


By Jemima Brewer and Justin Raine

The *Victims' Support and Rehabilitation Act* 1996 (NSW) Threats to the scheme



Although the operation of the *Victims Support and Rehabilitation Act* 1996 (the Act) is well established and the Act is widely known throughout the legal profession, its application to victims of sexual assault has undergone some significant changes in recent times, and further change is expected. >>

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he operation of the scheme in its current form is under threat:

- Recent government inquiries undertaken in NSW have addressed escalating costs and emphasised a greater focus on counselling and a move away from compensation.¹
- Recent decisions of the Victims Compensation Tribunal (the Tribunal) have attempted to limit the scope of sexual assault claims, and consequently a series of sexual assaults is more likely to constitute one 'related act', with only one award payable.
- The Tribunal has sought legislative reform to deny adult victims of childhood sexual assault the right to seek compensation.
- The attorney-general has foreshadowed changes to the costs regime.

Criminal injuries compensation schemes across the nation provide the framework for the community to recognise the impact of sexual assault and other criminal offences. The criminal justice system punishes offenders in recognition of the fact that the acts are wrong; the criminal injuries compensation schemes recognise that such crimes cause injury, loss and damage to victims and attempt to compensate them for these negative effects.

As the NSW scheme currently stands, there is community recognition of the fact that sexual assault crimes are in the category of the most severe.

OPERATION OF THE NSW SCHEME

At present, the NSW scheme operates in a beneficial way for victims of sexual assault, both recent and historic. There is recognition that sexual crimes perpetrated over many years can cause significant harm when compared with serious one-off offences.

The NSW scheme compensates sexual assault victims over a wide range of factual circumstances. Compensation is available to victims of sexual offences committed in all contexts: crimes committed by family members, acquaintances and strangers.

Compensation is awarded to victims of sexual assaults perpetrated by teachers or others employed in state-run or charitable institutions, including child welfare and aged care facilities.

Section 5 of the Act requires that applicants prove that:

1. they were the primary victim of an act of violence; namely, that they were subjected to violent conduct constituting an offence; and
2. they suffered a compensable injury as a result.

Applicants must lodge the application within two years of the date of the act of violence.² In practice, the Tribunal will not require the applicant to seek leave in applications where there has been a sequence of offences, the last of which occurred within two years of lodgement. Claims lodged outside the limitation period require leave of the director; however, there is a presumption that victims of sexual assault (and domestic violence) will be granted leave³ unless the director is satisfied that there is no good reason to do so. The applicant must provide an explanation for the delay in lodgement. A focus upon life circumstances and barriers in accessing justice will usually satisfy the director that good reasons exist to justify the exercise of the discretion.

AN OFFENCE-BASED APPROACH

Once the applicant has proved that the behaviour to which they were subjected constitutes a criminal offence, they must nominate a compensable injury:⁴

Schedule 1 to the Act lists the physical injuries available, or the applicant may nominate the offence-based injury of sexual assault. The degree of severity of the crime and any aggravating circumstances entitle the applicant to higher compensation. The following categories apply to the compensable injury of sexual assault:⁵

- Category 1 sexual assault consists of:
 - indecent assault; or
 - an assault with violence in the course of attempted unlawful sexual intercourse.
- Category 2 sexual assault consists of:
 - unlawful sexual intercourse; or

Fewer solicitors will be prepared to act in sexual assault claims if the power to award costs is eroded.

- the infliction of serious bodily injury in the course of attempted unlawful sexual intercourse.
- Category 3 sexual assault consists of:
- a pattern of abuse involving category 1 or category 2 sexual assault; or
 - unlawful sexual intercourse in which serious bodily injury is inflicted; or
 - unlawful sexual intercourse in which two or more offenders are involved; or
 - unlawful sexual intercourse in which the offender uses an offensive weapon.

It is not necessary for the victim to have reported the criminal activity to police. The Tribunal has the power to reduce or deny compensation in circumstances, *inter alia*, where the victim fails to report the crimes to police within a reasonable time,⁶ or fails to participate in any criminal investigation or prosecution.⁷

It is widely accepted that many victims of childhood sexual abuse do not disclose it until they reach adulthood, or have suffered an increase in the severity of their symptoms such that they seek professional assistance and, often only afterwards, receive the support of the community in bringing the offender to justice. Due to the severe nature of their psychological injury, many victims cannot participate in the criminal justice system without significant community and medical support.

