ Annexure B, pp 22-23.

¹²⁸ N.R. Cowdery QC, 'Statement Concerning the Report by the Honourable Gordon Samuels AC CVO QC on his Review of the NSW DPP Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts', 6 June 2002. Accessed from the media releases component of the DPP website at <www.odpp.nsw.gov.au>

¹²⁹ 'Crime victims should know of charge bargaining: advocates', *The Sydney Morning Herald*, 8 June 2002, p 12.

¹³⁰ Ibid; and 'Victims to be consulted before plea deals struck', *The Daily Telegraph*, 7 June 2002, p 9.

in the Legislative Assembly on 20 June 2002 proposes greater regulation of plea bargaining. In the Second Reading Speech on the Crimes (Sentencing Procedure) Amendment (Victims' Rights and Plea Bargaining) Bill 2002, Mr Hartcher stated:

This legislation has become necessary because of circumstances we have seen in recent times. In a number of prominent and well-publicised cases, victims have felt that their side of the story has not been told to the court.
 ...If plea bargaining is going to continue – and it will because it is a fact of life – victims must be fully informed and their views must be taken into account.¹³¹

The Crimes (Sentencing Procedure) Amendment (Victims' Rights and Plea Bargaining) Bill 2002 would amend the *Crimes (Sentencing Procedure) Act 1999* to:

- limit the extent to which a sentence can be reduced for a guilty plea, to **no more than 10%** of the penalty that would otherwise have been imposed;
- provide that the prosecutor must, before the offender is sentenced, **inform the victim** of any decision of the prosecutor to modify or not proceed with charges laid against an offender, including a decision to accept a plea of guilty to a less serious charge;
- grant the victim the opportunity to tell the prosecutor **whether the victim approves** of that decision. The victim's statement may be written, oral, or made through a representative. The victim may consult a legal practitioner or support person before deciding whether to make a statement;
- stipulate that the prosecution must **file in court the details** of any decision to modify or not proceed with the charges, and details of any statement made in response by a victim;
- require the **court to be satisfied**, before passing sentence, that the victim has been provided with the correct information about the prosecution's decision to accept a plea or modify charges, and that the victim has been given the opportunity to make a statement in response;
- require a judge, in sentencing an offender who has pleaded guilty, to **disclose in open court the details** of any decision by the prosecution to accept a plea bargain, unless the judge considers that it is not in the interests of justice to do so.

The amendments define a plea bargain as: 'negotiations carried out between a person, or the person's legal representative, and a law enforcement authority or a prosecutor in relation to the person pleading guilty to an offence in return for any concession or benefit in relation to which charges are to be proceeded with against the person and which charges are not to

¹³¹ Crimes (Sentencing Procedure) Amendment (Victims' Rights and Plea Bargaining) Bill, Second Reading Speech, Mr C. Hartcher MP, Deputy Opposition Leader, *NSWPD(LA)*, 20 June 2002, pp3531-3532. The prominent cases to which Mr Hartcher alluded were *R v AEM (jnr) & AEM (snr) & KEM* and *R v Laupama*.

be proceeded with.’

Debate was adjourned on the Crimes (Sentencing Procedure) Amendment (Victims’ Rights and Plea Bargaining) Bill 2002 in the Legislative Assembly after the Second Reading Speech on 20 June 2002.

The proposed reforms would restrict the application of the **guideline judgment** issued by the Court of Criminal Appeal in 2000 on the appropriate discount for pleading guilty: *R v Thomson; R v Houlton* (2000) 49 NSWLR 383. The Court (Spigelman CJ with whom Wood CJ at CL, Foster AJA, Grove J and James J agreed) held that the utilitarian value to the criminal justice system of a guilty plea should generally be assessed in the range of **10-25% discount** on sentence: at 411. Spigelman CJ confirmed that the calculation of the discount is at the sentencing judge’s discretion but that two important factors in determining the level of discount are:

- (i) the time at which the plea is entered \Rightarrow the earlier the plea, the greater the discount;
- (ii) the complexity of the evidentiary issues in the case \Rightarrow the longer and more difficult the potential trial, the higher the value of the plea: at 411, 418.

8. GOVERNMENT SERVICES FOR VICTIMS

Three statutory agencies are overtly focussed on supporting victims: the Victims Compensation Tribunal, Victims of Crime Bureau, and Victims Advisory Board, all within the Victims Services branch of the NSW Attorney General's Department. Many other public sector bodies have contact with victims and some perform specialised functions. These include the Department of Corrective Services, the Office of the Director of Public Prosecutions, and the Police Service.

8.1 Victims of Crime Bureau

Phone: (02) 9374 3005

Fax: (02) 9374 3020

Postal: Victims Services, Locked Bag A5010, Sydney South, NSW, 1235

Web: www.lawlink.nsw.gov.au/vcb

The Victims of Crime Bureau (VCB) was established under s 9 of the *Victims Rights Act 1996* to facilitate communication between victims and service providers throughout NSW.

The **functions** of the VCB, as outlined by s 10(1) of the Act, are to:

- (a) provide information to victims of crime¹³² about support services and compensation, and to assist victims in the exercise of their rights;
- (b) coordinate the effective and efficient delivery of support services for victims;
- (c) promote and oversee the implementation of the Charter of Victims Rights;
- (d) receive and endeavour to resolve complaints from victims about alleged breaches of the Charter of Victims Rights.

