



THE LAW SOCIETY  
OF NEW SOUTH WALES

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19 September 2011

The Hon. Greg Smith, SC MP  
Attorney General and Minister for Justice  
Level 31 Governor Macquarie Tower  
1 Farrer Place  
Sydney NSW 2000

Dear Attorney General,

**Amendments to the *Victims Support and Rehabilitation Act 1996***

The Law Society's Costs Committee and Injury Compensation Committee ('the Committees') welcome your announcement of 11 August 2011 that there is to be an independent assessment of the victims compensation scheme ('the scheme'). The Committees have asked me to write to you at this time with their concerns about certain inequities that exist under the scheme so that they may be examined in the context of this review.

The Committees have summarised these matters in an Issues Paper that they have prepared for your consideration. A copy of the Issues Paper is enclosed.

A matter of pressing concern is the reduction to legal costs that was given effect by Schedule 18 of the *Courts and Crimes Legislation Further Amendment Act 2010* ('the December amendments').

The Committees are cognisant of the financial difficulties that face the scheme at the present time. However, in the wake of the December 2010 amendments, the Law Society has been contacted by a number of its members throughout the State registering their extreme disappointment with the changes to the scheme and in particular, to the recent changes to the costs provisions.

Historically, legal costs under the *Victims Support & Rehabilitation Rule 1997* ('the Rule') have been very low and certainly not commensurate with the amount of work necessarily involved in progressing a victim's compensation claim. However, many of our members were content, until this recent reduction to the costs schedule, to continue taking instructions in victims' compensation matters more as a community service rather than a profitable area of the law.

The costs schedule has not been the subject of any increases, even in accordance with the CPI, since the Rule was introduced. Accordingly, members have told the Law Society that the recent, significant reductions to legal costs have been causing private practitioners to begin to turn victims away as they can no longer justify the increasing loss associated with taking instructions in victims' compensation matters.

The Committees are concerned that in areas where Community Legal Centres do not have the resources to cope with these matters, some victims may be left without legal representation.

In addition to their concern about the inadequacy of legal costs under the scheme, the Committees respectfully ask that you address the matters that have been raised in the Issues Paper, in the context of the imminent review.

These matters include:

- the amendments to section 5(3) of the *Victims Support and Rehabilitation Act 1996* ('the Act'), 'Related Acts';
- the insufficiency of the quantum recoverable for actual expenses under section 14A of the Act;
- the new section 15(2) of the Act relating to secondary victims;
- the amendments to section 23A of the Act which bars claims for prior acts of violence;
- the amendments to section 26 of the Act;
- the provisions relating to applications lapsing, under section 26B of the Act.

Members of the Committees would be happy to meet with you to discuss these issues in greater detail. Should you wish to discuss these matters further, please contact Patrick McCarthy, Policy Lawyer, Injury Compensation Committee, on 9926 0323 or [Patrick.McCarthy@lawsociety.com.au](mailto:Patrick.McCarthy@lawsociety.com.au) .

I look forward to receiving your response in due course.

Yours sincerely,



Stuart Westgarth  
**President**



## ISSUES PAPER

### *Victims Support and Rehabilitation Act 1996*

#### 1. Amendments made to the Victims Support and Rehabilitation Act 1996<sup>1</sup>

##### 1.1 Section 5(3) - Related Acts

The amendments to section 5(3) extend the definition of related acts. Prior to the amendment section 5(3) stated:

"An act is related to another act if:

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

The new amendment states as follows:

"Except as provided by subsections (3A) and (3B), a "series of related acts" is two or more acts that are related because:

- (a) they were committed against the same person, and
- (b) in the opinion of the Tribunal or compensation assessor:
  - (i) they were committed at approximately the same time, or
  - (ii) they were committed over a period of time by the same person or group of persons, or
  - (iii) they were, for any other reason, related to each other".

The definition has been extended from one act that is related to another act to a series of related acts. This disentitles victims from bringing more than one claim where there have been multiple crimes committed by the same person against the victim thus resulting in a worse situation for victims of domestic violence suffering from long term abuse and/or for people who suffered childhood sexual assault who have already received compensation for a different crime.

##### 1.2 Section 14A - Victims Assistance Scheme (VAS)

The recent amendment to this section means that all 'actual expenses' incurred by the victim of an act of violence are reimbursed not just 'prescribed expenses'. However, the maximum amount claimable, that is \$1,500, remains the same and therefore limits the maximum payment for actual expenses incurred by a victim of an act of violence to a maximum of \$1,500. This amount is inadequate to cover, in most cases, all 'actual expenses' incurred by a victim and should be increased.

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<sup>1</sup> Approved by Proclamation to begin on 1 January 2011, effective for all applications determined on or after 1 January 2011.

