About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the Legal Aid Commission Act 1979 (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically and socially disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW has significant expertise in the area of victims compensation. Grants of legal aid are available for applicants in victims compensation matters where the applicant is a person at special disadvantage pursuant to Legal Aid NSW Policy Online 6.25.7 (Addendum A).¹ The grant is limited to necessary disbursements only, such as medical reports, and does not include counsel's costs. In addition to providing representation in victims compensation matters, victims compensation issues regularly arise in the provision of civil law advice and outreach services by Legal Aid NSW lawyers.

Legal Aid NSW also funds or administers funds for other public legal assistance agencies in NSW including LawAccess, 36 community legal centres (CLCs) and 28 women's domestic violence court advocacy services. These public legal assistance partners provide information, advice, minor assistance and representation in victims compensation matters to some of the most disadvantaged people in NSW.

Legal Aid NSW welcomes the opportunity to provide these comments and would be happy to provide an additional oral submission. For further discussion of any of the issues raised in this paper, please contact Joshua Kulawiec, Solicitor, Legal & Policy Branch, at joshua.kulawiec@legalaid.nsw.gov.au or Annmarie Lumsden, Executive Director, Strategic Policy, Planning and Management Reporting Division, at annmarie.lumsden@legalaid.nsw.gov.au.

Background

Legal Aid NSW welcomes the NSW Attorney General's independent assessment of the Victims Compensation Scheme (the Scheme). Legal Aid NSW considers the assessment of the Scheme offers a significant opportunity for the Government to:

- clarify ambiguities
- promote consistency
- increase efficiency
- address identified deficiencies
- enhance services where needs are identified, and
- facilitate increased legal services for claimants.

In particular, Legal Aid NSW recognises the importance of addressing issues arising from the recent amendments to the Victims Support and Rehabilitation Act 1996 (NSW) (the Act).

The Legal Aid NSW response is predicated on the following underlying principles:

- reducing barriers to accessing victims compensation services
- providing quicker access to compensation
- supporting the particular needs of victims of domestic violence, sexual assault, and child abuse
- addressing the significant reduction in the number of legal services available
- providing legal providers with costs that reflects the amount of work involved, and
- ensuring any proposed amendments do not impact disproportionately on disadvantaged people, especially victims from rural, regional and remote areas, those who are culturally and linguistically diverse, and people from Aboriginal backgrounds.

This submission has focussed on these principles and issues that are of most concern to Legal Aid NSW. The numbering of questions in the submission reflects their numbering in the Issues Paper. No response has been provided for questions that are not relevant to the experience of Legal Aid NSW.

Legal Aid NSW would welcome the opportunity to comment on any draft bills or legislative amendments arising out of the review of the Scheme.
Scheme purpose

1. Are the objectives of the Act still appropriate in meeting the needs of victims of violent crime?

It is the view of Legal Aid NSW that the current objectives of the Act related to support and rehabilitation through counselling and compensation under s 3(a) are appropriate in meeting the needs of victims of violent crime. However, Legal Aid NSW believes the objectives under ss 3(b), (c) and (d) place too much focus on restitution, which creates policy that is neither cost effective nor fair on offenders (see also Questions 5 and 6).

2. Are the objectives of “support and rehabilitation” best achieved by “counselling and compensation”?

Legal Aid NSW endorses the dual principles of support and rehabilitation, and the statutory compensation and counselling scheme. Legal Aid NSW particularly supports the current counselling scheme which provides a relatively simple process for applying and getting approval for 2 hours of counselling, with the opportunity for a further 10 hours based on the report of the initial counselling sessions.

3. Are the objectives of the Act being met by the current benefit and support structure of the Fund?

Legal Aid NSW believes that, apart from the current significant timeframe between lodgement and determination, the current benefit and support structure meets the objectives of support and rehabilitation under s 3(a) of the Act.

4. Should the principle of the scheme be based on “compensation” or “support and rehabilitation”, or a combination of both?

The principle of the Scheme should be based on support and rehabilitation through compensation and counselling, as noted above in Question 2.