Some of the **activities** performed by the VCB in practice are:

- operating, in conjunction with the Sydney City Mission, a state-wide 24 hour Victims Support Line which offers telephone counselling, information and referral;
- administering the Approved Counselling Scheme and accrediting its counsellors;
- convening an interagency forum of organisations with an interest in victims issues, and undertaking projects that result from the interagency (see more below);
- training and educating providers of services;
- developing resource materials (brochures, information kits and posters) relating to victims rights;

¹³²

The definition of a victim of crime in s 5 of the *Victims Rights Act 1996* is a person who suffers harm as a direct result of an act committed in the course of a criminal offence, where 'harm' includes actual physical bodily harm, mental illness, nervous shock, or deliberate taking, destruction or damage of property. If the victim dies as a result of the act concerned, a member of their immediate family is also a victim of crime. For the purposes of the Victims of Crime Bureau, members of the immediate family of a missing person are also considered to be victims: s 10(2).

- publishing the *Victims of Crime Chronicle* quarterly newsletter that features updates on the VCB's activities and other relevant information;
- researching and developing policy and projects on matters affecting victims;
- providing policy advice to the Attorney General and the Premier's Office;
- coordinating support for those experiencing the loss of a missing person, through the 'Families and Friends of Missing Persons Unit' within the VCB.

The **interagency forum** hosted by the VCB is comprised of representatives from a diversity of government and community organisations, including: the Victims Services branch of the Attorney General's Department, the Office of the Director of Public Prosecutions, the Local, District and Supreme Courts, NSW Police Service, Department of Corrective Services, Department of Aboriginal Affairs, Ethnic Affairs Commission, Department of Juvenile Justice, Department of Health, Department of Community Services, Sydney City Mission, Homicide Victims Support Group, Victims of Crime Assistance League, Lesbian and Gay Anti-Violence project, and the Women's Refuge Referral and Resource Centre.

The primary objectives of the interagency are:

- to discuss and monitor implementation of the Charter of Victims Rights;
- to facilitate a 'whole of government' approach to the delivery of services to victims;
- to exchange information about services relevant to victims;
- to consult on specific operational issues.

8.2 Victims Advisory Board

Phone: (02) 9374 3009

Fax: (02) 9374 3020

Postal: Victims Services, Locked Bag A5010, Sydney South, NSW, 1235

Web: www.lawlink.nsw.gov.au/vab

The Victims Advisory Board (VAB) was established by s 12 of the *Victims Rights Act 1996* and first met in November 1997. Terms of Reference and an Operational Protocol were developed in early 1998 to direct and guide its work. The VAB currently meets every two months.

The main **functions** of the VAB, outlined in s 14 of the Act, are to:

- advise the Attorney General on policies, practices and reforms relating to victims compensation and support services;
- consult victims of crime, community support groups, and government agencies on issues and policies concerning victims; and
- promote legislative, administrative or other reforms to meet the needs of victims.

Members of the VAB are drawn from community organisations and government agencies. Section 13 of the *Victims Rights Act 1996* provides for the VAB to consist of up to 10 members appointed by the Minister including: 4 members representing the general

community; one representing the Police Service; one from the Attorney General's Department; and the balance from other relevant Government agencies. The current Chairperson is the Deputy Director General of the Attorney General's Department. Other current members are from the Victims Services section of the Attorney General's Department, the Office of the Director of Public Prosecutions, the NSW Health Department, the Police Service, Mission Australia, Homicide Victims Support Group, Victims of Crime Assistance League, and Enough is Enough Anti-Violence Movement. More information on appointments, procedures for meetings and so on is found in Schedule 1 to the *Victims Rights Act 1996*.

The VAB contributed or responded to a number of **issues** in 2000-2001:¹³³

- it raised concerns about organ retention and support mechanisms for family members of homicide victims in the context of the Human Tissue Amendment Bill 2001;
- it was represented on a team which examined the coronial process, with the aim of improving the provision of information to family members of homicide victims in cases referred to the Coroner;
- the members of the VAB voted unanimously to support a proposal for an online database of judgments on victims compensation appeals to the District Court against decisions of the Victims Compensation Tribunal;
- the Victims of Crime website (www.lawlink.nsw.gov.au/voc), which was developed by the VAB with assistance from other agencies, commenced operation on 2 April 2001. The website provides contact details and practical information on court processes, police, protection from offenders, legal redress, compensation, counselling and so on;
- the VAB is to be advised of any applications for guideline judgments, so that it may make submissions to the court in appropriate circumstances.

Some of the **projects** which the VAB intends to pursue in 2001-2002 are:¹³⁴

- contributing submissions to the review of the *Victims Rights Act 1996* and the *Victims Support and Rehabilitation Act 1996*, to be conducted for one year from December 2001 by the Attorney General's Department; and
- adopting strategies to bring victims issues to the attention of the judiciary.

8.3 Victims Compensation Tribunal

Phone: (02) 9374 3111

Fax: Compensation & Counselling - (02) 9374 3120;

Restitution & Appeals - (02) 9374 3160

Administration & Accounts - (02) 9374 3040

Postal: Victims Services, Locked Bag A5010, Sydney South, NSW, 1235

¹³³ Victims Advisory Board, *Report on Activities 2000/2001*, pp 2-3. Posted on the VAB component of the Victims Services website at <www.lawlink.nsw.gov.au/vab>

¹³⁴ *Ibid*, p 4.

Web: www.lawlink.nsw.gov.au/vct

The Victims Compensation Tribunal was originally created by the *Victims Compensation Act 1987* (repealed) as an independent body to determine applications for compensation. Applications are now considered on a preliminary basis by compensation assessors, according to the criteria of Part 2 of the *Victims Support and Rehabilitation Act 1996*, but can be referred to the VCT in a number of ways and can be appealed to the VCT by applicants. The actual Tribunal is comprised of up to 3 Magistrates, including the Chairperson.¹³⁵

The victims compensation scheme and the functions of the VCT are examined in greater detail under '4. STATUTORY COMPENSATION AND COUNSELLING SCHEMES' from p 21.

