

WESTERN AUSTRALIAN FEDERATION OF SEXUAL
ASSAULT SERVICES (WAFSAS) FORUM
4 October 2005, Perth

Criminal Injuries Compensation

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INTRODUCTION

In this presentation I will outline the new features of the revised criminal injuries compensation scheme enacted by the *Criminal Injuries Compensation Act 2003*, and then discuss two important aspects of the legislation which impact upon applicants for compensation, especially in cases involving sexual assault.

These two aspects are,

- 1) the obligation to report an allegation of an offence, and
- 2) the impact of the outcome of the investigation and prosecution of the allegation upon eligibility for compensation.

Some statistics: There were 1,320 awards of compensation made in the last financial year, for a total of \$19.4 million. A little over 10% of the awards were made in response to sexual offences. The Office received a record number of 1,441 new applications for compensation in that year, and our calculations show that the rate of new applications seems certain to continue to rise. The time taken to determine an application went down to an average of 6.48 months in the second half of the year, and 7.1 months overall. For the previous year the average was 7.8 months. We are very pleased with this improvement in service delivery.

CRIMINAL INJURIES COMPENSATION ACT 2003 ("THE 2003 ACT")

The 2003 Act came into effect on 1 January 2004. It made a number of significant changes to the scheme to provide compensation to victims of crime, while retaining the general framework of the old legislation.

The major changes have significant impact on those who have experienced sexual assault. They affect both procedure and entitlement. The new Act provides a one stop shop for compensation matters, making it simpler and easier to apply for and receive compensation.

Procedural: i) All applications must now be made to my Office, it is no longer necessary to apply to the court where the offender was prosecuted, as used to be the case in applications under the 1970 Act.

ii) Hearings are no longer compulsory in any application, and will only be held at the discretion of the assessor, and only where issues of evidence require one to be held. This is of particular significance where the alleged offender was not prosecuted. The 1982 Act required a hearing, and often the alleged offender had to be notified. Victims of sexual assault of course found these compulsory hearings difficult, and often they were held only because of the requirement under the Act and not because the assessor required to hear oral evidence. For some, the difficulty associated with a hearing was of sufficient significance to lead them to decide not to apply rather than have to attend such a hearing.

iii) Provision has been made for the payment of interim payments pending the final resolution of the application. This enables an applicant to fund counselling, or pay for reports in support of the application. In particular to be able to access counselling at an early stage before the application for

compensation is ready to be determined is an important feature of the scheme. In the last financial year 152 interim payments were made.

iv) An assessor may now make provision for expenses likely to be incurred in future, again for example for counselling or other treatment of injuries where treatment has not been concluded or is likely to be required again in the future, for example where life events can re-initiate some of the symptoms of the injury. In the last financial year provision for future treatment was made in 153 awards.

v) An assessor may now determine at an early stage not to seek to recover the amount of the compensation from the offender, where the applicant is concerned that to do so may provoke further episodes of offending. Once such a decision has been taken, it is no longer necessary to advise the offender of the making of the application or the award. This may assist to protect the safety of the applicant. Of course in the majority of cases a convicted offender is notified of the claim, because he or she will be pursued by the State to recover the compensation paid to the applicant, and is therefore entitled to know about the application.

Entitlement: vi) The maximum compensation has been increased to \$75,000, for an offence committed after 1 January 2004. The maxima which applied under the previous Acts have been preserved in the Table to section 31.

vii) The maximum compensation is now limited by a cap imposed by section 34, which limits the compensation in a case involving multiple offences against one person by the same offender over a period of time, to twice the maximum applicable to the last offence.

REPORTING OF OFFENCES

The decision whether or not to report a sexual assault to the police has important consequences to entitlement to criminal injuries compensation.

The 2003 Act provides in section 38 that an assessor may not make an award in favour of an applicant if the assessor is of the opinion that the applicant 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 the person who committed the offence.

From this it can be seen that reporting the offence is only the beginning of the obligation, which falls upon the victim of the offence, to support the criminal justice system in its response to that report.

The obligation relates to identification, apprehension or prosecution. There is a requirement of the applicant to maintain involvement in the prosecution up to and including, if necessary, the need to give evidence in court at the trial of the alleged offender. Beyond the making of the initial complaint, the applicant may be required to be involved in such activities as photo-board or line-up identification procedures, responding to follow-up enquiries from the police, providing police with the details of other potential witnesses, participation in the completion of a written statement, undergoing a medical examination where appropriate, including for the provision of forensic material such as DNA samples, and finally attendance at court at a trial for the purpose of giving evidence and being cross examined about the incident.