### **1.3 Section 15 - Compensation Payable to Secondary Victims**

Section 15(2) has been inserted and states:

"Any secondary victim who dies ceases to be eligible for statutory compensation. Any pending application made by or on behalf of a secondary victim does not survive the death of the secondary victim".

The change to section 15(2) brings this section into alignment with section 14(2) which states that a primary victim who dies ceases to be eligible for statutory compensation and that any pending application made by or on behalf of the primary victim does not survive the death of the primary victim.

This amendment disadvantages secondary victims and their families and this amendment should be removed. In addition if this section is removed it should also be removed from primary victims.

### **1.4 Section 21 - Special Payments for Approved Counselling Services**

Section 21(3)(a) makes a positive amendment increasing initial hours from two hours of counselling to ten hours. This removes the need for a victim to make a further application for counselling and wait an additional period for this to be approved. This should improve the continuity of treatment.

### **1.5 Section 23A - Claim may not be made for Acts of Violence Occurring Before Successful Claim Lodged**

This new amendment states:

- "(1) A person is not entitled to claim statutory compensation in respect of an act of violence (the uncompensated act of violence) if:
- (a) the Tribunal or a compensation assessor has at any time awarded statutory compensation to the person in respect of another act of violence, and
  - (b) the uncompensated act of violence occurred before the person lodged the application for statutory compensation in respect of the other act of violence".

Note the exceptions in 23A(2), (3) and (4).

The effect of this amendment will disentitle victims from bringing claims for other acts of violence for which they have not lodged a claim prior to the lodgement of their current application.

This section should be removed as its only purpose is to disentitle victims from bringing claims for compensation after the lodgement of their claim.



## **1.6 Section 26 - Time for Lodging Application**

This section has been changed substantially by the amendment of section 26(2A) and the insertion of subsections (2B) and (2C).

The amendment to subsection (2A) removes the Director's discretion with respect to providing leave for application of expenses. The new subsection (2A) states that the Director must not give leave for the acceptance of an application for expenses.

The former section 26(2) is extended in the new section 26(2B) by allowing the Director to give leave for acceptance of an application lodged out of time if the family victim was under 20 years of age or if no more than two years has elapsed since it became apparent that the primary victim died as a result of a homicide.

The amendments to subsection (2C) state that the Director must not give leave if a total amount of \$50,000 statutory compensation has been awarded with respect to the relevant act of violence.

The amendments to this section again restrict provisions for a victim to bring a claim of compensation and provide stricter parameters for the Director's decision to the disadvantage of the victim. This section should remain as it was prior to the amendments.

## **1.7 Section 26A - Withdrawal of Application**

This section allows an applicant to withdraw their claim by writing to the Director at any time prior to the application being determined.

This is a straightforward section which does not require removal.

## **1.8 Section 26B - Lapsing of Application if No Contact**

This section states as follows:

- "(1) If an applicant for statutory compensation has not made any contact with the Director for 6 months, the Director may give notice to the applicant stating that if the applicant does not contact the Director by the date and in the manner specified in the notice (being a date that is not less than 6 months after the Director gives the notice), the application will lapse.
- (2) If the applicant does not contact the Director by the date and in the manner specified in the notice, the application lapses.
- (3) The lapsing of an application under this section does not prevent the applicant from making another application for statutory compensation".

The amendment that enables the Director to lapse a claim if the applicant has not made contact for a period no less than six months, after a Director issued notice, is unreasonable and onerous on the solicitor representing the applicant. This amendment is unreasonable given that there are frequently lengthy delays from the date of lodgement of the application and all relevant documents, to the matter being listed for determination. There are further delays from the month of listing of the claim for determination to the issue of the determination. In some cases determinations are being received by solicitors some six months after the claim was listed for determination. This amendment may therefore routinely require a solicitor



for the applicant to correspond with the Director within the relevant time periods, often for no other purpose than to avoid the application lapsing.

As Victims Services has a backlog of claims, it is common practice that contact may not be made with the Director for over six months. The time made for determining matters has extended from between 12 and 18 months to 24 months. Matters that are awaiting determination by the Assessors could very well fall within this provision as there is no reason for either the victim or the victim's solicitor to contact Victims Services.

Section 26B(3) states that an applicant may lodge another application for compensation with Victims Services if their application lapses. It is, however, a very real possibility that if an application lapses and the applicant reapplies, the application may be out of time. This could be disastrous for certain applicants especially given the amendments to section 26.

This section should remain as it was prior to the amendments.

#### **1.9 Section 35 - Costs of Applications for Compensation in Proceedings before Tribunal**

This section provides Victims Services with a discretion to award up to the scheduled amount of \$825.

In particular Section 35(3A) states:

"The Tribunal or compensation assessor may decline to make an award of costs or may award costs of a lesser amount than the maximum amount provided for in the scale of costs referred to in subsection (1)".

