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Brigid Corcoran
General Manager
Law Commission
PO Box 2590
WELLINGTON 6140

By email: victims@lawcom.govt.nz

Dear Brigid

Issues Paper 11: Compensating Victims of Crime

The Society is grateful for the opportunity to comment on the Law Commission's paper "Compensating Crime Victims" (the paper).

The paper was referred to the Society's Accident Compensation and Criminal Law Committees. Their comments are as follows.

Introduction

The general tenor of the paper is that victims of crime are adequately compensated through the accident compensation scheme together with the Court's ability to order reparation as part of a criminal sentence. However, the Society believes that the Law Commission has overstated the current accident compensation regime's ability to compensate people who are victims of crime.

While the accident compensation scheme is comprehensive, in the sense that it covers the vast majority of personal injuries, it is, in our view, overstating the case to say that persons injured in the course of a criminal act will be entitled to forms of compensation such as lump sum and weekly compensation. For example, if a person is a visitor to New Zealand, they will have no entitlement to weekly compensation as they do not have any New Zealand tax paid earnings. Accordingly, although they are "covered" by the accident compensation system they have no entitlement to loss of income due to being injured. Similarly, people who are shareholder employees who declare a loss in the tax year before an injury have no entitlement to weekly compensation. People who do not work or have been out of employment for more than a month are (with some narrow exceptions) also generally not entitled to weekly compensation.

The three categories mentioned above – visitors from overseas, shareholder employees who declare a loss, and particularly persons who are not presently in employment – represent significant sectors of the community that will not be entitled to compensation, other than lump sum compensation if applicable, as a result of criminal acts.

The New Zealand government should be particularly concerned about the vulnerable status of visitors from overseas, who can have their ability to earn an income completely destroyed by criminal acts and not only not be entitled to any earnings related compensation at all, but who are also unable to sue the offender.

Similarly, parents who take time off work to look after children, but are intending to return to the workforce, are not entitled to weekly compensation even when an offender has destroyed their ability to work. There are some limited exceptions, where extensions to the accident compensation scheme provide entitlement to weekly compensation (for example for people who are on maternity leave), but in most cases parents caring for children will have no such entitlement.

The paper notes that some of these people may be entitled to seek reparation from the offender and that this issue is to come before the Supreme Court. The key problem, however, remains; the accident compensation scheme, when it comes to loss of earnings because of criminal offences, is not as comprehensive as the statutory bar on suit. The unfortunate result is that there are crime victims who cannot sue the offender for loss of income, and who are also not entitled to weekly compensation.

Further, the paper overstates the availability of lump sum compensation. Lump sum compensation is often described as being available “up to \$100,000”, when in reality very few victims of crime will be entitled to lump sum compensation at all and, generally, those who are entitled will receive only a small payment of perhaps \$5,000 - \$10,000.

The entitlement to the maximum lump sum payment is only for extremely seriously injured people who have permanent impairment arising from those injuries. Many victims of crime will not have permanent impairment, despite the fact that they are very seriously injured and that recuperation will take months and in some cases over a year. The minority who do suffer permanent impairment will have any percentage awarded to them under the accident compensation discounted. The Corporation discounts percentage figures assessed under the American Medical Association (AMA) Guides by reference to the person’s pre-accident condition. While discounting serves a purpose in terms of the accident compensation system, it is difficult to see why this should apply to victims of crime who have been deliberately injured. Again, the no fault compensation scheme is comprehensive in terms of preventing victims of crime suing the offender for personal injury, but not comprehensive when it comes to the awarding of lump sums. The paper seems to have over-emphasised the availability of lump sums. It implies there is a reduced need to compensate for pain and suffering, as many victims of crime would satisfy the criteria for a lump sum. That is not correct.

As the Law Commission has noted, no compensation is payable for pain and suffering under the present accident compensation scheme. The paper makes reference to pain being able to be taken into account when assessing lump sum compensation. That is not really the case. The assessments undertaken under the AMA Guides, for the purpose of lump sum payment, focus on measurable impairments as opposed to pain. It has been ACC’s position in a number of cases that pain itself is not impairment.