5. Is it appropriate to impose a levy on convicted offenders?

Legal Aid NSW believes that it is not appropriate to impose a levy on convicted offenders because it is tantamount to a double penalty. If a person is convicted of an offence they will receive a sentence which is appropriate to the offence. A levy is effectively an additional mandatory penalty and unlike a sentence imposed by the court, does not take into account the circumstances of the offence, the offender's personal and financial circumstances and other factors relevant to whether a penalty should be imposed.
The average amount reportedly owed by an inmate to the State Debt Recovery Office is $12,161.² Given the difficulties most offenders face when reintegrating into the community, further financial pressures are likely to increase the risk of recidivism.

6. **Is it appropriate to require convicted offenders to pay compensation to any victim of the crime?**

Legal Aid NSW is of the view that it is not appropriate to require convicted offenders to pay compensation to any victim of the crime, for the reasons noted in Question 5 above.

Further, from a public policy perspective, a victims compensation scheme should not be reliant on funding from offenders. The majority of offenders are economically and socially disadvantaged, and restitution would increase the risk of social exclusion and crime (see also Question 5 above). It is unreasonable for an offender to be sentenced to gaol and on release be burdened with a restitution order debt of up to $50,000.

Restitution can also place additional stress on disadvantaged families. There is anecdotal evidence that in domestic violence and sexual assault matters some women will not make police complaints or claims relating to assault as they do not want restitution from their partner or former partner. This is particularly the case where there are children involved.

7. **If the scheme is changed (with regards to eligibility, compensation and services), what should the continuation of rights be under the existing scheme?**

If the scheme is changed Legal Aid NSW would strongly support the continuation of rights and compensation under the existing scheme for both new claimants and those with pending claims. It would be unfair for the rules to be changed retrospectively.

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### Eligibility

8. **Are the current limitation periods appropriate? Under what circumstances, if any, should special leave be granted?**

Legal Aid NSW is of the view that the current limitation period is too short, primarily because the bulk of this time can be taken up by criminal proceedings. During this phase, victims may be reluctant to participate in a process that raises additional reminders of the violence committed against them, such as applying for compensation.

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² Kristy Martire, Sandra Sunjic, Libby Topp and Devon Indig, Australian & New Zealand Journal of Criminology. The online version of this article can be found at: http://anj.sagepub.com/content/44/2/258.
Further, the Victims Compensation Tribunal (‘the Tribunal’) is unlikely to award compensation without knowing the outcome of the police investigation or court proceedings. However, the limitation period of 2 years might require the client to make their application before the outcome of the proceeding. This could also leave them vulnerable to being accused in cross-examination of lying or stretching the truth in order to receive compensation.

In order to address such issues, Legal Aid NSW suggests the limitation period be extended to 3 years. This would also bring the limitation period in line with the time limit for personal injury matters under the Limitation Act 1969 (NSW) s 50C(1)(a) (‘the Limitation Act’).

In relation to special leave, Legal Aid NSW supports the current provision in s 26(3)(b) of the Victims Support and Rehabilitation Act 1996 (NSW) (‘the Act’) which provides a presumption in favour of granting leave in matters involving sexual assault, domestic violence, or child abuse unless ‘there is no good reason to do so’.

For matters where applicants are minors, or people who lack capacity, Legal Aid NSW proposes that special leave be granted in a manner that reflects ss 50E and 50F of the Limitation Act. These provisions respectively provide a special limitation period for minors injured by close relatives, and a suspension of the limitation period for people ‘under a disability’, which includes certain minors.

9. **Should there be an absolute upper limit on eligibility?**

Legal Aid NSW is of the view that there should be no absolute upper limit on eligibility. However, if the proposed upper limit of 20 years is adopted, an exception similar to the current leave provision in s 26(3)(b) of the Act should be maintained so that the upper limit does not apply to victims of sexual assault, domestic violence or child abuse.

