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Criminal Injuries Compensation for Victims of Family and Domestic Violence

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Abstract

Compensation for victims of crime has been available in various forms in Western Australia since the 1970's. The *Criminal Injuries Compensation Act 2003* (the Act) provides that victims of proved or alleged offences may apply for compensation in certain circumstances. There are provisions of the Act which have particular relevance to victims who have been affected by family and domestic violence. This paper provides a broad outline of the issues which arise from claims for family and domestic violence and touches on some of the considerations which are taken into account by Assessors in considering those claims.

Introduction

It was recommend in the Law Reform Commission of Western Australia Final Report *Enhancing Laws Concerning Family and Domestic Violence*¹ (the Law Reform Commission Report) that the Office of Criminal Injuries Compensation *publish in its annual report data about awards and refusals of compensation claims in circumstances of family and domestic violence.*² The Law Reform Commission Report also recommended that a *full review of how the criminal injuries compensation scheme operates in practice in relation to victims of family and domestic violence*³ be undertaken. Prior to that recommendation being made in 2014, the Annual Report of the Office of Criminal Injuries Compensation had not included data *about awards and refusals of compensation claims in circumstances of family and*

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¹Law Reform Commission of Western Australia *Enhancing Laws Concerning Family and Domestic Violence – Final Report Project 104 June 2014* available at http://www.lrc.justice.wa.gov.au/files/p104_fdv_finalreport.pdf accessed 5 May 2017

² Ibid at p 173 Recommendation 68

³ Ibid at p 174 Recommendation 69

domestic violence. In response to the recommendation, the Annual Report has included these statistics. The 2014 Annual Report discloses that about 45% of the awards made by the Assessors involved family and domestic violence.⁴ This is consistent with data from international schemes⁵ and highlights a number of issues in relation to how claims by victims of family and domestic violence are dealt with under the Act. It is noteworthy that information from the annual reports of victims of crime tribunals and bodies in Australia is not readily available and the writer was unable to find any other tribunal which has published data about awards and refusals of compensation claims in circumstances of family and domestic violence.⁶ Data in relation to the prevalence of family and domestic violence in the community is however generally available.⁷

The purpose of this paper is to outline how the criminal injuries compensation scheme in Western Australia operates in practice in relation to victims of family and domestic violence under the Act. The Law Reform Commission Discussion Paper *Enhancing Laws Concerning Family and Domestic Violence*⁸ (the Discussion Paper) highlighted a number of behaviours that feature in family and domestic violence.⁹ It was noted that family and domestic violence has a number of forms, including physical violence, psychological and emotional abuse, sexual violence, economic abuse and social abuse.¹⁰ The Act provides compensation for victims of family and domestic violence where the victim has suffered injury as a consequence of an offence.¹¹ Accordingly the applicant needs to establish an offence occurred under the *Criminal Code WA* or some other state statute in order to be entitled to

⁴ Available at

[http://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3913549af92a942d1ecbc7fd48257ee60031b312/\\$file/3549.pdf](http://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3913549af92a942d1ecbc7fd48257ee60031b312/$file/3549.pdf) Accessed 5 May 2017

⁵ See for example in the United States as noted by Danis, F. (2003) Domestic Violence and Crime Victim Compensation, *Violence Against Women*, Vol. 9 No. 3, pp. 374-390, page 377. Data on domestic violence within the victims of crime systems of Australia is not easy to locate and the author was unable to locate any publically available data (save for Western Australia).

⁶ Internet searches in relation to annual reports of the various sub-national victims of crime bodies have not revealed any similar data.

⁷ For example extensive data is noted on the *Our Watch* website available at

<https://www.ourwatch.org.au/Understanding-Violence/Facts-and-figures> accessed 5 May 2017, see also Law Reform Commission of Western Australia *Enhancing Laws Concerning Family and Domestic Violence* Project 104 December 2013 available at http://www.lrc.justice.wa.gov.au/files/p104_fdv-dp.pdf at p 13 accessed 5 May 2017

⁸ Law Reform Commission of Western Australia *Enhancing Laws Concerning Family and Domestic Violence* Project 104 December 2013 available at http://www.lrc.justice.wa.gov.au/files/p104_fdv-dp.pdf accessed 5 May 2017

⁹ *Ibid* at p 11. Note the term family and domestic violence has been adopted throughout this paper consistent with Western Australian legislation

¹⁰ *Ibid* pp11-12

¹¹ See sections 12-17 of the Act

compensation. Commonly this involves allegations of assault (including wounding, bodily harm, and manslaughter/murder) stalking, threats to kill or harm, acts or omissions causing bodily harm and sexual assault. No award can be made for economic abuse and social abuse simpliciter as this abuse is not an offence per se, but Assessors frequently note these forms of abuse as characteristics and features of offences committed by offenders.