The entitlement to lump sum compensation for pain and suffering was a major part of the argument put to the public when the right to sue was taken away. That form of compensation, available under the 1972 and 1982 Acts, was removed under the 1992 version of the Act. The removal of that form of compensation undercut the bargain for the “social contract” struck with the public when the right to sue was taken away.

The undercutting of the value of that social contract is one reason why many victims of crime feel short-changed. In that respect, the position under the Sentencing Act 2002 has led to the strange result that a victim can receive reparation for emotional suffering, but not for emotional suffering related to the injury that brought it about.

The paper makes the point that the reason why this form of compensation was removed from the 1992 Act onwards was that it was difficult to assess. The question then needs to be raised why, under the Sentencing Act 2002, the Court was given the ability to assess reparation for emotional harm.

The argument that courts are not in a position to assess damages for pain and suffering is starkly at odds with practice around the world. Courts throughout the world undertake this type of assessment constantly. New Zealand is the only country that has introduced such a wide-ranging system barring damages for pain and suffering with respect to personal injury. In fact New Zealand courts frequently assess general damages with respect to a wide range of civil wrongs where emotional distress is a significant element. General damages are available as part of all civil actions and, in such cases, issues of stress, inconvenience, embarrassment and upset, are part of the decision-making process of the Court.

Some legal actions, such as defamation, are based solely on subjective determinations of abstract values. It is hard to understand why a court should not be able to make a determination as to the value of pain and suffering, but can make a determination as to the value of the loss of a person's reputation.

The impediment in New Zealand seems to be an institutional reluctance to award damages for pain and suffering. This stand may have been born of the perception that to do so would mark a return to compensating people for personal injury, and it seems that those responsible for the development of the law in New Zealand are determined that this will not occur.

The paper's general description of the ACC scheme as "state-funded" blurs the line between the citizen and the state. It is not really a state-funded scheme, but a citizen-funded social insurance contract.

The integrity of the ACC scheme as a whole is under increasing pressure. The long-term viability of the scheme depends on its ability to change in response to public concerns about where the lines should be drawn on liability for harming others. The Society is concerned that that is not occurring fairly with respect to victims of crime. It does not, however, want a return to the right to sue for civil wrongs. A solution which addresses these concerns yet preserves the integrity of the ACC scheme, is to respond to this change by providing for greater compensation available under ACC entitlements.

Comments on the Commission's specific questions

Finally, the paper poses direct questions, in relation to the proposed compensation of victims of crime.

Q1 Are there any other issues that may be of concern to victims?

Yes. If the underlying principle, as set out in paragraph 1.4 of the Paper, is to compensate victims of crime for injury, loss or damage, then logically all victims must be considered for compensation arising out of any crime that has been committed. An examination of the implications of this approach, however, shows its impracticability. For instance:

Victims

Victims may be either those directly affected by a crime (e.g. the person physically assaulted) or somebody indirectly affected by a crime (e.g. a spouse who has to give up work to provide for a victim who has suffered personal injury).

While the ACC provides for treatment, rehabilitation and compensation for victims of crime who have suffered personal injury (as defined), it does not provide compensation for those indirectly affected.

Except in the case of damage to dentures or prostheses that replace part of the human body (see s26(1)(e)), the IPRC Act does not provide compensation for loss of or damage to property.

In fatal cases ACC provides funeral expenses, lump sum and weekly compensation for the dependent spouse or other person and any dependent children of the deceased whether or not the death was the result of a criminal act.

Victims of crime may include those closely associated with the direct victim such as a spouse or child (and therefore covered by the IPRC Act), or may be unrelated, but nevertheless seriously affected by the criminal act - for example people who lose their employment because of the death of the proprietor of a business through a criminal act. As a result of losing his or her employment through a criminal act, an employee may suffer mental trauma and be unable to work, thus sustaining economic loss, yet have no redress.

