Criminal Injuries Compensation for Domestic Sexual Assault: Obstructing the Oppressed

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The law in Australia relating to criminal injuries compensation is increasingly complex and inaccessible. Legislation throughout Australia's eight jurisdictions is remarkably disuniform and awards vary widely without apparent justification. Few cases are reported and appellate decisions in administrative appeals tribunals tend to be difficult of access. However, sums available for award to applicants in most jurisdictions are now substantial and recent decisions have opened up opportunities for multiple awards. What commenced as a relatively informal means of awarding modest sums of solatium to victims of criminal acts has transmogrified into an important means of procuring the next best thing to damages for victims.

The sums awarded can be substantial. In the Victorian AAT decisions of *J v. Crimes Compensation* (1993) 6 VAR 174 per J Rosen[2]; *WN v. Crimes*

1 The author acknowledges the valuable research afforded him by Sonia Bettega of McKean and Park, Solicitors, Melbourne.

2 Compare *Linda Wilson v. Crimes Compensation Tribunal*, unreported, Victorian AAT, 4 August 1994 per Ball DP.

Compensation Tribunal (unreported, Victorian AAT, 3 August 1994) and the ACT decision of Master Hogan in *Re Application for Criminal Injuries Compensation* ((1989) 103 FLR 297), the victims of sexual assault were awarded A$54 000, A$23 500 and A$50 000 respectively but amounts awarded and the principles for the awards are difficult to predict[3]. For a family in which long-term assaults have taken place, awards for direct and indirect injury may exceed in total A$100 000.

However, these cases are comparatively rare examples of genuinely benevolent interpretation of criminal injuries compensation legislation. Profound difficulties still confront applicants who are victims of domestic sexual assault, in particular children. Not least among these are the growing problems of statutory construction and case law interpretation which are rendering the area into one of the few 'expansion potentials' for lawyers. This paper will concentrate upon the difficulties confronting child victims of incest when they apply for compensation under the criminal injuries compensation legislation around Australia. Some of the problems are attributable to technical difficulties in the terms of legislation, others are reflective of a disinclination by government to permit major awards to victims but many find their genesis in a primitive understanding by the legal profession of the nature of the trauma caused to child victims by serial sexual assaults inflicted by trusted family members or associates.

Criminal Injuries Compensation Schemes

The payment of compensation for injury to victims and their dependants by the State is a relatively new phenomenon. Its purpose has been described as:

> *not to award damages of a kind comparable or analogous to damages which an injured party, as a plaintiff, might seek and recover from a tortious wrongdoer, but to give to the victim of a criminal act or omission some solatium by way of compensation out of the public purse for the injury sustained, whether or not the culprit is brought to book, and whether or not the culprit might otherwise be liable to the victim (Fagan v. Crimes Compensation Tribunal* [1981] VR 887 at 892; *see also* Duff 1987).

Thus, the jurisdiction is distinguishable from the civil damages area[4] in terms of criteria for entitlement and the key issue in most jurisdictions for the decision-maker is to determine whether there has been an injury, as variously defined, and whether the criminal act in question is the cause of the injury, even if not the sole cause (*see Savage v. Crimes Compensation Tribunal* [1990] VR 96 at 100). Awards are by way of a lump sum, in contrast to the all-encompassing accident

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3 Compare *Hards, Budds & Elliott v. Crimes Compensation Tribunal*, unreported, Victorian AAT, 4 August 1994 per Galvin DP, where only one award was made to each applicant in respect of multiple assaults and the amounts for the multiple sexual assaults were A$12 000, A$9000 and A$12 000 respectively.

4 *See*, for instance, the important decisions in the cross-vested jurisdiction of the Family Court in *Marsh v. Marsh* (1994) FLC 92-443 at 80 622 and *W v. H*, unreported, 18 March 1994, Family Court of Australia per Brown J.

compensation scheme existing in New Zealand. It is standard for crimes compensation legislation to be regarded as 'remedial' and so to be interpreted 'liberally' to the benefit of the claimant (*see*, for example, *Fagan v. Crimes Compensation Tribunal* [1981] VR 887 at 892). However, the extent to which such interpretation is extended varies significantly.