The Discussion Paper also noted that many instances of family and domestic violence are not reported to police or other authorities due to a number of barriers including low self-esteem, anxiety, social and economic isolation, retribution by the offender or the offender's family and fear and concern about being reported to government agencies such as child protection, housing or immigration.¹² It follows that whilst nearly half of the work of Assessors will relate to family and domestic violence, in reality this proportion might be higher were it not for some of the barriers preventing victims seeking assistance. As discussed below, an application can be made under the Act for proved or alleged offences; the latter allowing scope for previously unreported incidents to be the subject of claims provided the issues noted below are addressed. It is the experience of the Assessors that the behaviours that feature in family and domestic violence noted in the Discussion Paper are mirrored in the applications made for criminal injuries compensation. In many instances claims are made for unreported incidents and often claims are made many years after the incident has taken place. These characteristics give rise to special legal considerations which will be discussed below.

Time limitations on claims

It is frequently the case that applications by victims of family and domestic violence are made outside the limitation period prescribed under section 9 of the Act. Section 9 of the Act requires that an application for compensation be made within three years of the date of the offence. In the case of multiple offences by the same offender time runs from the last offence. Section 9 also allows discretion for the Assessor to extend this period where it is *just* to do so. There has been considerable litigation in relation to the principles to be applied when seeking and extension of time.¹³ The requirement that the Assessor be satisfied that it is just to do so includes consideration of:

¹² Ibid p 13

¹³ *DPJB v NCI* [2011] WADC, 150. *Gleeson v Lee* (1996) 18 SR (WA) 353, 354 -355, *Esther Investments Pty Ltd v Markalinga Pty Ltd* (1989) 2 WAR 196, 198. *Gallo v Dawson* [1990] HCA 30, *RT* [2006] WADC 185.

- the reasons for delay;¹⁴
- the age of the victim at the time of the offence;¹⁵
- the (power) relationship with the offender;¹⁶
- the physical or psychological effect of the injuries;¹⁷
- the length of time after the offence the application was made;¹⁸
- when the offender was prosecuted;¹⁹
- what evidence is currently available to the Assessor to consider the merits of the case.²⁰

Recently the District Court has determined that it is not sufficient for an applicant to seek an extension of time merely because they were unaware of the limitation period.²¹ The effect of that decision has been that applicants must elaborate in some detail the reasons for delaying or not lodging the application. According to the Annual Report of the Office of Criminal Injuries Compensation in 2015/2016, 32 applications were refused under section 9 of the Act²² of which 20 related to domestic violence claims. This suggests that delay in making a claim is a significant issue in domestic violence claims, however often in domestic violence matters a refusal may be made under section 9 of the Act because the claim is late, but the decision may also involve a combination of lateness, lack of reporting and other issues. That said, Assessors routinely grant extensions of time in cases involving allegations of family and domestic violence.²³

¹⁴ *Re Jackamara* [2014] WADC 9, *DAM v JTV* [2017] WADC 2

¹⁵ *RMK* [2011] WACIC R v *Criminal Injuries Compensation Commissioner Carey* [2008] TASSC 14 (22 April 2008) *CS v Victims of Crime Assistance Tribunal (General)* [2006] VCAT 1061

¹⁶ *J v VOCAT* [2002] VCAT 532, *Hinchcliffe v Hinchcliffe* [2010] WADC 78, *Re An Application Under the Criminal Injuries Compensation Act 1983 and Mt* [1996] ACTSC 34 (26 April 1996)