The policy behind this provision reflects a long standing view that acts of violence within these categories should be exceptions to any limitation rule. It is important to exclude these matters from an eligibility limitation because, as noted by the Tribunal in *Elena Harvey v Victims Compensation Tribunal & Anor* [2001] NSWSC 604:

> those types of offences are frequently not reported or disclosed by the victims until some much later time, often because of fear of the perpetrator, shame and embarrassment, or the victim’s tender age.3

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3 As noted by the Tribunal in *Elena Harvey v Victims Compensation Tribunal & Anor* [2001] NSWSC 604 (at par 74).
In considering the operation of s 26(3)(b), Dowd J noted:

*a clear intention by the legislature to make claims of sexual assault, domestic violence or child abuse outside the general policy, as determined by the balance of s26(3).*

For the above reasons, if an upper limit was in place, there would be many victims who would not be eligible for compensation for psychological injuries that manifest after the time limit has passed. This might include for example members of the stolen generations who were abused in care. The effects of crime can also reverberate through generations, as shown in the case study below. Many child victims of abuse find they are not able to parent or protect their own children as a result of their experiences.

Upper limits on eligibility also create an inflexibility which can result in injustice for certain victims. Time limits should not be a one size fits all approach as every victim will respond to their experience differently. Some may have more of an emotional capacity to withstand the trauma, while others will take up counselling immediately, and others will "ignore" the event and hope it will not catch up with them later in life. Other victims may experience trauma again making them more vulnerable to further emotional suffering.

<table>
<thead>
<tr>
<th>Legal Aid NSW experience</th>
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<tbody>
<tr>
<td>A Legal Aid NSW lawyer in a regional office has acted for a number of clients in victims compensation claims who are all members of the same family. Some of the incidents complained of were up to 40 years old and none were less than 20 years old.</td>
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<tr>
<td>The victims compensation claims were for acts of domestic violence and sexual assault by the stepfather and siblings. There were a total of 45 claims against the stepfather by multiple claimants. Each claim was successful with a maximum award of compensation, despite the absence of police reports in some cases.</td>
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<tr>
<td>The family consisted of the mother, stepfather, six children, and their children. Some of the grandchildren were fathered by the stepfather. Each of the children witnessed violence inflicted on the family which included being made to have sex with an animal, being assaulted by their stepfather, being forced to watch other family members being assaulted, giving birth at 13 years to their stepfather's child and grandchild, and generally witnessing physical and emotional suffering. The grandchildren were also abused, not only by the stepfather but also by the family who were themselves victims. The children never told the police or asked other family members for help.</td>
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<tr>
<td>The family have suffered greatly as a result of the abuse. One of the children has been murdered and another has committed a murder. The abuse experienced by the older generation has had a role in the family's continued dysfunction making them more vulnerable to trauma.</td>
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*4 Ibid at par 75.*
10. What limitation periods should apply and should these periods vary by the type of crime?

See Questions 8 and 9. The limitation period should effectively vary by the type of crime through the granting of special leave or exceptions to limitation periods, as discussed above.

11. What offences of violent crime should and shouldn't be covered?

Legal Aid NSW supports the current regime in relation to eligibility based on the type of offences that are covered.

12. In what circumstances should support be available for primary, secondary, family and/or support persons of victims?

Legal Aid NSW supports the current counselling services which are available from approved counsellors for primary, secondary, and family victims. This is particularly important for children of victims, and other family members of victims who have suffered severe trauma in circumstances such as homicide and those discussed in Question 9.

13. Who should be able to claim expenses or compensation in respect of a homicide?

Legal Aid NSW supports the eligibility of immediate family members to claim expenses or compensation in respect of a homicide. However, any such eligibility should take into account kinship structures that exist in Aboriginal and Torres Strait Islander communities.

14. The current threshold for compensation is $7,500 in compensable injuries. Is this an appropriate threshold?

Legal Aid NSW is of the view that this threshold is not appropriate for several reasons.

Firstly, under the present schedule a person can be quite seriously injured and be ineligible for compensation. For example the injury of a “fractured mandible and or maxilla (jaw bones)” only attracts an amount of $7200 on the current schedule. If this were the claimant’s only injury then they would be ineligible for compensation. It is even difficult to have this claimant reach the threshold if this injury is coupled with other injuries as they are only awarded 10% for the second nominated injury and 5% for the third injury, and are not able to claim for any other injuries. A person with a broken nose, dislocated jaw and perforated ear drum (unless as a result of domestic violence) would be more than $1000 under the threshold.
Secondly, the current threshold is based on an arbitrary sum of $7,500 which means little to a victim and merely creates a notion that one victim is deserving of compensation while another is not.