Diversity among Australian Schemes

Criminal injuries compensation regimes throughout Australia are diverse in both form and substance. A few examples paint the picture. In New South Wales and Victoria a Victims Compensation Tribunal and a Crimes Compensation Tribunal respectively have been set up to administer crimes compensation schemes, while in the ACT and in Tasmania the Master of the Supreme Court holds the jurisdiction. In Western Australia it is an assessor appointed for that purpose, while under the South Australian and Northern Territory schemes the function reposes with the District Court and Local Courts respectively. In Queensland the offender may be ordered by a court to pay up to A$20 000 but an application may also be made under the Criminal Code to the Governor in Council for an ex gratia payment (*Criminal Code Act 1989* (Qld), s.663 B).

There are quite different periods within which applications may be made. In South Australia (*Criminal Injuries Compensation Act 1978* (SA), s. 7(1)) and Western Australia (*Criminal Injuries Compensation Act 1985* (WA) s. 17) it is within 3 years of the commission of the offence unless dispensation is given. In Victoria (*Criminal Injuries Compensation Act 1983* (Vic.) s. 20(3)), the Northern Territory (*Crimes* (*Victims Assistance) Act 1992* s. 5) and the ACT (*Criminal Injuries Compensation Act 1983* (ACT). s. 10 (1A)) it is within one year of the injury or death unless the time is extended, while in New South Wales (*Victims Compensation Act 1987* (NSW) s. 17 (2)) it must be within 2 years of the act of violence unless the Tribunal allows a longer period. Under the Tasmanian *Criminal Injuries Compensation Act 1976* and the Queensland Criminal Code Act 1989 there does not seem to be any time limitation.

In Victoria (*Criminal Injuries Compensation Act 1983* (Vic.) s. 21) conviction is not a prerequisite, while in other jurisdictions such as South Australia (*Criminal Injuries Compensation Act 1978* (SA), s. 8 (1A)) the commission of a criminal offence must be proved beyond reasonable doubt[5]. Generally, the onus is upon the applicant to prove their entitlement on the balance of probabilities, although specific provision is made for ex gratia payments in South Australia (*Criminal Injuries Compensation Act 1978* (SA) s. 11) and Queensland (*Criminal Code Act 1989* (Qld) ss. 663C-D).

In Victoria, the Tribunal shall not make an award 'where the incident has not been reported to police within a reasonable time, except where special circumstances resulted in the criminal act not being reported' (*Criminal Injuries Compensation Act 1983* (Vic.) s. 20 (2)(b). In the Northern Territory there is an

5 The legislation provides a qualification: where the award is 'by consent'. In addition, the Attorney-General has wide discretionary powers set out in the legislation to make ex gratia payments: *see* s. 11.

almost identical provision save that the preclusion is that there must have been circumstances 'which prevented the reporting of the commission of the offence' (*Crimes (Victims Assistance) Act 1992* (NT) s. 121 (c)). The victim will also be precluded if they failed to assist police in the investigation or prosecution of the offence (*Crimes (Victims Assistance) Act 1992*)[6]. In Queensland, the offence must have been 'reported to a police officer without delay' (*Criminal Code Act 1989* (Qld), s. 663D(1)(c)(i). Otherwise, delay in reporting is not prohibitive. In New South Wales it is simply necessary that the act of violence has been 'reported to a member of the police force within a reasonable time' (*Victims Compensation Act 1987* (NSW), s. 20 (1)(b)). In South Australia the court must not make an order for compensation in favour of a claimant if it appears to the court 'without good reason' that the claimant:

> *(a) failed to report the offence to the police with in a reasonable time after its commission;*
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> *(b) refused or failed to provide information to the police that was within the claimant's knowledge as to the offender's identity or whereabouts;*
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> *(c) refused or failed to give evidence in the prosecution of the offender; or*
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> *(d) otherwise refused or failed to co-operate properly in the investigation or prosecution of the offence and in consequence investigation or prosecution of the offence was not commenced or was terminated or hindered to a significant extent* (*Criminal Injuries Compensation Act 1978* (SA) s. 7(9A)).

Similarly in Western Australia, where the Assessor forms the 'opinion' that the applicant or a close relative did not do any act or thing which he or she ought reasonably to have done to assist in the identification, apprehension or prosecution of any person alleged to have committed the offence or alleged offence, the Assessor is precluded from making an award (*Criminal Injuries Compensation Act 1985* (WA) s. 24).