BENEFICIAL CHANGES TO THE SCHEME

In 2006, the NSW government responded to the Court of Appeal

decision in *Victims Compensation Fund Corporation v GM and 5 Ors*⁸ by amending the definition of 'injury' in the Act's dictionary, removing the need for victims of sexual assault (and domestic violence) to prove that they had suffered a recognisable psychological or psychiatric disorder. The passing of the *Victims Support and Rehabilitation Amendment Act* in 2006 meant that victims within these categories need now prove only that they had suffered 'psychological harm' as a result of the violence. This was a significant gain for the proportion of sexual assault victims who have, with treatment, recovered substantially from the crimes committed.

In addition, the scheme was widened to include victims where the perpetrator may not be held criminally responsible because of age, mental illness or impairment. This meant that claims brought by victims sexually assaulted by siblings who were minors at the time of the offences could now succeed.

PROBLEMS ENCOUNTERED BY SEXUAL ASSAULT APPLICANTS

The 2006 legislative amendment, by lowering the threshold for 'injury' within the meaning of the Act, has significantly opened the scheme to multiple applications by sexual assault claimants. This has been met with various decisions from the Tribunal clearly aimed at limiting the number of

claims attracting compensation.

For applicants who suffer ongoing sexual assault, so long as the requirement for 'psychological harm' can be made out for each event, a separate claim can be brought for each assault. Previously, the need to prove a diagnosable psychological disorder in relation to each act of violence often effectively limited applicants to one, 'global' application. The advantages of multiple applications for compensation are immediately apparent – a single application is limited by the statutory cap on compensation (currently \$50,000), but that maximum is available for every successful application, so the applicant who is able to bring multiple applications can increase the available compensation accordingly.

It is not surprising that in cases where multiple applications are lodged, resistance is occasionally encountered from the Tribunal.

'Related acts'

The predominant problem encountered by applicants of long-term sexual abuse is the application of s5(3) of the Act, which gives power to the Tribunal to determine that a series of acts committed against the same victim are 'related acts' that together form just one act of violence. The relevant parts of that section are:

'5 Act of violence
[...]

- (3) 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.

However, an act is not related to any earlier act in respect of which an award of statutory compensation has been made if it occurs after the award was made.

- (4) For the purposes of this Act, a series of related acts, whether committed by one or more persons, constitutes a single act of violence.'

It stands to reason that the more acts the Tribunal can consolidate into each application, the fewer awards of compensation will be available to the applicant. Subsection (3)(b) places the determination of what are 'related acts' in the hands of the Tribunal.

For some time, the guiding authority on the question of 'related acts' was the decision in *Stark*⁹ (albeit under an earlier wording of the section). In this decision, the Court of Appeal broadly considered when one act might be related to another and favoured an interpretation that construed the limitation narrowly.

Since *Stark*, legislative reform has strengthened the 'related acts' provision >>

EXPERT OPINION SERVICE

Dr Andrew Korda

- ▶ Gynaecology
- ▶ Urogynaecology
- ▶ Obstetrics

Royal Prince Alfred Medical Centre 100 Carillon Ave Newtown NSW 2042

Phone: 02 9557 2450 Fax: 02 9550 6257 Email: akorda@bigpond.net.au

The Tribunal's recent decisions have attempted to limit the scope of sexual assault claims.

(for example, the insertion of the word 'approximately' into subsection (3)(b) to extend the temporal range of the definition). Nevertheless, despite significant use being made of the 'related acts' provision by the Tribunal to limit the number of claims, it seems that the higher courts are still favouring a limited approach to its application.

In the matter of 'S',¹⁰ DCJ Levy SC quashed and remitted a 'related acts' decision of the Tribunal. His Honour was critical of

'a particularly narrow and in my view non-beneficial construction of s5(3) of the Act. In turn, this has operated to the detriment of the applicant's rights and entitlements to compensation as a victim of the multiple crimes that have been perpetrated against her.'