8.4 Department of Corrective Services

The Department of Corrective Services conducts a range of programs that seek to assist victims of crime, through the provision of information, conferencing, and financial backing.

8.4.1 Restorative Justice Unit

Phone: (02) 9289 3921

Postal: G.P.O. Box 31, Sydney, NSW, 2001

Web: www.dcs.nsw.gov.au

The philosophy of restorative justice is that crime is a violation of one person by another rather than an offence against the State. Traditional justice seeks to punish the offender, whereas restorative justice encourages offenders to take responsibility for their own actions and repair the harm they have caused to victims and the community.¹³⁶

The Restorative Justice Unit was created in 1999 as a pilot project, and its continuation has been approved by the Minister.¹³⁷ Its primary functions are to administer:

- (i) victim-offender conferencing;
- (ii) protective mediation;
- (iii) the Victims Register.

(i) Victim-offender conferencing

Victim-offender conferencing allows a victim to meet an offender after the sentence has

¹³⁵ The number of Members is not set by the Act. The current number is indicated on the VCT website at <www.lawlink.nsw.gov.au/vct>, 'Victims Compensation Tribunal – What we do'.

¹³⁶ Department of Corrective Services website at <www.dcs.nsw.gov.au>, 'Restorative Justice – Frequently Asked Questions'.

¹³⁷ Department of Corrective Services, *Annual Report 2000-2001*, p 4; and Department of Corrective Services website at <www.dcs.nsw.gov.au>, 'Restorative Justice – Introduction'.

been imposed, talk about the effect of the crime on each of them, and come to an agreement about how the harm caused may be repaired. It is the first post-sentence conferencing program conducted by a corrections department in Australia.¹³⁸

Conferences are organised in response to referrals from offenders, victims, or people working with them. The victim and offender must both agree to a conference taking place. Those in attendance are the victim and offender, their respective supporters, the conference facilitator, and other people involved in the incident. A conference agreement is reached, recorded in writing, and signed by key participants. The terms of the agreement may include an apology, repayment of money, repair of physical damage, community service work, or an undertaking to seek counselling or treatment.

The possible benefits for victims are:

- being able to confront the offender in a safe setting;
- participating in the criminal justice process and in formulating a solution in their own case;
- receiving an apology;
- putting the ordeal behind them;
- perceiving the criminal as a person, rather than an unknown entity or an ongoing threat.

There may also be benefits for offenders such as:

- having the opportunity to apologise or make amends to the victim;
- gaining insight into the effects of the crime;
- taking responsibility for their actions;
- becoming motivated to change their ways.

After the conference, the convenor follows up on the victim and the offender, and will arrange referrals to other professionals or agencies if required. Staff from the Restorative Justice Unit also check whether or not the agreement has been fulfilled.

(ii) Protective mediation

Protective mediation is a less direct procedure than victim-offender conferencing. It is a method for enabling victims and offenders to clarify their needs, preferences, and practical details about future or potential contact. Referrals to the program can be initiated by victims, offenders, or anyone working with them.

A trained mediator liaises between the offender and the victim to ascertain whether contact may take place and, if so, on what terms. The nature and level of contact is clarified through mediation and a written agreement, without the victim and offender meeting face-to-face.

¹³⁸ Department of Corrective Services website at <www.dcs.nsw.gov.au>, 'Restorative Justice – A Positive Response to Crime'.

Examples of situations in which contact might need to be negotiated include: where the offender and victim live in the same small community and are likely to come into contact with each other, or where the victim is a relative of the offender and wishes to maintain contact but subject to certain conditions.

Any agreement made relies on goodwill except in cases where compliance forms a condition of a supervised order of parole or probation. In such a case, a breach would be reported to the court or the Parole Board.

(iii) *Victims Register*

The Charter of Victims Rights, which received formal recognition in the *Victims Rights Act 1996*, stated that victims should on request be kept informed of the offender's impending release or escape from custody, or of any change in security classification allowing the offender to be eligible for unescorted absence from custody: s 6.15. In compliance with this objective, a Victims Register was established by the *Sentencing Amendment (Parole) Act 1996* No 144.¹³⁹

The Attorney General envisaged that the register would facilitate the efficiency of communicating with interested victims:

A victims register is essential so that the Parole Board can be confident that it will inform all victims who wish to make submissions of their opportunity to make submissions when that opportunity arises. Similarly, a victims register is essential so that the board will not inadvertently contact those victims who would rather have nothing more to do with the matter.¹⁴⁰

The newly created Restorative Justice Unit took over the responsibility for administering the Victims Register in 1999. The *Crimes (Administration of Sentences) Act 1999* and the accompanying *Crimes (Administration of Sentences) Regulation 2001* currently govern the Victims Register.

The concept of a 'victim' is defined for the purposes of the Victims Register by s 256(5) of the *Crimes (Administration of Sentences) Act 1999* to mean:

- the victim of the offence for which the offender has been sentenced; or
- a family representative where the victim is dead or under any incapacity; and
- includes a person who suffers actual physical bodily harm, mental illness or nervous shock, or whose property is deliberately taken, destroyed or damaged, as a direct result of an act committed, or apparently committed, by the offender in the course of a criminal offence.

¹³⁹ The Act commenced on 20 December 1996, inserting the Victims Register provision at s 22M of the *Sentencing Act 1989* (now repealed).