In Victoria (*Criminal Injuries Compensation Act 1983* (Vic.) s. 18), the ACT (*Criminal Injuries Compensation Act 1983* (ACT) s. 6) and Tasmania (*Criminal Injuries Compensation Act* (Tas.) s. 4(3)) compensation is given for 'pain and suffering', while in New South Wales (*Victims Compensation Act 1987* (NSW) s. 10) compensation for injury is defined to include compensation for pain and suffering and loss of enjoyment of life, while in a claim by a close relative of a deceased person it includes both categories as well as 'grief. 'Grief' is also a separate head of award in South Australia (*Criminal Injuries Compensation Act 1978* (SA). In the Northern Territory (*Crimes (Victims Assistance) Act 1992* (NT) s. 9) pain and suffering, the mental distress of the victim and loss of the amenities of life by the victim are all compensable, but 'mental distress' is explicitly provided not to include 'grief'. In Western Australia (*Criminal Injuries Compensation Act 1985*) (WA), s. 3) and Queensland (*Criminal Code Act 1989*

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6 Compare Wilson PM in *Bridget Ann Watts v. Crimes Compensation Tribunal*, unreported, Victorian AAT, 22 September 1992 at pp. 11-12.

(Qld) s. 663A) it is 'injury' which is compensable. This is defined broadly to mean 'bodily harm, mental and nervous shock' and to include 'pregnancy'.

Many more uncertainties and anomalies can be identified (*see* Freckelton 1996a forthcoming; Freckelton 1996b forthcoming). This is unsatisfactory because it is fundamentally unfair upon a victim of a crime of violence that she or he receive different entitlements depending upon which side of the River Murray a crime is committed on or upon whether an offence takes place in the west of Queensland or the east of the Northern Territory. The entitlements of victims to state compensation for injuries perpetrated upon them ought to be separate from the trial of offenders, should be recognised as an important aspect of state care of the vulnerable and the wronged and should be uniform Australia-wide.

In light of the extraordinary variation in crimes compensation schemes, a reference should be given to the Australian Law Reform Commission to assess the various models which exist around Australia, and in other countries, and to draft a model code of criminal injuries compensation for submission to the Standing Committee of Attorneys-General.

Curbs on Criminal Injuries Compensation Awards

A range of impediments has reduced the number and extent of awards made to victims of criminal acts:

(1) On occasion applications are denied in respect of criminal incidents that have not been promptly reported to police (*see*, for example, *Criminal Injuries Compensation Act 1983* (Vic.), s. 20(2)(b) unless justification for delay can be adduced by the claimant.

(2) Applications not made within the set period from the time of injury or death in most jurisdictions risk being denied, although the nature of the crime may be the reason for the delay in reporting and applying.

(3) Until 1993-94 in Victoria the practice in most jurisdictions has been for multiple sexual assaults perpetrated on the one victim by the one assailant over an extended period to ground only one application for compensation. This fails to recognise the cumulative damage wrought by long-term sexual violence upon children and domestic violence upon women.

(4) Limited understanding by the legal profession of the nature of trauma and the behaviour of victims regularly results in inadequate advocacy on behalf of victims and confused decision-making by those responsible for dispensing criminal injuries compensation awards.

Delay in Reports to Police

Multiple reasons exist why sexual assaults generally are not reported to police. The recent CASA report (Centre Against Sexual Assault 1993) found in its study that 20 per cent of the victims that it surveyed failed to report to police, although this figure is much lower than that reported in other studies (*see* National Committee on Violence 1990; CASA House 1990; Summers 1975; Freckelton & Bolton 1988; Victorian Community Council Against Violence 1994). The reasons advanced, however, are interesting:

Offender known to and/or feared by victim	66.7%
Fear of police/legal process	70.8%
Did not want friends/family to know	58.3%
Due to victim's disability	12.5%

In the context of children, many other factors also come into play, most pertinent of which is their disempowerment at the hands of their victim and their lack of access either to perspective on the crime committed against them or to resources.

In the area of incest, or family violence generally, it is simply not realistic or equitable for legislatures to impose arbitrary time limits within which reports must be made to the authorities. Those provisions that exist should be amended to recognise the nature of domestic assault and the dynamics created by assaultive family members.

Delay in Applications

Limitation periods in a variety of contexts have been described as 'the primary stumbling block for adult survivors of incest'. It is typical of the denial experienced by a large cross-section of victims that they do not report a criminal act against them for some considerable time. Delay is motivated by a maelstrom of different emotions engendered by the trauma experienced at the hands of the assailant.