Legal Aid NSW suggests that the threshold be removed, but the schedule of compensable injuries be maintained. This in effect would replace an arbitrary monetary threshold with a threshold based instead on the type of injury. It would still require that a significant injury is suffered in that it is a compensable injury according to the schedule. A person would then be entitled to compensation for that injury provided they can show the violence occurred and the injury resulted.

15. **Under what circumstances, if any, should secondary victims or support persons be covered?**

Legal Aid NSW supports the current regime in relation to secondary victims and suggests that other support persons should be able to access counselling if required and as appropriate.

16. **What level of evidence should be required to establish that an act of violence has occurred on the balance of probability (police reports, medical reports, witness accounts etc)?**

The level of evidence required to make out a claim for victims compensation is a matter for the assessor, as they must be satisfied on the balance of probabilities based on the evidence provided by the claimant. The evidence must be sufficient to support a claim that the claimant was a victim of an act of violence occurring during the course of an offence, and that they suffered injury as a result. To do this one would expect evidence in the nature of a statement from the victim and medical reports going to injury. Evidence may also include a police report (if applicable), witness accounts, statutory declarations, reports to counsellors, and reports to community services or other agencies, but such evidence should not be necessary to prove a claim.

However, evidence including police reports or medical reports should not be required where there are no such records in certain out of time sexual assault matters, and especially childhood sexual assault matters.

Legal Aid NSW also notes that any increase in the level of evidence required to make out a claim will likely reduce the number of applicants who are able to lodge claims without legal assistance. This would increase the demand for legal practitioners to assist with claims.
17. **Should a police report on the violent crime be required as part of the application process for eligibility?**

Legal Aid NSW does not support the requirement of a police report as part of the application process for eligibility. A police report may not be available at the time of the application, particularly in matters involving sexual assault or domestic violence. See also Question 16 above.

18. **Should applicants need to show evidence of their injuries and associated recovery costs?**

Legal Aid NSW is of the view that applicants should need to show some medical/psychological evidence of their injuries.

It should not be a requirement that applicants need to show evidence of their out of pocket expenses in relation to the injuries sustained. Many clients affected by an act of violence do not keep receipts or other evidence of their "associated recovery costs". Additionally, many victims may not have actually incurred any costs as a result of their medical treatment, for example if they were a patient in a public hospital.

### Compensation

19. **What should the aim and purpose of any compensation payments be?**

Legal Aid NSW believes the aim and purpose of compensation should be to acknowledge that claimants have been victims of crime, to assist victims to recover from crime physically, emotionally and psychologically, and to compensate them for associated expenses, loss of earnings and loss of personal effects. This aim is reflected by the objectives of support and rehabilitation as provided under s 3(a) of the Act (see also Question 1).

20. **Are lump sum payments the most appropriate way of providing this compensation?**

Legal Aid NSW is of the view that lump sum payments are the most appropriate way of providing compensation. Lump sum payments are administratively efficient, enable finality, and allow victims to utilise their compensation in a way that most effectively assists with their recovery.

21. **What types of injuries should compensation be provided for and to whom?**

Legal Aid NSW supports the schedule of compensable injuries currently provided for under the Scheme.
22. **Is a schedule of compensable injuries appropriate?**

Yes, see Question 21 above.

23. **What is an appropriate level of compensation?**

Legal Aid NSW supports the amounts of compensation currently provided under the schedule of injuries.

24. **What should the maximum amounts of compensation be for primary / secondary victims?**

Legal Aid NSW believes the maximum amount for compensation should remain at $50,000 for primary victims. However, this amount should apply separately for each claim arising from separate acts of violence. Legal Aid NSW does not support the amendments to the Act which provide that separate claims for violence committed over a period of time can now be treated as one claim with a maximum award of $50,000.

Further, Legal Aid NSW believes claimants should be able to claim compensation for violence that took place before the lodgement date of any earlier successful claim for victims compensation. This particularly affects claims regarding victims of childhood sexual assault who have made an earlier claim. Victims with these claims form a large number of the applicants who currently seek representation through CLCs.