¹⁷ *Roberts v NTA & Hodgins* [2002] NTMC 11 *J v VOCAT* [2002] VCAT 532 *Hinchcliffe v Hinchcliffe* [2010] WADC RLG [2009] WACIC 13 *L v Carey* [2010] TASSC 54 (24 November 2010)

¹⁸ *Re McHenry* [2014] WADC 92

¹⁹ *Re McHenry* [2014] WADC 92

²⁰ *Purcell v Victims of Crime Assistance Tribunal (General)* [2011] VCAT 146, *Gutsche v Northern Territory or Australia & Young* (deceased) [2003] NTMC 52

²¹ *Re Jackamara* [2014] WADC 9

²² This is 32 refusals by section 9 out of a total of 222 refusals in 2015/2016. In the same year 1987 awards made.

²³ The Law Reform Commission Discussion Paper noted that the provisions of section 9 were wide enough to take into account issues of fear of retaliation or positions of power delaying a claim and saw not compelling case for reform of this section of the Act.

Reporting offences and assisting investigations

As noted, the Law Reform Commission identified that a characteristic of family and domestic violence is that victims frequently do not report incidents of violence to police and other authorities for a range of reasons. This has particular repercussions in relation to applications for criminal injuries compensation because of the effect of section 38 of the Act. Section 38 of the Act requires that the applicant must establish that he or she assisted police in the identification, apprehension or prosecution of the offender. Notably however, section 38 has been held to involve a subjective element in that it requires the applicant to take such action as he or she ought reasonably to have taken to assist in the identification, apprehension or prosecution of the offender.²⁴ It follows that where the applicant has not reported an incident of violence to the police and subsequently makes an application for compensation in relation to that incident, he or she must also then provide some rationale for not reporting the incident. In many cases this is self-evident insofar as it is clear that had the applicant reported the incident to police he or she would have been subjected to further or more substantial violence by the offender and in some cases the offender's family. This is an important consideration for the Assessor.²⁵ It is the experience of the Assessors that in many instances involving family and domestic violence the applicant frequently does not report the incident to police, but the incident is reported by third parties, such as neighbours and relatives. In 2015/2016, of the 31 applications refused under section 38 of the Act (out of 1987 awards made), 23 related to family and domestic violence.

Continuing Relationship with the Offender

Section 36 of the Act is of particular relevance to family and domestic violence applications. This section provides that an Assessor must not make an award of compensation where the applicant has a relationship or connection with the offender and, by reason of that relationship or connection the award is likely to benefit or advantage the offender. This two-step provision requires the Assessor to consider whether the applicant remains in a relationship with the offender.²⁶ In most claims section 36 is not a consideration because the applicant has made the claim after the relationship has ceased. However, in some instances (the numbers are very small) applications are made by victims of family and domestic

²⁴ Noted in *CME* [2004] WACIC 9

²⁵ For a survey of cases in relation to section 38 of the Act see *Pargovski* [2015] WACIC 19

²⁶ *Shepherd v Shepherd* [2010] WADC 30, *James v Northern Territory* [2012] NTSC 51 (25 July 2012)

violence who have resumed or remained in the relationship with the offender. This is, however, uncommon as evidenced by the Annual Report for 2016 which discloses that no applications were refused by reason of section 36. In cases where the applicant has made an application but has resumed co-habitation this becomes apparent when preparation is made to serve a notice upon the offender of the applicant's claim.²⁷ When it becomes apparent that the applicant and the offender have resumed a relationship by reason of their co-habitation, the Assessor notifies the applicant of the effect of section 36 of the Act. In some instances the application is discontinued and in many instances the Assessor takes no action on the file rather than refusing the claim. This is because the common experience of the Assessors is that at some time in the future it is likely the applicant will separate from the offender and the claim may be revived.²⁸ In other cases Assessors have paid the award to the Public Trustee with a direction that it not be used for the benefit of the offender.²⁹

Contributory Conduct

In addition to the issues involving non-reporting and late claiming, in some instances the Assessor has to consider the effect of sections 39 and 41 of the Act. In the case of section 39 the Assessor is precluded from making an award of compensation where the applicant was committing a *separate offence* at the time of being injured. In the leading case compensation was refused to an applicant who had been sexually assaulted but who was at the time of the assault consuming prohibited drugs with the offender. The Supreme Court affirmed the Assessor's refusal of the claim for compensation.³⁰ Since that decision an internal review of section 39 cases has however revealed no gender bias in the application of section 39. Rather, the over whelming application of that section relates to cases of physical assaults involving men who at the time were in possession of, or had consumed prohibited drugs or who were themselves committing acts of violence when injured. That said, however, 11 cases involving family and domestic violence were refused in 2015/2016 under section 39.³¹