¹⁴⁰ Victims Rights Bill, Victims Compensation Bill, Sentencing Amendment (Parole) Bill, Second Reading Speech, Hon. J.W. Shaw, Attorney General, *NSWPD(LC)*, 15 May 1996, p 979.

Therefore the offence does not have to involve violence, and the offender may be serving a sentence of imprisonment, home detention, periodic detention or a community-based order.¹⁴¹

The register records the names and contact details of victims who have requested registration of their interests, in order to be informed if the offender:

- is due for parole consideration;
- is due for release;
- has escaped from custody;
- is to be considered for a change of security classification which may result in the offender being eligible for unescorted, pre-release leave of absence.

The Victims Register does not, as a matter of course, advise victims of changes in security classification, or routine transfers between correctional centres or for medical treatment. However, a victim may at any time inquire about the offender's location, or the term and duration of the sentence.¹⁴²

A victim must be registered to have an opportunity to make submissions in relation to the release of the offender on parole. This practice is examined in detail in '**6. VICTIM PARTICIPATION IN THE PAROLE PROCESS**' from p 44.

By 31 December 2001, a total of 1,156 victims had registered with the Victims Register. Of those, 617 were 'active registered victims in relation to offenders in custody on that date.'¹⁴³

Victims can obtain further assistance through the Victims Register Liaison Officer. For example, victims might inquire about external leave programs, the procedure for making a victim submission, or whether the offender will be attending a Parole Board hearing.

The bulk of victims are catered for by the Victims Register maintained by the Department of Corrective Services. But two smaller, separate registers also exist:

- Victims Register of the Department of Juvenile Justice – to keep victims informed about young offenders who are in custody in juvenile detention centres;
- Victims Register of the Mental Health Review Tribunal – for victims of offenders who were pronounced unfit to stand trial, but were found guilty at a 'special hearing' under

¹⁴¹ Department of Corrective Services website at <www.dcs.nsw.gov.au>, 'Restorative Justice Unit – Victims Register'.

¹⁴² Ibid.

¹⁴³ Crimes (Administration of Sentences) Amendment Bill, Second Reading Speech, Mr R. Amery, Minister for Corrective Services, *NSWPD(LA)*, 8 May 2002, p 1805.

the *Mental Health (Criminal Procedure) Act 1990* and are being detained as 'forensic patients'.

8.4.2 Victims of Violent Crime Grants Program¹⁴⁴

The Victims of Violent Crime Grants Program (VOVCGP) makes annual grants to community organisations which assist victims of violent crime. The program is funded by Corrective Services Industries, the commercial unit which provides employment opportunities to inmates in prison. Therefore, some of the profit from inmate labour is effectively being channelled into a type of reparation to the community.

VOVCGP first operated in the 1998-1999 financial year, when it allocated grants totalling \$131,352. In 1999-2000, \$172,500 was paid, rising to \$194,616 in 2000-2001. The organisations which received grants in the last financial year included the Women's Legal Resources Centre (\$15,000), Rosebank Child Sexual Abuse Service (\$12,900), Kempsey Family Support Service (\$15,000), and various neighbourhood centres and women's health centres. Applications are invited in February/March of each year.

8.4.3 Victim Awareness Program¹⁴⁵

Since the 1997-1998 financial year, the Victim Awareness Program (VAP) has funded Enough is Enough Anti-Violence Movement to conduct the 'R' Program throughout correctional centres in NSW. This venture encourages inmates to accept responsibility for their actions by highlighting the damage caused to offenders and to those affected by crimes.

In 2000-2001, Enough is Enough delivered 14 presentations to 204 inmates in 12 correctional centres. Presentations to staff were given on 11 occasions to a total of 349 personnel. Earnings from inmate labour also support this work.

Reviewing and evaluating the VOVCGP and VAP initiatives were cited among the 'major targets' for the Department of Corrective Services in the 2001-2002 financial year.¹⁴⁶

8.5 Office of the Director of Public Prosecutions

Phone: (02) 9285 8666 or toll free outside Sydney: 1800 814 534

Postal: Locked Bag A8, Sydney South, NSW, 1232

Web: www.odpp.nsw.gov.au

¹⁴⁴ Information was obtained from: Department of Corrective Services, *Annual Report 2000-2001*, p 13, Appendix 26; and 'Victims of Violent Crime Grants Program (VOVCGP)' 5(3) *Victims of Crime Chronicle 2* (newsletter produced by the Victims of Crime Bureau), December 2001.

¹⁴⁵ Department of Corrective Services, *Annual Report 2000-2001*, p 13, Appendix 27.

¹⁴⁶ *Ibid*, p 28.

The Office of the Director of Public Prosecutions (DPP) prosecutes serious ('indictable') crime in New South Wales. Its staff are encouraged to notify victims of developments in their cases and to consult with them about important decisions. The consideration of the interests of victims by DPP lawyers when negotiating pleas of guilty or modifying charges is dealt with at '5. VICTIMS AND PLEA BARGAINING' on p 52.

The publications produced by the DPP include the pamphlets 'Your Rights as a Victim' and 'Being a Witness'. Also available is a Victim Impact Statement Information Package, prepared jointly by the DPP and the Victims of Crime Bureau. The DPP has a specialist unit called the Witness Assistance Service which is staffed by social workers trained to deal with victims.

