Briefs

COMPENSATION

A new victim rhetoric in Victoria

IAN FRECKELTON examines changes to criminal injuries compensation in Victoria.

On 1 July 1997 Victoria became the only jurisdiction in Australia to deny to victims of crime an award of financial compensation for the pain and suffering that has resulted from criminal conduct. By a revamping of the entitlements of victims of crime introduced by the Victorian Government in December 1996, Victoria joined New Zealand and a number of United States jurisdictions in declining to provide any form of financial award on the part of the state to people who have suffered mental health consequences as a result of crimes such as rape, serious assault and armed robbery. The signs are that the Victorian initiative, which stands to save the state tens of millions of dollars, may well be followed by other allegedly cash-strapped jurisdictions. By mid-1997, for instance, the ACT Attorney-General's Department had released a Discussion Paper in which the position adopted was that: '[T]he value of a monetary payment to assist a crime victim to recover from their ordeal is dubious. The new Victorian approach of providing crime victims with free crisis counselling services as soon as possible after their ordeal, and to continue to provide counselling where it is needed, has much to commend it' (p.23).

The justification advanced

The Victorian Attorney-General, Jan Wade, in her Second Reading Speech to the 1996 amending legislation[1] indicated that 'it is not at all certain' that the monetary benefit that victims of crime had been deriving from compensation for pain and suffering was assisting victims in 'coming to terms with the offence or in seeking rehabilitation'. As well, she argued that it was not apparent that the then compensation system had been meeting the 'real needs' of 'legitimate victims' of crime for assistance in recovering from their injuries. This, she said, was because in most cases the compensation hearing does not take place until many months, sometimes years, after the injury has been sustained by the victim: 'Consequently the only time the victim receives any form of counselling is, in many cases, for the purposes of the Tribunal hearing, rather than to reduce the emotional impact of the crime shortly after it has been committed. This can result in the victim's injury being unnecessarily exacerbated.' Finally, the Attorney-General asserted that legal and medical costs awarded in the compensation process often exceeded the actual amount of awards for injuries.

The new scheme

Applications for compensation for financial loss remain available in Victoria, and in fact in some instances have been extended. As well, applications can be made for expenses incurred in lengthy therapy from psychiatrists and psychologists. A positive innovation of the *Victims of Crime Assistance Act 1996* (Vic.) is a voucher system allowing up to five free visits to a bank of mental health professionals in the immediate aftermath of prescribed crimes.

The Victorian initiative represents a complete rethink of the criminal injuries compensation process. It constitutes an unequivocal rejection of a core element of the previous scheme. The changes were allegedly motivated by a perception that compensation delayed is compensation of little therapeutic utility. It was contended by the Attorney-General that the gap in time between onset of injury and obtaining of counselling (for the purposes of Tribunal application) could result in aggravation of the victim's psychological injuries, presumably because it was felt that the healing process could not begin until a Tribunal application is concluded. However, she did not support this assertion with any empirical or other justifications.

Most concerning from the point of view of child and domestic sexual assault victims, is that the attitude of the Victorian Government appears to deny the factors that all too frequently have impelled victim/survivors of sexual assault to be reticent in complaining and reporting to authorities. It is so often a combination of threats, manipulations and the psychiatric consequences of assaults that have resulted in victim/survivors being disinclined to take steps in relation to formal reporting of crimes. The fact that these factors have also militated against victims seeking counselling is misunderstood by the rationalisations advanced on behalf of the new legislative scheme. If it is the financial inducement of a criminal injuries compensation award that has often put victims in touch with the therapy that has allowed them to embark on the road toward recovery, albeit at first for the purpose of enabling a claim for compensation, that should be recognised as a positive feature of the scheme rather than an indictment of it. The curious notion that interaction with professionals after a lengthy hiatus since the criminal incident will exacerbate the psychological injury appears predicated on the idea that without such confrontation with memories of the crime, the victim/survivor will in the natural course of things, get better — a view that defies the collective experience of professionals who have had contact with such people.

Changes to schemes

The origin of the Victorian changes (although this has been indignantly denied) probably lies in the fact that the cost of each of the Australian crimes compensation schemes has tripled over the last decade. Community awareness of people's rights to make application has been the major contributor to the phenomenon. The schemes, in short, have buckled under their own success. In addition, post-traumatic stress disorder as a manifestation of the psychiatric damage caused to many victims of crime has become better understood within the legal community and has regularly formed a basis of claims for compensation for victims of a variety of crimes, most particularly sexual assaults. Legal representation of applicants for compensation has professionalised and num-

bers of psychiatrists and psychologists have devoted parts of their practices to preparation of crimes compensation reports and giving evidence before decision-making bodies on the subject. Appeals against first instance crimes compensation awards have proliferated. This has made easier the claim by politicians and bureaucrats intent on reducing expenditure that the domain of victim compensation has been 'taken over' by lawyers and mental health professionals.