In addition to section 39 the behaviour of the applicant is taken into account by reason of section 41 of the Act which requires the Assessor to consider whether the applicant has

²⁷ Willis[2014] WACIC 11

²⁸ RACB [2013]WACIC13

²⁹ See Law Reform Commission Discussion Paper p 153-4

³⁰ Attorney General of Western Australia -v- Her Honour Judge Schoombee [2012] WASCA 29, see also Thomson v Francis [2016] WADC 154

³¹ Internal research conducted by the Assessors suggests most cases of refusal under section 39 involve contemporaneous use/dealing/sale of illicit drugs

contributed to his or her injuries *by reason of any behaviour, condition, attitude or disposition*. In cases of family and domestic violence Assessors are informed by their experience and judicial statements from the District and Supreme Courts, together with current literature on these matters. In some cases applications are made where the Incident Report in the police brief indicates that the applicant may have participated in a physical altercation or may have been intoxicated at the time that of the injury. In such matters consideration of the context of the incident is important. Only one case involving family and domestic violence was refused in 2015/2016 under section 41.³²

Assessment of Claims

Under the Act allowance is made for injuries (pain and suffering), treatment expenses, loss of earnings or reduction of scope of employment, future treatment expenses, travel expenses and damage to personal items.³³ These are assessed using the same principles of assessment as in tortious claims. Section 6 of the Act prescribes those matters which are taken into account in considering loss for the purposes of the Act. Unlike tortious claims, compensation for gratuitous services provided to an injured applicant is not available.³⁴ In relation to future medical and treatment expenses, allocations are made by an Assessor for those expenses it is likely the applicant will incur, but these are not paid to the applicant when the award is made. Pursuant to section 48 of the Act, an allocation for future payments is made and held by the Office of Criminal Injuries Compensation for up to 10 years from the date of the award, until the expense is actually incurred. In family and domestic violence cases, the most frequent award for future treatment expenses relates to psychological or like counselling. Importantly, by reason of section 42 of the Act, the Assessor has to take into account any contract of insurance or other compensation available to the applicant when considering the cost of future treatment expenses. In practice this means that the Assessor will have regard for Medicare rebates and private health insurance refunds. As such, the full cost of the

³² *ibid*

³³ *RJE v Bandy* (Unreported, WASC, Library No. 1365, 31 May 1974), *KLH v Dennison*, unreported; SCt of WA; Library No 5172; 6 December 1983. "*M*" v "*J*", unreported; SCt of WA; Library No 920598; 19 November 1992. *R v Forsythe* (1972) 2 NSWLR 951; "*O*" v "*J*", unreported; SCt of WA; Library No 920027; 13 February 1992, *S v Neumann* (1995) 14 WAR 452. *BMW v RLW*, unreported; SCt of WA (Kennedy J); Library No 4614; 23 August 1995

counselling or other treatment is borne partly by the applicant's insurance coverage and partly by the State.

Section 6(2)(b) of the Act requires the Assessor to consider whether the future treatment expenses are likely to be reasonably incurred. This requires a two-step process. Firstly, there must be evidence that treatment is required and secondly, that it is likely that the treatment expenses will be reasonably incurred.³⁵ In many cases psychiatric and psychological reports recommend a form of treatment, but the history and circumstances of the applicant's treatment suggest to the Assessor that it is unlikely that the treatment will be used in the future or that expenses for the treatment will be incurred. Experience indicates that the most frequently used future treatment expenses are for dental repairs, scarring remediation and nasal fracture repairs.