8.5.1 Recognition of the interests of victims

According to the DPP's *Prosecution Policy and Guidelines*,¹⁴⁷ the decision to prosecute is governed primarily by the question of whether or not the public interest requires that a matter be prosecuted: Policy 5. Two of the discretionary factors that are listed under Policy 5 as relevant to assessing the public interest are the attitude of a victim to a prosecution, and any entitlement or liability of a victim or other person to criminal compensation, reparation or forfeiture if prosecutorial action is taken. A decision whether or not to proceed must not be influenced by, among other nominated factors, the personal feelings of the prosecutor towards the victim.

The *Prosecution Policy and Guidelines* refer in numerous places to prosecutors' duties towards victims and witnesses. For example:

- **Policy 11** ('Victims of Crime')
 - Prosecutors must, to the extent that it is relevant and practicable to do so, have regard to the Charter of Victims Rights, in addition to any other relevant matter.
 - The views of victims will be sought, considered and taken into account when decisions are made about prosecutions, but those views will not alone be determinative. The public interest must be served.
- **Guideline 24** ('Victims of Crime')
 - Interested victims and relatives of victims should, at an early stage of the proceedings, have explained to them the prosecution process and their role in it. Prosecutors generally should initiate the giving of such information and should do so directly, rather than through intermediaries.
 - The special needs or conditions of witnesses, victims and relatives of victims

¹⁴⁷ The *Prosecution Policy and Guidelines* in force at the time of writing were issued in March 1998. They were accessed electronically on the DPP's website at <www.odpp.nsw.gov.au>

should be given careful consideration.

- A request freely made by a victim that proceedings be discontinued should be accorded significant weight, especially in sexual cases. However the wishes of victims may not coincide with the public interest, which must prevail, particularly where there is other evidence implicating the accused or where the gravity of the alleged offence justifies prosecution. In domestic violence cases, the needs, welfare and safety of the victim should be considered as relevant factors in determining where the overall public interest lies.
- **Guarantee of Service** (Appendix O to the *Prosecution Policy and Guidelines*)
 - The victim's home address and telephone number will be kept confidential wherever possible.
 - When the grant of bail is being considered, the court must be informed of any need for a victim to be protected from the accused. The victim should be informed about the accused's bail conditions where they affect the victim or their family.
 - A victim impact statement will be tendered at sentence if the legislation permits and the victim desires it, provided that the statement complies with the legislation.

8.5.2 *Witness Assistance Service of the DPP*¹⁴⁸

The Witness Assistance Service (WAS) of the DPP has staff with qualifications and experience in social studies and counselling. The 'clients' of WAS are adult and child witnesses for the prosecution and victims of crimes being prosecuted by the DPP. WAS can become involved once the police have finished their investigation and charges have been laid against the alleged offender. Thereafter, WAS may be consulted at any stage of the criminal process, including committals, bail applications, trials and appeals.

The types of information and practical support supplied by WAS include:

- details of the DPP Solicitor in charge of the case and how to contact them;
- what stage the case is up to in the criminal system;
- information about victims rights, entitlements, and compensation;
- court assistance eg. familiarisation tours, information on the court process, techniques for coping at court, attendance of a support person;
- making use of victim impact statements and the Victims Register of the Department of Corrective Services if the accused person is found guilty;
- giving victims the opportunity to talk about the outcome of the case and their experience of the proceedings.

¹⁴⁸

Information was obtained from the WAS component of the DPP's website at <www.odpp.nsw.gov.au>

8.6 NSW Police Service

Police deal with victims on a frequent basis and receive training in victim support. While it is not feasible to examine police practices in detail here, reference should be made to a couple of items that have particular relevance for victims.

The Police Service *Victims Support Policy* was first released in December 1994.¹⁴⁹ Rewrites of the Policy were prompted by legislative reforms and other changes. According to the Policy, the Police Service aims for 'first response officers' to be able to meet the information and referral needs of victims in 90-95% of cases. In the remaining 5-10% of cases, specialised police liaison officers should be contacted.¹⁵⁰ The Policy emphasises the importance of:

- compliance with the Charter of Victims Rights;
- keeping victims informed of the progress and outcome of their matters;
- referring victims to specialist officers or agencies for counselling or other assistance if required.

The Policy reminds police officers that:

- it is inappropriate for them to assist victims in preparing victim impact statements, as they may be accused of attempting to influence the victim's testimony or the judge's decision on sentence;
- police are not expected to become involved in the long-term psychological well being of victims – other organisations are more suited for this type of victim support.

Liaison Officers working in the Police Service have the training, skills and sensitivity to help victims from groups with special needs. Some types of liaison officers are qualified police and some are not:¹⁵¹

- *Domestic Violence Liaison Officers* – these specialist police officers are located at most police stations and are available to assist with court attendances, applications for apprehended violence orders, and referrals for accommodation and financial support.
- *Ethnic Community Liaison Officers* – 11 ECLOs operate from police commands with high non-English speaking populations. They are administrative officers with language skills and cross-cultural training. As part of their role to facilitate rapport between police and local ethnic communities they assist victims and explain procedures to

¹⁴⁹ 'Victims' Support Policy and Procedures' (1998) 6(1) *Policing Issues & Practice Journal* 4.

¹⁵⁰ NSW Police, *Victims Support Policy and Procedures*, November 1997, p 5. Supplied to the author by the Customer Assistance Unit of the Police Service.

¹⁵¹ Information was obtained from the Police Service website at <www.police.nsw.gov.au> Go to 'Library' then download the fact sheets.

relatives of people charged with crimes.