Clause 12 of the *Victims Support and Rehabilitation Rule 1997* states:

"General

- (1) For work carried out by a solicitor or barrister in relation to the lodgement of an application for compensation, preparation of material required to enable the application to be determined and for work after determination
  - (a) in the case of an application determined by the awarding of compensation Up to \$825
  - (b) in the case of an application that is dismissed Up to \$400
- (2) For work carried out by a solicitor or barrister in relation to an appeal to the Tribunal
  - (a) in the case of an appeal determined without a hearing Up to \$500
  - (b) in the case of an appeal determined after a hearing – including preparing for the hearing, conferring with the applicant, attending the hearing and travelling to and from the hearing Up to \$1,500"



Professional costs awarded in victims compensation matters were, prior to the amendments, grossly inadequate compared to the amount of work carried out by solicitors in respect of these matters. As a result of the recent amendments the situation regarding professional costs has further deteriorated with solicitors representing successful claimants entitled to receive an amount up to the maximum amounts listed above. The changes set out above have reduced practitioners' fees by half with respect to appeals. Previously, for an appeal determined without a hearing a solicitor was paid a set fee of \$1,000. This has now been reduced to an amount of 'up to \$500'. These fees do not represent the amount of time dedicated to each matter.

For years legal costs to Victims Services matters have remained the same, and now these costs have been reduced. The effect of the change is that a substantial number of practitioners will refuse to represent victims seeking compensation.

This will adversely impact upon the legal assistance available to those vulnerable in the community and it will also have an adverse impact on members of the legal profession who are currently practicing in this area as the changes are retrospective and are effective for all applications determined on or after 1 January 2011.

Having reduced the total amount of costs payable under the Act, the amendments have removed references to an entitlement to costs. The effect of this change to the language of the Act has been to emphasise the discretionary nature of the Tribunal's power to make an award of costs and, indeed, its power to refrain from making a costs order at all.

The shift in emphasis has resulted in some concerning developments. For example, in a recent case before the Tribunal, which was resolved in favour of the applicant in March this year, the compensation assessor awarded costs in the amount of \$275. The case involved the sexual abuse of a minor over several years and the solicitor acting had been representing her client for almost 2 years before achieving the compensation order in favour of her client. The matter had also involved a separate application for leave to proceed. The costs order was manifestly inadequate, failing to reflect the work undertaken by the victim's solicitor. However, there is no right of appeal on the question of costs, and nor did the compensation assessor invite the solicitor with carriage to make submissions as to costs before making the order.

In the case outlined above, the solicitor for the applicant is a principal with the only firm within a radius of 100 kms which accepts victim compensation matters. The solicitor has decided that she cannot accept any new instructions in this jurisdiction in light of the changes to the Act and her experience in this recent case. Indeed, since the amendments have taken effect, numerous solicitors have advised the Law Society that they are being forced to decline to take on new work, given the decrease in the maximum costs available, and the uncertainty as to whether the very low maximum will be allowed in a given matter.

The costing provisions should be reviewed and costs for legal practitioners should be increased. Provision should also be made for the continual indexation of legal costs on an annual basis to ensure that the amount remains in line with financial values of the relevant day.



## **2. PROPOSED AMENDMENTS**

### **2.1 Section 19 - Statutory maximum of \$50,000**

The statutory maximum amount of compensation available for victims of an act of violence is grossly inadequate and has not been increased since 1996 when the Act established the current statutory compensation scheme. This amount should be urgently reviewed and increased. Again, provision should be made for the indexation of the statutory maximum amount on an annual basis to ensure that the amount remains in line with the financial values of the day.

Furthermore, it is unsatisfactory that the maximum amount of statutory compensation that the primary victim of an act of violence, all secondary victims and family victims claiming through that primary victim are together only entitled to receive a total amount of \$50,000 (s 19(2)).

### **2.2 Section 20 - Threshold amount of compensation & Clause 3 of Sch 1 to the Act - Multiple injuries**

The threshold amount of \$7,500 should be removed as victims with quite serious injuries as a result of an act of violence often fall short of this threshold as do victims with multiple injuries due to the restriction on the recovery of compensation for the second and third injury claimed (cl 3 of Sch 1 to the Act). The restrictions in relation to the percentage of compensation available to victims for the second and third most serious injuries should be reviewed and increased so as to increase the amount of compensation received by victims with multiple injuries.

### **2.3 Clause 5(3) of Sch 1 to the Act - Category 1 psychological or psychiatric disorder**

Consideration should be given to removing the restriction that provides that this injury may only be claimed by victims of acts of violence involving armed robbery, abduction and kidnapping. Many other victims of violent acts suffer psychological or psychiatric disorders, however their injury is often not severe enough to qualify for the injury of category 2 psychological or psychiatric disorder. These victims are often left with no compensation at all because their physical injuries do not reach the threshold of \$7,500 and they are not entitled to claim compensation for the injury of category 1 psychological or psychiatric disorder.