Similarly, in the high-profile case of 'JM',¹¹ Rothman J found that *'the evaluation of whether acts are related or, more accurately, whether acts constitute a series of related acts, is not susceptible to a simplistic approach'*. The applicant in 'JM' was subjected to weekly sexual assaults from the age of about 5 to age 16 – some 500 separate acts of sexual assault were estimated. Seven applications for compensation were lodged, covering five specific instances of sexual assault and two claims for sets of offences covering the balance. The Tribunal found the claims to constitute 'related acts', on the basis that the relationship between the victim and offender remained constant throughout the period, and denied compensation for each. The applicant sought judicial review in the Supreme Court. Rothman J found:

'that the approach of the Tribunal discloses error in that it treats relationship as defined, simply, by the

formal position of the perpetrator and victim, and treats the fact of the same relationship as mandating a finding that the acts were related, without regard to the changing circumstances of the victim, in terms of age, location and the nature of the offences'.¹²

As it stands, the various decisions of the 'related acts' point seem favourable to applicants, although the 'JM' matter will go before the Court of Appeal in late 2010. Whatever the outcome, further appellate court guidance will hopefully assist in the framing of claims in the future.

In the 2007/2008¹³ Chairperson's Report, the outgoing Chairperson of the Victims' Compensation Tribunal made a number of recommendations. It is expected that the Chairperson's 5th recommendation contained in the 2007/2008 Chairperson's report will be seriously considered:

'I recommend that s5(3) be strengthened to provide that an act is related to another act if the acts were committed against the same person by the same perpetrator or perpetrators. It will be noted that s5(1) refers to offences committed by one or more persons.'

THREATS TO THE SCHEME – REMOVAL OF RIGHT TO COMPENSATION

As has been noted,¹⁴ there has been a legislative response to a 'blow out' in the costs of criminal injury compensation schemes in Australian and New Zealand jurisdictions, and moves to restrict the compensation to which applicants were entitled. The discretionary model of compensation operating in NSW was replaced with the current, tariff-based scheme in 1996, although there was specific provision and identification of the need to differentiate sexual assault victims.

The Joint Select Committees on Victims' Compensation formed between 1997 and 2000 focused on reform in an attempt to limit the cost of the NSW scheme, and have further consolidated the view that the scheme should primarily focus on rehabilitation rather than compensation.

Making better rehabilitation and counselling available in the absence of

compensation arguably meets the need of victims for facilitated healing and reintegration into society. However, rehabilitation does not provide the financial base required to significantly improve the quality of life for those who have suffered the debilitating impacts of sexual assault upon their capacity for employment, their day-to-day activities, and their ability to parent and function as competent citizens.

THREATS TO THE SCHEME – REMOVAL OF RIGHT TO LEGAL REPRESENTATION

NSW attorney-general, John Hatzistergos, announced on 11 November 2008:

- that the compensation claim process would be streamlined by reducing instances where legal fees are paid, claiming that approximately 50 per cent of cases are straightforward and can be dealt with by victims' services staff, without requiring any additional resources.
- that the changes will simplify the application process for victims and reduce the amount of information they have to provide.

The current system of restricted costs for legal practitioners is providing a great benefit to victims in NSW.

The legal costs and disbursements paid as part of the scheme in 2007/2008 were in the region of \$3 million. That left the sum of \$58 million paid out as awards for the 2007/2008 period. The proportion of legal costs payable was therefore less than 5 per cent of the total sum awarded. Figures are comparable for the 2008/2009 period.

The attempt to reduce legal costs payable is a real threat to access to justice for victims of sexual assault, in particular. It is highly unlikely that these claimants, with their psychological disabilities, avoidant tendencies and the difficulty they face in advocating for themselves, would be capable of prosecuting their own compensation claims.

In the 2007/2008¹⁵ Chairperson's Report, it was recommended that costs be payable only on successful claims. Given the difficulty of finding corroborative evidence for sexual assault crimes, and the fact the scheme is paper-based, thereby denying the victim an

opportunity to give evidence in support of an application, claims relating to sexual assault are difficult to prove. Any erosion of the power to award costs (currently \$825 plus GST) will only mean that fewer solicitors are prepared to act in sexual assault claims.