- *Gay and Lesbian Liaison Officers* – more than 130 police throughout the State are assigned as GLLOs. Their work is intended to reduce homophobic attitudes and violence against gays and lesbians.
- *Aboriginal Community Liaison Officers* – there are 55 ACLOs attached to police commands in rural and urban locations where Aboriginal communities are found. As non-police, much of the work of ACLOs is oriented towards facilitating communication between police and Aboriginal people, and assisting the relatives of Aboriginal offenders, but they may also have involvement with Aboriginal victims.
- *Youth Liaison Officers* – these police officers, who are situated in every local area command in NSW, are focussed on ensuring that police meet their legislative responsibilities towards young offenders more so than victims.

9. VICTIMS SUPPORT GROUPS

9.1 The influence of victims organisations

A consequence of the fact that criminal prosecutions are conducted by the State is that victims are not a party to the proceedings. If they appear, they do so as witnesses giving evidence. Whereas most defendants have their interests advocated by a private lawyer or Legal Aid, the victim is not 'represented' in this sense by the prosecutor. Rather, the police prosecutor in summary matters or the Crown Prosecutor and/or DPP solicitor in indictable matters, act on behalf of the State of New South Wales and serve the interests of the community, although they may assist the victim where possible.

Dissatisfaction with their relatively passive role in criminal proceedings was one of the factors that motivated victims to organise themselves into action groups and bring their concerns to the attention of the authorities. Legal literature identifies a 'victims movement' as emerging in the United States and England by the early 1970s and in Australia in the early 1980s.¹⁵² Growing international awareness of victims rights may be signified by the United Nations General Assembly adopting a *Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power* in 1985, promoting the principles of access to justice, fair treatment, restitution, compensation, and assistance for victims.¹⁵³ Similar issues were highlighted in New South Wales by the Charter of Victims Rights that was endorsed by government departments in 1989.

Some lawyers assert that the participation of victims in criminal proceedings and policymaking is not appropriate because they are insufficiently objective and are motivated by revenge. But it is difficult to remove emotion from criminal cases, particularly in homicides, sexual assaults, and offences against children. It is also fair to recognise the degree to which bias already operates in our legal system. The adversarial process encourages practitioners to adopt the vested interests of their client or employer, and the law is ingrained with cultural and socio-economic values.

The main victims support groups in New South Wales were all established by the surviving relatives of deceased victims of homicide. The histories of these groups reveal a frustration with the status quo on the part of their founders and a determination to seek reform. The websites of the victims groups recount the personal experiences of victims of various crimes, to maintain that the criminal justice system gives disproportionate emphasis to the rights of the accused, that the victim's version of the events may not be accurately represented in the evidence before the court, and that sentences are often too lenient. The perspective shared by many victims is exemplified by Garry Lynch, an active campaigner for victims rights since his daughter, Anita Cobby, was murdered on 2 February 1986:

¹⁵² New South Wales Law Reform Commission, Discussion Paper 33, *Sentencing*, paras 11.4-11.5.

¹⁵³ *Ibid*, para 11.6.

What I feel very strongly is a deep disenchantment with the judicial system and some of the laws of this country. Many people are hurting from them. We believe in cases like ours, where horrendous, wanton murder has been committed, and the evidence shows no doubt as to the guilt of those involved, a line should be drawn across their record and their file should be closed. That is, unless new evidence is brought forward.

...I have always thought that we live in a democracy where justice prevails but having experienced the judicial system, I have come to the conclusion that those in the judiciary are masters at playing a grand game of their own, the judges answerable to no-one but themselves, where the only ones that profit are the players, and where people on the outside are voiceless and powerless. We shall see.¹⁵⁴

It is hardly surprising, given the intensity and discontent at their basis, that part of the mission of victim-run organisations is to push for greater participation and recognition of victims in the criminal process. The impact that victims have made in the last couple of decades on legislation, policy and procedure has been significant, including:

- relatives of homicide victims have participated on government bodies such as the Serious Offenders Review Council (SORC) and the Victims Advisory Board (VAB). For example, Garry Lynch was a Member of SORC from 1990 to 1995, while Ken Marslew (founder of Enough is Enough Anti-Violent Movement) is a current Member of VAB;
- victims campaigned for the abolition of unsworn ‘dock statements’ by defendants in 1994;
- members of the Homicide Victims Support Group (HVSG), Victims of Crime Assistance League (VOCAL) and Enough is Enough made submissions and/or gave evidence to the New South Wales Parliamentary Joint Select Committee on Victims Compensation between 1997 and 2000;
- the Minister of Corrective Services, announcing amendments in 2002 to allow victims to make oral submissions to the Parole Board, acknowledged the input of HVSG to the reforms;¹⁵⁵
- representatives of Enough is Enough and VOCAL made submissions and/or gave evidence to the Review of the New South Wales Director of Public Prosecutions’ Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts by the Honourable Gordon Samuels in 2001-2002.

¹⁵⁴ G Lennox, *Struck by Lightning: the Story of Garry Lynch*, 1996, Allen & Unwin, p 238.

¹⁵⁵ Crimes (Administration of Sentences) Amendment Bill 2002, Second Reading Speech, Minister for Corrective Services, Mr R. Amery MP, *NSWPD(LA)*, 8 May 2002, p 1805.

9.2 A selection of support groups

All of the victims support groups provide information and assistance in relation to coping with the loss of a loved one, the effects of experiencing a crime, and understanding the criminal justice system.

Information has been obtained from the websites of the organisations, unless otherwise stated.

(i) ENOUGH IS ENOUGH Anti-violence movement

Phone: (02) 9542 4029

Postal: P.O. Box 24, Jannali, NSW 2226

Web: www.enoughisenough.org.au

Enough is Enough was formed by Ken Marslew after his 18 year old son Michael was killed on 27 February 1994 during an armed robbery at the Pizza Hut where he worked in Jannali. Mr Marslew is a member of the NSW Premier's Council On Crime Prevention; the NSW Police Service Standing Committee; the Victims Advisory Board; the Corrective Services Restorative Justice Advisory Committee; the Corrective Services Eastern Region Community Consultative Committee; and Victims Support Australasia.