That is in the case of the adult victim, but for the child victim, the psychiatrically, physically or intellectually impaired victim or the ethnically disadvantaged victim, sheer inability to report may be the explanation of the delay. The abuse of trust through the vehicle of sexual assault by an authority figure manipulates the victim's dependency and innocence to prevent recognition and revelation (*see Evans v. Eckelman*, 265 Cal Rptr 605 at 609 (Cal App 1 Dist 1990). However, to establish this, expert evidence needs to be carefully marshalled to explain the circumstances of the applicant, the problems confronting victims of sexual abuse in reporting the abuse and to link these considerations to the effluxion of time before reporting or applying for compensation.

As Lamm argued in 1991:

> *Although the victim may know that she has psychological problems, the [post-incest] syndrome impedes recognition of the nature and extent of the injuries she has suffered, either because she has completely repressed her memory of the abuse, or because the memories, though not lost, are too painful to confront directly. Thus, until she can realize that her abuser's behaviour caused her psychological harm, the syndrome prevents her from bringing suit. Often it is only through a triggering mechanism, such as psychotherapy, that the victim is, able to overcome the psychological blocks and recognize the nexus between her abuser's incestuous conduct and her psychological pain* (Lamm 1991).

Many states in the United States have enacted legislation modifying or extending the limitation period for the prosecution of sexual abuse cases 'in recognition of the fact that sexual abuse often goes unreported and even undiscovered for years' (*R v. L (WK)* (1991) 64 CCC (3d) 321 at 328-9). In 1992 British Columbia also amended its Limitation Act to enable survivors of sexual assault to pursue legal action at any time (*see* Limitation Amendment Act 1982 (BC), cl. 44).

Victorian authority suggests that in general terms the onus does not lie upon the late appellant to show 'an acceptable explanation for their delay' (*see Dix v. Crimes Compensation Tribunal* [1993] 1 VR 297, not following *Hunter Valley Developments Pty Ltd v. Minister for Home Affairs and Environment* (1984) 58 ALR 305) when seeking to prosecute an appeal out of time. However, the presence of time limitations upon the bringing of applications in most jurisdictions leaves the institution of an application years subsequent to the criminal act a precarious exercise. This, of course, is the norm rather than the exception in cases of sexual assault perpetrated on children by family members or friends, the assailant so often succeeding in persuading the child that dire consequences will follow upon revelation of details of the assaults.

The leading Australian decision in the area had the potential to be *Sharon Arnold v. Crimes Compensation Tribunal* (unreported, 10 December 1992). Ms Arnold claimed that on a number of occasions between 1974 and 1978 and again that in 1981 she was sexually assaulted by a neighbour who was a family friend. She said that she suppressed the memory of these assaults until she revealed them during counselling in the course of 1987. She reported them to police in December 1988 and swore in evidence that she was not aware of her right to claim compensation until some time late in 1989. In February 1990 she signed a claim form which was lodged by her solicitor in June 1990 and rejected by the Crimes Compensation Tribunal in May 1991.

The Administrative Appeals Tribunal allowed her appeal in part finding that special circumstances had resulted in the failure to report the criminal act but ruled against her in relation to whether an extension of time should be allowed in relation to her delay in applying more than one year after the injury. Unfortunately, although the matter was appealed to the High Court, special leave being granted against the refusal of the Full Court of the Supreme Court to overturn the decision of the Administrative Appeals Tribunal, little emerges from the decisions by way of helpful guidance for future cases.

The most compelling and extensive decision in the area is that of the Canadian Supreme Court in *M(K) v. M(H)* (1992) 96 DLR 289. In that case the

appellant testified that she had been abused from the age of 8 and penetrated by her father from the age of 10 until she left home at age 17. Her cooperation and silence were elicited by standard threats: her disclosure would cause her mother to commit suicide, the family would break up, nobody would believe her and finally he would kill her. The appellant tried to tell her mother what was happening to her when she was 10 or 11 and made unsuccessful disclosures to a school counsellor and a psychologist. At 17 she left home to live with another family and shortly afterwards married. After she bore her husband three children, she separated from him because she could no longer tolerate sexual relations with him (at 295). She sought and received counselling in which she was not able effectively to engage. She subsequently met another male, whom she ultimately married, and was prevailed upon to try counselling once more with a marital and family therapist.