It is noted that currently a secondary victim is not eligible for any amount of compensation where the primary victim has been awarded the full amount, or no more than the difference between $50,000 and the amount awarded to the primary victim. Legal Aid NSW believes the withholding of adequate compensation from a secondary victim due to the amount of compensation awarded to the primary victim is unfair to the secondary victim and it fails to reflect the objects of the Act. For this reason, Legal Aid NSW recommends that the secondary victim should be eligible for a maximum amount of compensation of up to $25,000 regardless of the award to the primary victim.

25. **What conditions should pre exist before compensation should be paid? (For example, permanent injury or costs over a certain amount.)**

Legal Aid NSW is of the view that the only conditions that should pre-exist before compensation is paid is appropriate evidence of a compensable injury in accordance with the schedule of injuries and, where available, evidence of the costs associated with that injury (see also Question 14).
26. What specific services should the Fund provide for victims? (For example, counselling, “gap” medical and dental payments, cleaning, home care, legal aid, accommodation, relocation, loss of replacement of damaged clothing, income replacement, funeral expenses, incidental travel, security of premises, loss of financial support, translation services, other)

Legal Aid NSW supports the provision of all of these types of services for victims, as long as they are provided in addition to compensation.

Legal Aid NSW notes in particular the increased burden on the Fund to provide legal services given the reduction in the availability of such services following the recent amendments to the Act in relation to costs, as discussed in Question 45 below.

27. What are the main gaps in coverage for mainstream and specialised services for victims of violent crime?

It is the experience of Legal Aid NSW that there are several gaps in coverage for mainstream and specialised services for victims of violent crime.

A significant gap is the lack of access to specialist counselling services for victims in custody. This includes victims of sexual assault who are not able to access appropriate specialised sexual assault counselling whilst in custody. Inmates are able to access generalist counselling through the justice health system whilst in custody, but this does not address the specialised nature of sexual assault counselling.

There are also many gaps in the provision of services for clients who live in regional and remote areas of NSW. These clients may not be able to access approved counselling where they live and have to travel long distances (where there is no public transport) in order to access counselling. Victims in rural, regional and remote areas also may not have the same access to lawyers who are willing take on victims compensation matters. These clients are therefore effectively denied legal representation, and may not even be aware that they are able to make a claim.

28. What rehabilitation and supports are needed for victims?

The Fund should provide counselling and access to other appropriate services, as outlined in Question 26, customised to the requirements of each particular victim.
29. What information services are useful and how should this information be disseminated?

Legal Aid NSW supports existing Victims Services information portals such as the various Victims Services publications, the Victims Access Line and the Aboriginal Contact Line. However, Legal Aid NSW notes that some victims do not have access to the internet or a telephone (or the ability to pay for 1800 numbers from a mobile phone) in order to obtain such information, and Legal Aid NSW suggest that alternative methods of disseminating information are used, such as an increased number of in-person information sessions particularly in rural and remote areas.

Other helpful information services include telephone advice provided by LawAccess, and advice services provided by Legal Aid NSW such as those that can be accessed through its Outreach Advice Network and Cooperative Legal Service Delivery (CLSD) Program.

30. What are your views on the Victims Access Line (VAL) as a single entry point for victims of crime?

Subject to our response to Question 29, Legal Aid NSW supports a single entry point for victims of violent crime to enable them to navigate the system without undue difficulty. However, Legal Aid NSW also supports the Aboriginal Contact Line which is dedicated for Aboriginal victims of crime who would like advice and information about counselling and compensation.

31. What special remote area needs may be required?

As noted in Questions 27 and 29, more services are required that are specifically targeted at rural, regional and remote areas.

An additional consideration in some remote Aboriginal communities is the fear that any information provided will not be kept confidential. In these communities there may be one medical service providing advice and counselling, but victims of crime, especially domestic violence and sexual assaults, often prefer to talk to a counsellor who is not connected with their community. This problem could be overcome by the funding of visiting counsellors.

32. To what extent are case managers required to provide support to navigate the complexity of mainstream and specialist service systems for victims? i.e. Should there be a broader service coordination role?

Legal Aid NSW supports the provision of further assistance to victims in dealing with the service systems, including a broader service coordination role as suggested, which could operate in conjunction with the VAL and the Aboriginal Contact Line.
33. Is witness assistance support required for victims, for example, a friend's expenses in attending court proceedings?