Q2 Should crime victims receive greater entitlements to compensation for personal injury than other accident victims? Why? If so, how much more compensation is required and for what type of loss?

No. While the public is willing to accept limitations on a social contract of accident insurance, it may be more difficult for the public to accept that there should be limitations on compensation for criminal behaviour. It is possible the public could accept that there should be different levels of compensation available, provided the person who committed the criminal act paid the difference, or provided compensation to victims of crime administered by ACC was awarded only after convictions were secured.

However, to afford victims of crime greater entitlements to compensation for personal injury than accident victims would be inequitable. There are many victims of other misfortunes who are also deserving of society's recognition and compassion. Currently such victims have only the right to bring a civil action against the criminal, notwithstanding that in the vast majority of cases such action would not result in any, or adequate, compensation for the injury or damage suffered.

Q3 Should any additional entitlements be administered by the accident compensation scheme, a stand-alone tribunal, or under a hybrid scheme?

By the accident compensation scheme.

If it is considered that crime victims should have greater entitlements to compensation for personal injury, then the Society's view is that the establishment

of separate tribunals would be too cumbersome, and would involve additional administrative processes likely to be inefficient and of limited use to people who are victims of crime.

Incorporating compensation for victims of crime into the existing accident compensation system is seen as preferable. As the paper notes, in determining an order for reparation there must be no double-up between compensation received through the ACC system and reparation ordered by the Court. The simplest way to avoid such a double-up, while keeping the system administratively efficient, is to have ACC determine entitlements for personal injury and administer the process for determining compensation for personal injury due to criminal conduct in co-operation with the Courts.

With respect to people who are not entitled to compensation for loss of earnings, that determination could be made by the Corporation, which could then make recommendations on reparation to fill that gap. The court could oversee that process, to ensure it happened in a timely fashion.

Q4 Should improvements be made to the process for delivering compensation to victims under the accident compensation scheme? If so, what improvements could be made?

Yes. The paper expresses the view that the Corporation is required to respond to timeframes set out in sections 56 and 57 of the Act. The reality of the situation is that often those timeframes are not met, and victims can wait many months before receiving their entitlements. The process for delivering compensation to victims of accidents and of crimes should be fast tracked.

There is an unfortunate crossover between the Sentencing Act 2002 and the accident compensation legislation, where doubling up of compensation is not allowed, but the process for determining compensation would be split. It makes sense to move the process into the compensation arena under timeframes supervised by a probation officer, with judicial oversight, if necessary.

Q5 Do you agree there should be some exception to the rule that mental injury alone is not compensated? Why?

Yes. All victims, of accidents and of crimes, should receive compensation for suffering from mental injury.

Q6 If so, which option do you consider to be appropriate?

The Society supports proposed option 3. Cover should be available under the IPRC Act for mental injury generally, regardless of the cause of the injury, and all victims should be treated the same. Cover could be determined on the basis of the test recently formulated for work-related mental injury.

Q7 If option 2 is appropriate, which crimes do you consider cause mental injury so as to warrant their inclusion in an expanded Schedule 3?

The Society does not support option 2 for the reason that it is difficult to say which crimes cause mental injury so as to warrant their inclusion in an expanded Schedule 3. People who suffered mental injury as result of a specific crime that is not in Schedule 3 might risk receiving no compensation.

Throughout the paper there appears to be an implication that victims of crime will have suffered from some form of physical action against them which results in either physical or mental injury.

Many types of crimes can result in the victim suffering mental trauma. An example is the crime of arson. Arson of business premises may result in the closing of the business with the traumatic loss of employment to many employees; the destruction of a historic church building, with its treasured decorations and contents, could result in mental trauma to many people. The “victims” of a crime may be numerous and widespread.

“White collar” crimes, such as fraud or forgery or breaches of security laws, can result in investor victims losing their life savings and even their homes. The victims are likely to be traumatised and suffer mental injury but, apart from a civil action, have no remedy.

The crime of kidnapping may cause no physical injury yet may lead to mental trauma, which would not be covered by the IPRC Act.