This person testified at trial when she sued her father for damages that the appellant:

> *would have been unaware of the connection between the incest and her psychological and emotional injuries until she understood that she was not responsible for her childhood abuse, and had assigned the blame to her father* (at 295).

A psychiatrist also called by the appellant testified that:

> *the earlier disclosures indicated some awareness of the incest and its consequences, but it was not until the appellant began therapy that she could make a connection between the two. Although there may at times have been an intellectual awareness of the correlation between cause and effect, the appellant did not have an emotional awareness of the connection* (at 296).

The Canadian Supreme Court found that incest was both a tortious assault and a breach of fiduciary duty. Although the tort claim was held to be subject to limitations legislation, it was held not to accrue 'until the plaintiff is reasonably capable of discovering the wrongful nature of the defendant's acts and the nexus between those acts and her injuries' (at 296)[7].

As the English Court of Appeal had held in 1991, the Canadian Supreme Court in *M(K) v. M(H)* stressed that 'the larger social context that has prevented the problem of incest from coming to the fore' should not be ignored:

> *Until recently, powerful taboos surrounding sexual abuse have conspired with the perpetrators of incest to silence victims and maintain a veil of secrecy around the activity.*

The Court applied the United States criterion of focusing upon when 'the plaintiff discovers the causal relationship between his harm and the defendant's

[7] A further difficulty, too, of course, is the unawareness on the part of many victims of their entitlement to apply for criminal injuries compensation.

misconduct[8], and found that the action crystallised for limitation period purposes 'when the incest victim discovers the connection between the harm she has suffered and his childhood history' (*Raymond v. Eli Lilly & Co* 371 A 2d 170 (NHY 1977), the realisation of link between damage and fault. Speaking for the Court, La Forest J held that he was:

> *satisfied that the weight of scientific evidence establishes that in most cases the victim of incest only comes to an awareness of the connection between fault and damage when she realizes who is truly responsible for her childhood abuse. Presumptively, that awareness will materialize when she receives some form of therapeutic assistance, either professionally or in the general community* (at 305).

If this reasoning were extended to the criminal injuries compensation context, the preclusions existing in relation to reporting to police and instituting proceedings would have to be removed. Such an amendment to the law would recognise the fundamental problem experienced by so many victims of familial sexual assault who fail to identify the nexus between their subsequent functional difficulties and the sexual assaults perpetrated upon them[9]. An important obstacle would be removed to the bringing of legitimate applications for criminal injuries compensation.

Multiple Applications

The law in the criminal area in the sentencing context is consistently called upon to grapple with the impact of multiple assaults upon a victim and also with the moral culpability of the assailant responsible for serial assaults. It is common for assailants to be sentenced to a period of imprisonment for one form of sexual assault against a victim and then for other assaults, sexual and otherwise, to result in concurrent sentences or only partly cumulative sentences. This may be in the context of oral, vaginal and anal rape, assaults by multiple offenders or in the context of serial sexual assaults over a night of terror or years of incest. Frequently, victims express the complaint that such an approach devalues the real nature of the conduct of the assailant and the nature of the trauma and pain experienced by the victim.

The issue also arises in the criminal injuries compensation context where the approach of governments, having instituted compensation schemes, is to curb the extent of payouts to victims. This finds expression in Victoria for instance in probing and aggressive cross-examination of persons claiming to have been raped conducted by counsel appearing to assist the Administrative Appeals Tribunal on appeal from the Crimes Compensation Tribunal. It has also resulted in such counsel assisting, instructed by the Government Solicitor's Office, to

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8 *See Stubbings v. Webb* [1991] 3 All ER 949 where the English Court of Appeal was held also in a civil action for childhood sexual assault that the critical date was the plaintiff's realisation that her mental injury was attributable to the acts of her adoptive father and brother.

9 Other members of the Court cavilled at the use of the device of a discretion: Sopinka J at 338; McLachlin J at 339.

seek wherever possible to establish that a claimant's mental disorders are not attributable to criminal acts, expert evidence to that effect notwithstanding. The unfortunate reality in this era of government cutbacks is that more and more legitimate applications for compensation are being made, resulting in a significant burden for the taxpayer, and more significantly major expenditure being occasioned for governments dedicated to reducing their expenditure. The danger is that, government rhetoric notwithstanding, changes to legislation will take place not with a view to protecting victims, or even ensuring that the unworthy do not make fraudulent windfalls, but simply in order to save money. The most likely category of victims to suffer will be those who have been sexually assaulted when young.