Witness assistance support is not required for victims in all cases, but Legal Aid NSW would agree with the provision of such support where appropriate.

34. What limitations should be made on the financial support provided in respect of services?

Legal Aid NSW believes the current cap of $1,500 for reimbursements for certain expenses for victims under the Victims Assistance Scheme is too low and should be raised. The threshold currently leaves many clients out of pocket and fails to meet the objective of the Act of support and rehabilitation for those victims who are not otherwise eligible for statutory compensation.

35. What are the barriers to utilisation of services and benefits?

As noted in our response to Question 27, there are barriers to the utilisation of services and benefits for inmates, and geographical barriers for those in regional, rural and remote areas. Clients with geographical barriers may not have appropriate services available nearby, or may not even have access to information and would therefore be unaware that any such services exist. There is also a lack of approved report writers available in these areas. Where services are not readily available in these areas, such barriers could be reduced by reimbursing travel costs.

36. Should interim payments in cases of financial hardship be available and if so, what level of evidence is required for payment and what limits would be appropriate?

Legal Aid NSW supports interim payments in cases of financial hardship, up to a limit of half of the full award. Legal Aid NSW suggests that the level of evidence should be similar to what is required for a full claim, in addition to some evidence of financial hardship (e.g. Centrelink statement, copy of overdue accounts, letter from a Centrelink social worker, or a letter from a financial counsellor or other caseworker involved with the victim).
37. **What services definitely shouldn’t be provided by the scheme?**

Legal Aid NSW has no comment to make in relation to this question.

38. **If the level of financial assistance to meet specific needs is increased in the scheme, how should the compensation amounts available under the scheme be changed?**

Legal Aid NSW believes that the level of financial assistance to meet specific needs should not affect the amounts of compensation available.

**Administration**

39. **What are acceptable waiting times for access to compensation benefits?**

Legal Aid NSW is of the view that the current waiting times for access to compensation benefits are unacceptable. Legal Aid NSW suggest the maximum waiting time should be reduced to less than 12 months. However, where there are lengthy delays applicants should be able to access urgent payments.

40. **What are acceptable waiting times for reimbursement of payment for appropriate services and for timeliness of the delivery of services?**

In order to meet the objective of the Act to provide victims with support and rehabilitation, it is important that waiting times for reimbursement of payment for appropriate services are kept to a minimum and services are provided without undue delay.

41. **Are there any administrative roadblocks that may deter victims from accessing appropriate compensation?**

Legal Aid NSW has no comments to make in relation to this question.

**Disputes**

42. **Under what circumstances should disputes be allowed under the Fund?**

Legal Aid NSW supports the current regime where disputes are allowed under the Fund where there is an error of law.
43. **What dispute process should be followed?**

Legal Aid NSW believes the current system is adequate provided claimants are represented and they have advocates capable of identifying errors of law. However, the Tribunal needs to have procedures in place to assist applicants who have meritorious claims, but not the ability to draft those claims or make submissions in a way that clarifies the legal issues and supports their claims. This is particularly important given the increase in self-represented litigants as a result of amendments to the Act (as noted in Question 45 below).

Legal Aid NSW is also of the view that the Tribunal should have a mechanism to receive feedback from the stakeholders and adopt improvements to its handling of disputes. Regular meetings could be scheduled for members of the Tribunal to discuss possible changes to rules and procedures with stakeholders, as is currently the case with courts and tribunals.

44. **Should there be different levels of dispute resolution and what principles should guide this?**

Subject to the issues raised above in Question 43, Legal Aid NSW believes the current dispute resolution process is appropriate for victims compensation matters. Given the nature of these matters and the parties involved, Legal Aid NSW would not support the use of alternative dispute resolution mechanisms.

### Other issues/considerations

45. **What role should legal providers play within the Fund, in the process of making an application, seeking a review, or appealing a decision?**

**a. The role of legal providers**

Legal Aid NSW believes that legal providers play an important role in all aspects of the victims compensation process, particularly in complex matters. However, Legal Aid NSW acknowledge that certain straightforward claims may be able to be made without legal assistance provided that the applicant is capable of doing so.