The mission statement of Enough is Enough promotes 4 ideals:

- supporting those affected by violence;
- encouraging individuals to make a determined effort to eliminate violence from all areas of their lives;
- encouraging the community to embrace the concepts of reform by education and understanding the alternatives to violent actions;
- spreading the goals of Enough is Enough to others in the community, without encroaching on personal boundaries.

The goals of the organisation are:

- to make Australia a better and safer place for all Australians;
- to not accept violence in our society;
- to seek justice at every level.

Among its activities, Enough is Enough:

- offers positive and creative support to victims;
- conducts seminars, forums, and meetings across the community to develop strategies for change on specific subjects such as victims of crime, development of youth, restorative justice, and social responsibility;
- gives school presentations to inform students about violence, drugs, and life's challenges;

- runs the 'R Program' in prisons to confront offenders with victims who tell them about the negative effects of their crimes. The letter 'R' signifies responsibility, rehabilitation and reintegration.

(ii) V.I.S.T.A.+E

Contact details: same as Enough is Enough.

This acronym stands for Vehicle Incident Support Team Australasia + Education. The group's purpose is to assist victims of road incidents.

The vision statement of V.I.S.T.A. + E is: 'To be the primary organisation for the provision of support and direction in addressing the specific needs of survivors of motor vehicle incidents.' These needs may be physical, emotional, psychological and material.

The activities of V.I.S.T.A. + E include: crisis intervention; emotional support and counselling; information sharing and referrals; assistance during the stages of investigation, prosecution, and court proceedings; professional training and community education; and contributing to prevention and reform.

Driver responsibility programs with traffic offenders and secondary school students are among the projects in which the organisation currently participates.

(iii) HOMICIDE VICTIMS SUPPORT GROUP

Phone: (02) 8274 8900 or toll free on 1800 191 777

Postal: P.O. Box 103, Darlinghurst, NSW 1300

Web: www.users.bigpond.com/hvsg

The Homicide Victims Support Group (HVSG) was established in 1993 by family victims including Garry Lynch (the father of Anita Cobby) and Peter and Christine Simpson (the parents of Ebony Simpson).¹⁵⁶ HVSG holds regularly meetings to give families the opportunity to meet other members, to receive support from counsellors, and to hear guest speakers.

The types of services provided are:

- assistance with documentation including victims compensation claim forms and submissions to the Parole Board;
- court support persons to accompany victims to court;
- printed information about various court proceedings and commonly used legal terms

¹⁵⁶

'Building a life after Ebony', *The Sun-Herald*, 11 October 1998, p 5. Anita Cobby, a 26 year old nurse, was abducted on her way home from work, sexually assaulted and murdered by a group of males in February 1986. Nine year old Ebony Simpson was abducted after alighting from her school bus, sexually assaulted and murdered by Andrew Garforth in August 1992.

in plain English;

- a telephone support line, staffed by volunteer counsellors and available to families and friends of murder victims 24 hours, 7 days a week. The counsellors come from a variety of backgrounds such as psychology, social work, police work and health, as well as some who have experienced the loss of a loved one through homicide;
- a recovery centre, 'Ebony House', named after Ebony Simpson, was opened on 8 December 1995 and is a retreat for people affected by homicide when they feel overwhelmed with everyday life. Families or individuals can stay on their own or with a support person from HVSG. The accommodation is free of charge and is also available to families from regional NSW, interstate and overseas who are attending court cases in Sydney.

(iv) VOCAL

Newcastle Branch -

Phone: (02) 4926 5826

Postal: P.O. Box 1193, Newcastle 2300

Web: www.vocal-hunter.com.au

Sydney branch -

Phone: (02) 9743 1636

The Victims of Crime Assistance League (VOCAL) is a community-based registered charity, operating according to a constitution and managed by an elected committee.

VOCAL was formed in response to the murder of Tracey Gilbert by her ex-boyfriend in Newcastle in 1987. He was initially sentenced to life imprisonment but the sentence was reduced on appeal and the actual time served was 6 years. Tracey's mother, Dawn Gilbert, assisted by others in the Hunter community and bipartisan political support, established VOCAL in 1989 to further the cause of justice and the rehabilitation of victims.

The VOCAL Centre in Newcastle is staffed by a coordinator, an assistant and volunteer workers. Regular support meetings are held there. VOCAL provides: guidance, practical advice, procedural information, court support and preparation, advocacy, referrals to other agencies, family meetings, complaints resolution, training for volunteers, assistance in lobbying for effective change, and information for anyone performing work relating to victims of crime, including the media, academics and political representatives. VOCAL also supplies speakers for public meetings and educational institutions, and often represents victims in the media.

The VOCAL Committee is elected annually and considers issues affecting victims of crime, their families and communities. The Committee selects members to act as representatives on other committees and to liaise with Government with the aim of bringing about positive, effective and empowering changes for the rehabilitation of victims.

(v) MISSION AUSTRALIA

Victims Support Line: (02) 9374 3000 or toll free on 1800 633 063.