THREATS TO THE SCHEME – REMOVAL OF RIGHT TO COMPENSATION FOR ADULT SURVIVORS OF CHILDHOOD SEXUAL ABUSE

The 2007/2008 Chairperson's Report shows that of the 944 claims for child sexual assault lodged out of time, 142 claims were lodged when the applicant had reached 41-50 years of age, 65 when the applicant was 51 to 60, and 14 when the applicant was over 61.

The 4th recommendation made in the 2007/2008 Chairperson's Report was that the government should limit the time within which claims for sexual assault can be lodged.

An obvious problem with this approach is that confining claims to assaults within a recent period will mean that many claimants will miss out on proper compensation, or will be excluded entirely from the scheme. It is difficult to anticipate the level of injury and suffering that a child victim might suffer in the future. It is extremely difficult¹⁶ to distinguish the impact of the sexual abuse from that of all the other factors – such as poor family functioning, domestic violence, physical abuse, the quality of peer and family relationships, and psycho-social factors before the abuse occurred – on the long-term outcome for the child. It is widely accepted that the harm suffered by child sexual abuse victims may not manifest itself until many years after the abuse.

THE RESPONSE OF THE PROFESSION

The legal profession can respond to the threats to the scheme. Carefully preparing applications and diligently searching for evidence in support of sexual assault claims improve the prospects for these very deserving victims. A decision to explore the prospects for appeal in superior courts gives the judiciary the opportunity to

scrutinise decisions.

Practitioners should take very seriously the requirement that victims' compensation awards must be repaid to the Tribunal from any civil claims damages. Failure to honour this obligation means that the fund is depleted and less compensation is therefore available to future victims.

There are additional barriers faced by sexual assault victims in their efforts to access justice and to seek recognition for crimes committed upon them.

The very nature of sexual assault means that the victim faces significant difficulty in accessing justice. The crimes occur in secret, often after a significant investment by the offender in carefully planned grooming behaviour, which ensures a victim's silence. Victims can be silenced by their symptoms, which can be grave and pervasive.

As a profession, we should stand firm against any changes that threaten the rights of sexual assault victims. The participation of the profession in claims and policy direction will ensure that these vulnerable claimants are given the voice that violent crime has denied them. ■

Notes: 1 See Joint Select Committee on Victims' Compensation publications, First Interim Report: *Alternative Methods*

for Providing for the Needs of Victims of Crime, May 1997, Second Interim Report: *The Long Term Financial Viability of the Victims Compensation Fund*, December 1997, and the February 2000 publication Report: *Ongoing Issues Concerning the NSW Victims' Compensation Scheme*.

2 Section 26 of the Act. 3 Section 26(3) (b) of the Act. 4 Section 11(2) of the Act. 5 Schedule 1 to the Act. 6 Section 30(1) (b) of the Act. 7 Section 30(1)(d) of the Act. 8 2004 NSWCA 185. 9 *Director General of the Attorney-General's Department v District Court of New South Wales & Stark* (1993) 32 NSWLR 409. 10 'S' v *Victims Compensation Fund Corporation* [2009] NSWDC 109. 11 *JM v Victims Compensation Fund Corporation* [2009] NSWSC 1300. 12 *Ibid* at [47]. 13 In the Chairperson's Report for 2008/2009, the most recent publication, the chairperson declined to give recommendations in light of the short period of time in which he had held the role. The statistics for 2008/2009 were relied upon to justify the recommendations, and for that reason are relied upon. 14 Christine Forster and Patrick Parkinson, 'Compensating Child Sexual Assault Victims within Statutory Schemes: Imagining A More Effective Compensatory Framework' (2000 23(2) *Uni NSW Law Journal* 172). 15 See note 13 above. 16 See note 14 above.

Jemima Brewer is a principal solicitor with *Artemis Legal* (formerly *Fosters Lawyers*) in Gladesville, NSW. **PHONE** (02) 9817 4463 **EMAIL** jemimab@artemislegal.com.au.

Justin Raine is a barrister at *Henry Parkes Chambers, Sydney*. **PHONE** (02) 9264 6665 **EMAIL** raine.justin@gmail.com

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