In New South Wales and Queensland, changes to crimes compensation legislation in 1995 and 1993 respectively have pursued the objectives of reducing expenditure and securing greater consistency of decision making by the more benign means of imposing a cap on awards for different categories of injuries sustained as a result of criminal conduct through the use of 'Tables of Maims'. A NSW Joint Select Committee on Victims Compensation in May 1997 issued its 'First Interim Report' entitled 'Alternative Methods of Providing for the Needs of Victims of Crime'. As yet there is no indication of whether the Committee will recommend a scheme similar in any material way to that now existing in Victoria.

Significance of changes

What has distinguished the development in Victoria is that the prime motivator for making application for compensation (and so for making contact with mental health professionals to facilitate applications), the award of compensation for *pain and suffering,* is what has been removed. This is the most serious vice of the legislative change. While undoubtedly some unmeritorious awards have mistakenly been made to those who have managed to dupe Crimes Compensation Tribunals, the overwhelming number of applications have been brought by victims who have been able to prove, on the balance of probabilities, that they have been adversely affected, to varying degrees, by criminal behaviour. Certain categories deserve special mention. Victims of childhood abuse and of adult sexual and domestic physical assault have figured in increasing numbers as applicants. This has been a positive step from the point of view of public health. For many applicants the award by an organ of state, especially in those jurisdictions where a hearing in person has tended to take place, has been highly significant. It has marked a symbolic and real acknowledgment on behalf of the community that what victims have said has happened to them has been believed and is acknowledged as having had an adverse impact on their lives. It has provided, too, a modest but tangible token of the community's awareness of the pain and indirect financial penalty suffered by victims of many kinds of criminal conduct. Sometimes the money has been spent on security measures for a dwelling in which a crime has taken place; sometimes it has enabled a person to obtain alternative housing or even move into rented housing instead of living on the street; on other occasions it has enabled a small holiday or the purchase of some small 'luxury' possession that for the first time has allowed an indulgence in an otherwise victimised existence. It has usually been money well spent.

The Victorian Government has said nought in its statements in defence of its disembowelling of awards for pain and suffering in relation to other justifications traditionally advanced on behalf of the scheme which until then had received bipartisan parliamentary support since 1972. Such government schemes allow egalitarian receipt of compensation by victims of crime, rather than advantaging those either financially placed to be able to bring civil actions, or who have been victimised by a person in possession of assets and so able to pay damages ordered by a court for trespass to the person.

It is to be hoped that the allure of the savings undoubtedly already being reaped by the mean-spirited Kennett Government's overhaul of the crimes compensation system in Victoria will not attract ready emulation in other jurisdictions.

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References

1. Victorian Hansard, Legislative Assembly, 31 December 1996.

INTERNATIONAL LAW

Confronting crimes against humanity

Former Filipino comfort women are bringing an action against the Japanese Government. MYINT ZAN considers international legal issues relevant to their case.

Ustinia Dolgopol's article 'Cold Comfort' ((1996) 21(4) *Alt.LJ* 156, is a superb analysis of the legal and non-legal dilemmas and difficulties the 'comfort women' from various Asian countries, who were sexually enslaved by segments of the Japanese military during the Second World War, have had to encounter in their search for acknowledgment, compensation and justice.

Recently this writer heard on a BBC news report that former Filipino 'comfort women' have finally lodged a law suit in a Japanese court to obtain monetary damages from the Japanese Government. The comfort women are seeking compensation from the Government for the actions of its soldiers which had used them as 'sex slaves' during the Japanese occupation of the Philippines. The sexual enslavement of the comfort women took place more than 50 years ago and they only recently made public their harrowing experiences.

Not being in any way involved with the case which apparently is now in Japanese courts, the writer is unaware of the details of the actual legal proceedings. However, from the standpoint of a student of international law, the comfort women's case raises interesting legal issues.

One of the substantive issues that could be considered is whether international laws were breached by Japanese soldiers during the Second World War in forcing the Filipino women to act as their sex slaves. Concomitant to this issue is what other contemporary developments in international human rights law should be taken into consideration.[1]

At the end of the Second World War the Tokyo tribunals which tried major Japanese war time leaders ruled that they had breached, among others, laws and customs of war regarding treatment of prisoners, non-combatants and the civilian population. The Tokyo tribunals ruled that the 1929