Web: www.mission.com.au

The Victims Support Line is operated by the Sydney office of Mission Australia, in conjunction with the Victims of Crime Bureau. This service provides telephone counselling and referral 24 hours a day to victims of crime and their families. The telephone counsellors are trained volunteers. In 2000-2001, the service received over 10,000 victim and victim-related calls.¹⁵⁷ Some of the crimes commonly suffered by the victims who use the service are sexual assault, domestic violence, child abuse, theft, violent assault and armed robbery. Information is given on topics such as the rights of victims, applying for victims compensation or counselling, and resolving complaints with Government services.¹⁵⁸ Face-to-face counselling with qualified staff is also available.¹⁵⁹

¹⁵⁷ Victims Compensation Tribunal, *Chairperson's Report 2000/2001*, p 4. The report was accessed on the Victims Services website at <www.lawlink.nsw.gov.au/vs> Go to 'About Victims Services', then 'Reports'.

¹⁵⁸ Victims of Crime Bureau and Mission Australia, Pamphlet, 'Are you a victim of crime?', No. 6/2000.

¹⁵⁹ Mission Australia, *Annual Report 2001*, p 16.

10. CONCLUSIONS

Victims today have access to a greater range of entitlements and services than ever before. The Charter of Victims Rights, contained in the *Victims Rights Act 1996*, sets the standard for notification and protection of victims at every stage of the criminal justice process, while statutory agencies such as the Victims of Crime Bureau, Victims Advisory Board, and Victims Compensation Tribunal were established to implement government schemes and contribute to policy. Under the *Victims Support and Rehabilitation Act 1996*, victims of an act of violence can claim compensation of up to \$50,000 and receive counselling free of charge. Victims are authorised by legislation to tender a victim impact statement at sentence proceedings and, through the Victims Register, to be advised by the Department of Corrective Services about the release or change in status of offenders. A number of statutory reforms of benefit to victims were passed in 2001-2002. The sexual assault communications privilege that can prevent disclosure of the confidences between complainants and counsellors was strengthened by applying a broad meaning to the concept of counselling.¹⁶⁰ Industrial relations legislation was amended to authorise victims to take leave from work to attend court,¹⁶¹ and the right of victims to deliver a written submission to a parole hearing was extended to oral submissions, whereas previously this option could only be exercised with the leave of the Parole Board.¹⁶²

Some of the improvements in government services in recent years include: the launch in April 2001 of the Victims of Crime website, developed by the Victims Advisory Board with assistance from other agencies; the operation of a state-wide, 24 hour Victims Support Line by the Victims of Crime Bureau in partnership with the Sydney City Mission; and the conduct of victim-offender conferencing programs by the Restorative Justice Unit of the Department of Corrective Services since 1999. Action groups formed by the relatives of murder victims have been prominent in New South Wales from the late 1980s, especially the Homicide Victims Support Group, Victims of Crime Assistance League, and Enough is Enough. These groups supply procedural information, court support and counselling; campaign to raise awareness of victims issues; and participate in legislative reforms affecting victims.

However, from another perspective, the theoretical entitlements of victims are not always implemented and may be accompanied by limiting criteria. Victim impact statements are required to be acknowledged by sentencing judges but their force is arguably diminished because they are not taken into account in determining the sentences. Statutory provisions relating to victims have separate, often detailed definitions. For example, qualifying for an award of victims compensation is subject to meeting the definitions of 'victim', 'act of violence', 'injury', 'psychological disorder', 'family member' and so on. The Charter of Victims Rights is not legally enforceable and complaints from victims about lapses in

¹⁶⁰ *Criminal Procedure Amendment (Sexual Assault Communications Privilege) Act 2002.*

¹⁶¹ *Industrial Relations Amendment (Leave for Victims of Crime Act) Act 2001.*

¹⁶² *Crimes (Administration of Sentences) Amendment Act 2002.*

compliance are aired publicly from time to time. Last year, allegations that the Office of the Director of Public Prosecutions had failed to adequately consult with victims before accepting plea bargains prompted a report on prosecutorial guidelines and practices, released in June 2002.¹⁶³

In the future, it can be expected that the recognition of victims rights will continue to grow. However, there is strong resistance from sections of the legal profession and the judiciary to victims playing an active role in criminal proceedings beyond giving evidence as witnesses. It is also probable that victims compensation will undergo further reassessment. During the 1990s, the gap widened between the funds paid in compensation and the money recovered from offenders.¹⁶⁴ Restrictions on eligibility have been regularly imposed, most recently by the *Victims Compensation Amendment Act 2000*.¹⁶⁵ Yet, over the same period, the scope of the counselling scheme has broadened. This could signal a trend away from monetary remedies and towards providing alternative methods of rehabilitation for victims. A review of the *Victims Rights Act 1996* and the *Victims Support and Rehabilitation Act 1996* is currently being conducted by the Attorney General's Department, and may shed light on the likely direction of victims rights.

¹⁶³ *Review of the New South Wales Director of Public Prosecutions' Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts*, Report by the Honourable Gordon Samuels AC CVO QC, 29 May 2002. Released on 6 June 2002.

¹⁶⁴ In 1994-95, \$66.7 million was awarded in compensation, while \$88 million was paid in 2000-2001, a jump of over \$20 million. The amount recovered from offenders over the same period increased only marginally, from \$2.93 million to \$3.5 million. Source of 1994-95 figures: Victims Rights Bill et al, Second Reading Speech, Hon. J.W. Shaw, Attorney General, *NSWPD(LC)*, 15 May 1996, p 974. Statistics from 2000-01: Attorney General's Department, *Annual Report 2000-2001*, p 55.

¹⁶⁵ For example, the Act increased the minimum threshold for compensation and confined payment for some psychological injuries to certain offences. This appears to have caused a reduction in the number of applications: Victims Compensation Tribunal, *Chairperson's Report 2000/2001*, p 7.