A major problem in this regard is the uncertainty of the law in light of conflicting decisions. In a series of determinations, including *J v. Crimes Compensation Tribunal* ((1993) 6 VAR 174), *WN v. Crimes Compensation Tribunal* (unreported, Victorian AAT, 3 August 1994) and the ACT decision of *Re Application for Criminal Injuries Compensation* (1989 103 FLR 297) multiple applications were permitted in relation to quite separate acts of sexual violence against child victims. However, the other approach has gained the ascendancy in Victoria pending Supreme Court pronouncement. Bell DP in *Linda Wilson v. Crimes Compensation Tribunal* (Unreported, *Victorian AAT, 3 August 1994),* Galvin DP in *Hards, Budds and Elliott v. Crimes Compensation Tribunal* (Unreported, Victorian AAT, 4 August 1994) and MacNamara DP in *Bichel v. Crimes Compensation Tribunal* (Unreported, Victorian AAT, 20 March 1995) have rejected the making of multiple awards when more than one criminal act results generically in the same injury. This has confirmed the previously common practice in most jurisdictions for awards for criminal injuries compensation to be made in a global form, aggregating multiple assaults into one award.

The controversies are made the more poignant by a 1993 New South Wales Court of Appeal decision in which the Court had occasion to interpret the key limiting provision in New South Wales of s. 3(3) of the *Victims Compensation Act 1987* (*Director-General of Attorney-General's Department v. District Court of New South Wales* (1993) 69 A Crim R 324). Under s. 3(1) of that Act compensation is payable to a 'victim of an act of violence' which is defined as 'an act or series of related acts (as referred to in subsection (3)), whether committed by one or more persons: (a) that has apparently occurred in the course of the commission of an offence; and (b) that has resulted in injury or death to one or more persons'. Section 3(3) provides that an act is related to another act if

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

This becomes problematical in the context of a series of, for example, sexual assaults perpetrated by a family member. The Court found that the acts had not been committed at the same time, they having been separated at intervals of one or more days. The question, therefore, became whether the several acts of assault

'were, for any other reason, related to each other' within s. 3(3). Mahoney JA expressed the view that the phrase 'at the same time' is to be given a broad operation and affirmed the District Court Judge's ruling that ordinarily it would be 'impossible to say' that acts 'committed days, weeks and months apart' are committed at the same time.

The way, therefore, is unclear as to whether victims of multiple acts of sexual assault can make separate applications for compensation when they have suffered the one injury or exacerbated a pre-existing psychic injury. Arguably, though, acts of molestation separated by significant periods of time have a cumulative and serious developmental impact upon a child. Multiple acts of sexual interference are generally much more serious than one; just the same as Walker would not suggest that one act of wife battery could induce battered woman syndrome (*see* Walker 1984). If compensation is for injury, then compensation should be available for multiple injuries which have an aggregate impact. It is relevant, too, to recognise that persons may suffer multiple or serial post-traumatic stress disorders as a result of separate incidents of trauma. To suggest that separate incidents of violent and intrusive criminality can simply be aggregated and dealt with as one is to diminish both the trauma occasioned by separate episodes of molestation and the nature of the cumulative damage of such interference upon a child's psycho-social development.

However, the danger is that this hard-fought recognition of the impact of crime upon victims of sexual assault will be overtaken by governments' desires to limit the effect upon their budgets of payment of compensation for multiple acts of indecent assault and rape to victims of domestic sexual assault.

Understanding of Trauma

The perception that the task of quantifying the impact of crime upon victims is a complex and specialised role is coming but slowly to the legal system. Even now Masters of the Supreme Court, Magistrates, members of Administrative Appeals Tribunals and Judges of District, County and Supreme Courts all serve terms as such assessors of damage. The irony is that in other areas of the law practitioners are well cognisant of their limitations. Personal injuries specialists are rarely to be seen prosecuting or defending armed robbers in the criminal courts and criminal specialists rarely are found representing plaintiffs in complex personal injuries actions. Even judicial officers are becoming more and more specialised in recognition of the trend toward greater specialisation in our legal system.