These and numerous other crimes illustrate that many victims of crimes will not be entitled to cover under the IPRC Act. Nevertheless, it would not be appropriate to amend Schedule 3 of the Act to afford cover. Currently such victims have only the right to bring a civil action against the criminal, notwithstanding that in the vast majority of cases such action would not result in any or adequate compensation for the injury or damage suffered.

To provide a compensation system for all “crime victims” would obviously open a “Pandora’s box” of problems. It is difficult to see how such a system could be implemented in an equitable and affordable way. Many victims of crimes would not be entitled to cover under the IPRC Act. It is not appropriate to amend Schedule 3 of the Act to afford cover.

Q8 Should state-funded trauma counselling be available? Why?

Yes. State-funded trauma counselling should be available to all victims who suffer significant emotional trauma. The administering agency can then determine eligibility on the basis of trauma suffered on a case-by-case basis and within the limits of the funds available.

Q9 If so, for what category of crime victims and under what circumstances?

State-funded trauma counseling should be available for both crime and accident victims.

Q10 Should the fines enforcement regimes under the Summary Proceedings Act 1957 and the Crimes Act 1961 be brought into line?

Yes. It would be good to bring the two regimes into line because the Crimes Act provisions are limited. Potential for confusion exists where similar enforcement mechanisms are available under the two regimes, but the circumstances in which they apply are defined differently.

Q11 Can the systems for recovering reparation from offenders be improved? If so, how?

Yes. Reparation orders should take priority over fines for further offending.

Q12 Should there be a state-advances reparation scheme? Why?

No. The risk that the state would not recover costs from the offender would be too high and significant sums of reparation might never be recovered. In the vast majority of cases the perpetrator of a crime will not have the financial resources or ability to compensate the victim or victims fully for injury, loss or damage resulting from the crime. While it may be a commendable goal to investigate the development of a “compensation regime that prioritises victims’ losses and adequately compensates them”, as indicated in paragraph 1.16 of the paper, such a scheme would impose a huge financial burden on taxpayers.

A state-advances reparation scheme is likely to involve substantial costs, which would necessarily be tax-payer funded.

There would also be considerable potential for fraudulent claims under a state-advances reparation scheme.

Q13 If so, should it cover both insured and uninsured loss, or uninsured loss only?

No. See response to question 12.

Q14 Should there be a state-funded reparation scheme? Why?

No. See response to question 12.

Q15 Should consideration be given to an examination of the feasibility of a compulsory insurance scheme for property loss or damage caused by offending?

No. Private insurance is a matter of individual choice.

Q16 Is the funding and coverage of the existing special assessment schemes adequate?

The Society is not in a position to answer this question. However, it appears that the special purpose assistance schemes are not used very often. It is unclear why this may be the case. The Society questions whether it is necessary for the existing special assessment schemes to have arbitrary caps.

Q17 Is there a need for additional special assistance schemes, and if so, what schemes and to whom should they apply?

N/A.

Q18 Should a levy be imposed on offenders? Why?

No. As mentioned above, in most cases the perpetrator of a crime will not have the financial resources or ability to compensate the victim or victims fully for any injury, loss or damage resulting from the crime. Such a scheme could not in reality provide full or even partial protection for all potential victims. Any such scheme would impose a huge financial burden on taxpayers. Further, the administration costs to enforce levies would exceed the amount collected. If, however, any levies

were to be imposed on offenders they might best be collected through the fines mechanisms.

Q19 If so, on what categories of offenders should it be imposed? For example, should it be imposed on traffic offenders, including those who commit infringement offences? Should it be imposed on offenders sentenced to imprisonment?

See response to question 18.

Q20 Should a levy take priority over reparation and/or fines? Why?

No. See response to question 18.

Q21 What should the money raised be used for? Do you agree with the Commission's view that it should be paid into the consolidated fund rather than an earmarked pool?

N/A.

Yours sincerely

A handwritten signature in black ink, appearing to read 'John Marshall', written in a cursive style.

John Marshall QC
President