As noted in Addendum A, Legal Aid NSW Policy 6.25.7 requires that to be eligible for a grant of legal aid for representation in making a claim for victims compensation, the applicant must be at special disadvantage, which requires that they are either a minor or a person who has substantial difficulty in dealing with the legal system due to a disability. However, any claimants can access legal advice from a Legal Aid NSW lawyer at any stage of the process.

Clients may require legal assistance to make an application to ensure that it accurately and effectively sets out their claim. For instance, legal providers can assist
claimants to identify the most appropriate injury or injuries from the schedule of injuries. Claimants may not know what their injury is or how it relates to the schedule.

Many victims compensation matters are more complex than at first sight, and investigation by a legal practitioner can assist to tease out these complexities and assess them against eligibility for the scheme. Many claims involve issues of both physical and psychological damage, and upon speaking with their client it may become apparent to a lawyer that they might have more than one claim where they have suffered more than one act of violence during their life. Claimants may also not consider a secondary injury or psychological injury in relation to their injuries. Alternatively, legal providers can advise clients where they have no compensable injury or where they fail to meet the current $7,500 threshold.

Lawyers should also be involved at the review and appeal levels given the additional complexities involved. For example, a successful appeal requires that the claimant make out an error of law in the original decision. It is not reasonable to expect a claimant who is not legally trained to be able to do this without legal representation, as these matters are highly specialised and technical. Additionally, as appeals are usually heard in the District Court there may be costs implications for the claimant.

b. Costs issues

As of 1 January 2011, amendments to the Victims Support and Rehabilitation Act 1996 (NSW) s 35(1) (‘the amendments’) provide that the Tribunal has discretion to make a costs award ‘up to $825’ for work carried out in relation to an application for compensation which results in compensation, and ‘up to $400’ for work where an application is dismissed, based on the scale of costs under Clause 12 of the Victims Support and Rehabilitation Rule 1997. Further, costs for appeal work have been halved from $1000 to ‘up to $500’.

In explaining the amendments, the Victims Services fact sheet states that:

The amendments to legal costs merely clarify the discretion that was already available to compensation assessors to award legal costs based on the scale of costs. However, prior to the amendments the wording of the section created an expectation that legal costs would be paid irrespective of the outcome of an application and irrespective of the amount of work involved.

The amount of legal fees awarded will not automatically be reduced for successful claims. Costs will be awarded based on the amount of work that has been performed in relation to a claim or the complexity of a claim…This could mean awarding costs at the top end of the scale for successful or complex claims, or awarding costs at the lower end of the scale for simple claims.5

Therefore, although the amendments do not differ greatly from the previous provisions, the amendments make it clearer that Tribunal costs are discretionary and that they may refuse to make a costs order. The experience of Legal Aid NSW lawyers is that as a result of the amendments costs orders are being made that fail to reflect the amount of work undertaken. Further, the amendments have caused a perception among lawyers that costs are no longer guaranteed. As a consequence, the amendments have caused many legal providers to decline victims compensation work, and the number of unrepresented applicants is increasing. As noted by the Tribunal Chairperson:

The proportion of unrepresented applicants lodging applications for statutory compensation increased from 19 per cent in 2009/10 to 29 per cent in the year under review. Victims Services is closely monitoring this trend. It may well be due to a reduction in the number of legal firms prepared to do victims compensation matters. The reduction in legal fees provided for in the 2010 amendments to the Act has made the work less financially attractive. There is also some evidence that some legal firms are being more selective in commencing claims, leaving applicants with claims with less chance of success having to bring such claims without legal representation. The question of the funding of appropriate legal assistance to applicants and appellants will be an important matter for consideration and recommendation by the independent assessment review.6

The decline in the number of lawyers willing to run these matters presents a particular issue for Legal Aid NSW in its assigning of grants of legal aid for victims compensation matters to private legal providers. Currently, grants for victims compensation matters are only for disbursements, namely a medical report, on the understanding that the Tribunal would pay the lawyer's costs. This is in accordance with s 35(4) of the Act which provides that:

Despite any Act or law to the contrary, but subject to any order of the Tribunal or compensation assessor, an Australian legal practitioner is not entitled to charge or recover, by way of costs in respect of an application for statutory compensation or of the proceedings of the Tribunal in respect of such an application, any amount in excess of the amount awarded under this section.