Whilst the assessment of criminal injuries claims is made upon tortious principles, section 31 of the Act prescribes statutory maximum compensation depending upon the time of the offence. The current statutory maximum is \$75,000 per incident of offending, but by reason of section 34 of the Act, if there are multiple offences committed by the same offender on separate occasions then the applicant is entitled to up to twice the statutory maximum payment, that is to say, a maximum of \$150,000 per offender. This is particularly relevant in the case of family and domestic violence applications where it is commonly the case that the application involves multiple offences. In most instances of domestic violence where the last offence occurred after 1 January 2003 the statutory maximum of \$150,000 is available per offender. It is also not uncommon for Assessors to consider applications where an applicant has been subjected to domestic violence at the hands of a number of offenders. In passing it would appear that Western Australia provides the highest maximum payment for victims of family and domestic violence and is one of the few jurisdictions which has retained individualised assessments of claims which do not resort to scheduled entitlements or arbitrary allowances.

The statutory maximum does not operate to require the Assessor to consider whether the claim fits within a worst case scenario, that is to say, the Assessor does not award the statutory maximum for the worst case scenario and then lesser awards for relatively less

³⁴ *McAllister -v- Stansbury* [2010] WADC 71, *Ali Ahmed* [2008] WACIC 57 at [25] and *Vucen* [2008] WACIC 41 at [52]

³⁵ *Re PK (by her next friend the Public Trustee)* [2014] WADC 139

serious claims.³⁶ The statutory maximum operates as a cap only and is not a factor taken into account when considering an application save where the statutory maximum has been reached.

The assessment of a claim for family and domestic violence requires the Assessor to consider the direct impact of the offence/es. Other stressors such as the applicant's interactions with police and the court system are not compensable and must be distinguished. Assessors consider the medical evidence provided, usually consisting of physical and psychological elements together with victim impact statements. In addition, Assessors have access to the police brief and in the case of more serious matters the Office of the Director of Public Prosecutions files which often contain useful information including the Magistrates or Judges' sentencing comments. By reasons of section 19 of the Act Assessors may give a person a notice that requires them to provide relevant information or appear to give evidence to the Assessor. This allows the Assessors to gain access to information from employers, superannuation providers and insurers, government authorities and the like. As noted, in addition to an allocation for injuries or pain and suffering, the Assessor may consider evidence of loss of earnings or reduction in the scope of employment. In family and domestic violence cases this is often problematic particularly where the applicant does not have an extensive work history and has by reason of the relationship has not been an income earner. This does not necessarily prevent the Assessor from making an allowance for reduction in scope of employment.

Claims for mental and nervous shock are often an element of applications for family and domestic violence and can be made for witnesses to the events such as the children of the parties. In this regard the application triggers section 35 of the Act which has specific requirements and certain limits to secondary victim claims. Medical support for secondary victims claims is in practice of great assistance in assessment of such application, however if the applicant is unable to obtain a report or on reasonable grounds does not wish to obtain a report a victim impact statement dealing the impact of the incident may be considered by the Assessor.

³⁶ *RJE v Bandy* (Unreported, WASC, Library No. 1365, 31 May 1974), *KLH v Dennison*, unreported; SCt of WA; Library No 5172; 6 December 1983.

Notification of the Offender

Another consideration in relation to family and domestic violence matters is whether or not the offender should be given notice of the claim. Part 6 of the Act provides a framework for the State to seek recovery of compensation payments made to the applicant by the State. This part only operates in the case of proved offences, that is, applications pursuant to section 12 of the Act. It is not uncommon for the applicant or his or her representatives to make submissions that the offender not be notified of the application because of the propensity to cause fear or harm or reprisals against the applicant and/or the applicant's family. Where the Assessor chooses not to issue notification to the offender, the assessor will also usually order that the State has no right to recover against the offender. A decision to notify or not therefore requires the Assessor to balance the right of the State to seek recovery against the potential for further harm to be inflicted upon the applicant.

In many cases the application made for compensation arising from family and domestic violence includes proved and alleged offences. The State only has a right to recover in relation to the proved offences, even if the award includes an allocation for the alleged offences. In such cases it is the practice of the Assessors to apportion a sum of compensation to the proved offences and limit recovery to that sum. Where the Assessor determines that it is appropriate not to notify the offender, then an order is made pursuant to section 45(1)(a) to bar proceedings against the offender. Even if notice is given to an offender section 45 may be utilised to bar proceedings for recovery or limit the amount of compensation that can be recovered from the offender.