The qualification within the legislation of what might be seen as an onerous responsibility on the victim is that from the point of view of the criminal injuries compensation application, the conduct of the applicant must be regarded by an assessor as reasonable in all the circumstances.

The determination of this question turns upon an analysis of whether the conduct was reasonable, by reference to what reasonably could be expected of the appellant in the circumstances which prevailed. There are a number of factors which readily spring to mind which may influence this determination. It is also clear that the question of the reasonableness of the applicant's conduct may arise from time to time in the context of different aspects and stages of the investigation and prosecution.

Reasonableness in this context is not judged by reference to what a hypothetical reasonable person would have done. The judicial discussion in this area has clarified that the section focuses upon the applicant and what he or she ought, reasonably, to have done. In this context it is open for an assessor to take account of the characteristics and the particular cultural context, age and other factors personal to the applicant in determining what that person might reasonably have done in all the circumstances.

It may be for instance that, because of the nature and circumstances of the commission of an offence, the injuries suffered, or other factors personal to the applicant, a report will not be made immediately, or even shortly, after the incident. Delay in reporting is of course not necessarily fatal, depending upon the circumstances giving rise to it.

Where there has been delay, but ultimately a prosecution, the delay will be irrelevant to the application. However, where delay has occurred and no prosecution has been undertaken, it will be necessary for the assessor to consider the reasonableness of the applicant's conduct, taking into account for instance whether the delay might be seen as having prevented the police from identifying or apprehending the offender. Even if the delay has had that outcome objectively, it is still open to an assessor to be satisfied that the applicant's reasons for the delay were reasonable, for that person, and in the circumstances which prevailed.

For instance a very lengthy delay in reporting the matter to the police, brought about by the belief of the particular applicant that there was no evidence or

"lead" available so that it was unlikely that any police investigation of the matter would succeed, has been found to have been reasonable in the circumstances that that particular person found himself in. On the other hand where an applicant makes a choice not to report a matter to the police for instance because of an ongoing relationship with the alleged offender which it was sought to maintain, this may constitute a bar to compensation in the circumstances. Even in the latter example, it is also open to the applicant to seek to persuade an assessor that it was not unreasonable for the applicant to have attempted to maintain the relationship with the alleged offender immediately after the offence, and not to have reported the offence until after the relationship ultimately ended. This is a feature arising in many cases of intra familial offending.

Fear of the alleged offender may often operate to inhibit the cooperation of the victim with the police and the prosecution service. This particular issue is often encountered, for instance by a person making an allegation of sexual assault committed against him or her whilst incarcerated. The pressures upon a prisoner not to make complaint of conduct by other prisoners, or even by a prison officer, are well recognised and understood. It will frequently be regarded as reasonable not to complain in such circumstances, and whilst one is a prisoner. However there are cases which indicate that a change in the applicant's circumstances, for instance following release from prison, may be such as to make a continued failure to report the matter or support the prosecution unreasonable in those particular circumstances.

It is important to stress that the complete failure to report a matter to the police will not always be fatal to eligibility for compensation. It is open to a person to attempt to persuade the assessor that her reasons for never having reported the matter to police are such as to make that decision not unreasonable. In other words, the assessor may view the decision by the particular applicant not to report the matter to the police as a reasonable decision in the circumstances confronting and continuing to confront that applicant.

Failure to report an offence committed against the applicant when the applicant was a child will often be regarded by an assessor as reasonable in the circumstances. In some cases the applicant may determine to take the matter to the police once he or she has reached adulthood, but this will not always be the case. Reasons such as the family relationships around a child, the wish not to upset a parent, grandparent or sibling and ongoing fear of the alleged offender who remains part of the family, are often advanced by applicants to explain a decision not to report offences to the police. In addition it may be the case that the child told an adult who took no further action. Clearly the child's actions are the ones upon which the Act focuses, not the actions or failure to act of those responsible for care of the child.

It is important to bear in mind that where the matter has not been reported to and investigated by the police, the assessor will be hampered by a lack of information upon which to rely in reaching the conclusion that the conduct alleged did, on the balance of probabilities, occur. It may be difficult for an assessor to be satisfied of an alleged offence, where it is mentioned only for the purposes of making an application for compensation, sometime after the event and where the applicant cannot produce any material tending to support the occurrence such as a complaint of it to another person. This is not to say that in such circumstances an application must always fail. In such a case it may be that the assessor will decide to have a hearing in order to be able to speak in person with the applicant, in order to form a view as to that person's credibility and reliability and to seek to better understand that person's particular circumstances.