Therefore, as a result of the amendments, lawyers who accept work under a grant of legal aid can be left out of pocket should the Tribunal not make an adequate costs order. Further, a real prospect exists that where an offer of a grant of aid is made to a lawyer on the Legal Aid NSW panel, and a lawyer accepts that grant in good faith, that lawyer will not be paid for the work done for an unsuccessful claim.

This in turn is causing access to justice issues, as it is having a significant impact on the capacity of the CLCs to take on extra victims compensation matters that would have ordinarily been picked up by the private profession. CLCs report that they are already at capacity with regards to victims compensation matters (especially given the complexity of the matters they accept), and in some areas there are now limited numbers of private legal practitioners accepting such matters on referral. This is causing a gap in service delivery and further increasing the number of self-represented applicants. This is problematic because as discussed above many victims would not be able to lodge an application and be successful without legal representation, especially as they often come from particularly vulnerable and disadvantaged backgrounds.

The increased number of unrepresented applicants is likely to add to the complexity of the system and the backlog of claims, as it will reduce the quality of applications and increase the number of invalid claims which would otherwise be filtered out by lawyers.

In order to address the lack of representation due to these costs issues, Legal Aid NSW recommends that consideration should be given to establishing a scale of legal professional costs which directly relates to the amount of work done by the lawyer. The scale would provide a modest amount of costs for a straightforward claim, and a higher amount for a more complicated matter.

46. **What other potential funding sources should be considered?**

Legal Aid NSW suggests that an increased amount of funding should come from proceeds of crime.

47. **What support should be available for convicted inmates who are victims of violent crime?**

Legal Aid NSW is of the view that convicted inmates who are victims of violent crime should be provided the same support and services as victims in the general community. In addition to depriving people of their liberty, prisons are often violent and oppressive places which lack appropriate levels of support and services. However, correctional centres and terms of imprisonment are also intended to serve the purpose of rehabilitation. Inmates who are the victim of a violent crime require appropriate support and services whilst in prison to assist them to recover from the act of violence. Deprivation of appropriate services should not undermine their overall rehabilitation. Appropriate support and services would assist in reducing recidivism when the offender is released into the community.
48. To what extent should benefits and compensation be adjusted for contributory negligence?

Legal Aid NSW does not support benefits and compensation being adjusted for contributory negligence. This is a common law defence that arises in actions in tort. There is no negligence in criminal matters, although defences such as provocation may be a mitigating factor in sentencing. It would therefore be a new concept which would be inappropriate and difficult to apply. It is unclear how contributory negligence would be consistently assessed where there is no oral evidence as compensation is awarded on the papers. Procedural fairness would require that any such claim be tested in cross-examination.

49. Are there other funding models that should be considered?

Legal Aid NSW has no comments to make in relation to this question.

50. How should the scheme link with the broader service system?

Legal Aid NSW has no comments to make in relation to this question.
Addendum A

6.25. Applications for legal aid in civil matters when the applicant is at special disadvantage

6.25.1 When is applicant at special disadvantage?

An applicant is at special disadvantage if:

- the applicant is a child or acting on behalf of a child; or
- they are a person who has substantial difficulty in dealing with the legal system because of a substantial:
  - psychiatric condition
  - developmental disability
  - intellectual disability, or
  - physical disability.

...  

6.25.7 Victims compensation matters

Legal aid is available for victim's compensation matters where:

- the legal aid applicant is at special disadvantage, and
- the legal aid applicant is the applicant in the victim's compensation proceedings.

For legal aid to be granted in these types of matter the following tests must be satisfied:

- the applicant meets the Means Test
- the matter meets Merit Test A, and
- the Availability of Funds Test.

Funding for the grant of legal aid is limited to:

- necessary disbursements only, and
- it does not include counsel's costs.

The applicant for legal aid must be at special disadvantage for legal aid to be granted in these matters.

For guideline on requirements to attend ADR see Civil Guideline 3.2.

For guideline on grants of aid for test cases see Civil Guideline 3.8.

Note: Refer to 6.25.2 for the policy relating to appeals in victims compensation matters.

Note: Legal aid is not available to a defendant who is objecting to a Preliminary Order for restitution under s47 the Victim's Support and Rehabilitation Act 1996: see civil law policy 6.26.