Victims, however, are not given the benefit of such specialisation. Decision-makers who have never encountered DSM-IV or standard works on trauma and victim impact are put in the position of having to deal with this sensitive area. No textbook exists in Australia or New Zealand on criminal injuries compensation. Works on administrative law and criminal law tend to give minimal treatment to the area. The result is that the tariff, for example, for the award for those suffering moderate or severe post-traumatic stress disorder is almost impossible to discern. Amounts awarded vary dramatically from one decision-maker to another and from one jurisdiction to another. Appeals are comparatively rarely instituted—in part because of the costs involved, the inadequacy of legal advice

proffered, and the formality of the second and third tiers of decision-making when appeals are run.

Cases before the first level of appeal bodies are rarely reported and it is mostly those who are briefed on behalf of government to oppose appeals by victims claiming they have received too little or nothing at all at first instance who have ready access to unreported decisions in the area.

The time has arrived for it to be recognised throughout the legal system that the area of criminal injuries compensation is a complex and specialised area of practice. This has ramifications for both the bodies and decision-makers whose task it is to assess the existence and quantum of injuries flowing from criminal acts, and for those who represent victims. Greater understanding of the whole area is needed and better communication between mental health practitioners and lawyers if victims are to receive awards which reflect the real level of impact of criminal activity upon their lives.

The Threshold Question

However, there is an important threshold question that must be addressed at the start of a reappraisal of the operation of crimes compensation schemes throughout Australia. That is, whether payment of a lump sum to victims of criminal acts is the best way of extending state beneficence and/or whether it is a better way than improving the quality of rehabilitation, trauma recovery and victim support services. Ideally these would not be mutually exclusive, but in practice they seem largely to operate as alternatives. This is not a controversy into which I shall enter for the purposes of this paper save to offer these reflections.

It is apparent that governments in a variety of jurisdictions throughout Australia are embarking upon ways of reducing the number and quantum of awards to victims of crime while maintaining the posture at pro-victim policies. The categories of victims most under threat in the mooted changes are sexual assault victims who have been repeatedly assaulted, particularly when young, victims of assaults on the sports fields and law enforcement officers and armed guards.

At the same time, moves have already commenced in some jurisdictions toward formulating increasingly stringent criteria for eligibility, in terms of the injury suffered, the nexus between injury and continuing disability, the contribution of the victim to the injury, and the cooperation of the victim with police and prosecuting authorities, these latter being rationalised as evidence of the victim's bona fides. The reasons for these changes are in essence financial because of the number and nature of claims that have been made in recent years as community awareness of entitlement to crimes compensation schemes has grown. In short, the schemes are said to be becoming too expensive for governments under current economic conditions.

The issue that these restrictions pose is whether the system of providing lump sums of consolation to victims of crime, rather than, for example, the New Zealand system of providing regular payments to those injured through any cause, remains worthwhile. Does the Australian model operate to enhance

recovery or in too many cases does it operate counter-therapeutically? Are decisions by those responsible for awarding compensation unacceptably erratic? Are the deficiencies of the systems so thoroughgoing that the award of a 'token' by way of consolation to victims of certain crimes in certain circumstances is so unsatisfactory that the money could be spent better? The answer must lie in the end-product: the way in which victims can best be assisted toward recovery from a major trauma to which they have been exposed through no (or little fault) of their own. The trends in accountability financing are increasingly in the direction of reducing lump sum payments and concentrating upon improving relevant resource availability and quality. It may well be that this will be the direction taken for dealing with victims of criminal injuries in the future.

Conclusion

Criminal injuries compensation currently plays an important symbolic and practical role in compensating members of the community for injuries of which they are innocent victims. It is time that the various models of compensation that are available in Australia be subjected to rigorous conceptual scrutiny and to cost/benefit analysis. If the compensation system is to continue in something resembling its present form but to function equitably, it needs a major overhaul and a reappraisal. The disuniformity of compensation schemes is thoroughgoing and inequitable and the criteria for and amount of awards vary without apparent justification. The Australian Law Reform Commission should be asked to produce model legislation for provision of compensation through specialist Assessors or Tribunals. Such legislation should be constructed on the basis of an informed understanding of the reasons why victims of domestic sexual assault fail to report to police, often for many years, and fail to lodge applications within a short period of the commission after the crime against them.

Provision should exist for multiple awards of compensation, up to a sensible figure, say A$100 000 to victims of multiple long-term sexual assaults, to reflect the profound psycho-social developmental damage often wrought by such criminal acts. Finally, careful selection processes should be devised, with appropriate education if necessary, to ensure that those given the important role of assessing injury as a result of crime are able to discharge their task informedly, compassionately and equitably.

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