In a case involving the applicant's participation at the trial of an alleged offender, the failure or refusal of a witness to give evidence may be fatal to an application. In such a case the outcome of the trial itself may determine the eligibility issue, but if not (eg a nolle) it remains important to stress that the reasonableness of the applicant's conduct is the determination the assessor must make. In a relatively recent case the applicant had given evidence at a preliminary hearing, and again at at least one trial. When the time came to confront the giving of evidence on a further occasion at a re-trial she indicated

that she was not prepared to do so. In that case it was determined by an assessor that that decision was not unreasonable in the circumstances and that her compensation application ought not to be defeated, notwithstanding that her decision meant the alleged offender was not dealt with in respect of her allegation.

OUTCOME OF INVESTIGATION AND PROSECUTION

Following a complaint it is for the Police Officer to determine whether to proceed to lay a charge. It will not be fatal to an application for compensation if the police determine not to proceed to a prosecution. A decision that there was, for example, insufficient evidence to proceed will not of itself affect eligibility to apply. It will of course be necessary for the assessor to be fully informed of the reasons for that decision, in order to determine the issues I have been discussing with respect to co operation with the prosecution.

It is a somewhat counter intuitive outcome, but it may be the case that compensation is more readily available to an applicant where the police have decided not to lay charges, than in a case where they do. Eligibility may become more problematic following the prosecution, depending upon the outcome of that prosecution.

An acquittal will often, but not always, constitute a bar to a compensation claim. Following an acquittal, compensation must be refused except where an assessor may be satisfied that a person other than the person who was acquitted of the charge, actually committed it. In other words, an acquittal on grounds of identity is not fatal to a claim.

In the context of sexual assault we know that by far the majority of such offences is committed by persons known to the victim. This means that on an allegation of sexual assault, alleged to have been committed by a person known to and identified by the victim, where there is an acquittal it will not be possible for an assessor to be satisfied that a person other than the named and identified alleged offender committed the offence.

The uncomfortable fact is that it is likely that on what the police may have perceived to be a "stronger" case, and therefore decided to prosecute, the applicant is vulnerable, in terms of an application for compensation, to the likelihood of an acquittal. Had the case appeared to the investigating Officers to be "weaker" and a decision made not to prosecute, this may well have preserve the applicant's entitlement to compensation. Similarly where the police are unable to identify the alleged offender, the applicant's eligibility for compensation is preserved. The difficulty of proving allegations of sexual assault are well known, as is demonstrated by the statistics provided by Mr Paul Yovich from the DPP's Office.

The previous legislation allowed for an application to be made to the Attorney General in circumstances where an acquittal was thought to have led to an unjust result in terms of compensation. This avenue was not provided for in the new legislation. The rationale might be understood more clearly in the case of an assault where an acquittal, flowing for instance from a defence of self defence, more easily supports the argument that the victim ought not to be eligible for compensation. The scheme is a scheme to provide criminal injuries compensation, and it gives full faith and validity to the outcome of the prosecution system. To provide compensation in the face of an acquittal would be to go behind the prosecution system, and the 2003 Act no longer provides for that option.

I do not suggest of course that those exercising the prosecutorial discretion should do so on the grounds that the decision may have the impacts on compensation which I have discussed. It is, however, important that police and prosecutors are aware that when they make a decision not to proceed with a prosecution, the victim's rights to compensation will be affected by the reasons for and the basis upon which this decision was reached, and that entitlement may well be preserved by a decision not to proceed (subject to the co operation issues I have already discussed).

We know that people with mental illness are over represented in the criminal justice system, both as offenders and victims of crime. A decision not to prosecute may often be made on the basis of the alleged offender's mental illness or impairment. The 2003 Act has cured the defects which arose under the previous legislation and which used to mean that in many cases such a decision was fatal to a compensation claim.

To understand the eligibility rules in this context it must be noted that compensation is only available in respect of an offence for which the offender or alleged offender bore criminal responsibility. The only exception to this rule is where a person is acquitted on grounds of unsoundness of mind.

The victim of an alleged offence committed for example by a child under the age of criminal responsibility will not be eligible. However in the case of a person of unsound mind, the entitlement to compensation is preserved, whatever the outcome of the investigation and prosecution, subject to the co operation rule I have discussed. A decision not to prosecute because of information that the offender is of unsound mind will not, of itself, prevent the victim from being eligible for compensation.

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4 October 2005