THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 46

Criminal Injuries Compensation

REPORT

OCTOBER 1975

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

The Commissioners are -

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CONTENTS

TO: THE HON. N. McNEILL, M.L.C.
MINISTER FOR JUSTICE

TERMS OF REFERENCE

1. The Commission was asked to conduct a review of the *Criminal Injuries (Compensation) Act 1970*.

2. The original terms of reference were confined to reporting on a proposal that the Act be amended for the purpose of increasing the maximum amounts of compensation payable thereunder, and of ensuring that the amounts are adjusted from time to time in line with the fall in the value of money. The Commission considered that it could not satisfactorily deal with these questions except as part of a general review of the Act, and accordingly sought and obtained a reference in terms of paragraph 1.

WORKING PAPER

3. The Commission issued a working paper on 3 June 1975. A list of those who commented on the working paper is contained in Appendix I to this report. The working paper itself is reproduced as Appendix II.

4. The working paper contains a synopsis of the present Act (paragraph 3), a table setting out particulars of claims made under the Act (Appendix II) and an outline of the law elsewhere (paragraphs 8 to 10 and Appendix III). In paragraphs 12 to 60 of the paper the Commission discussed the operation of the Act and set out its provisional views. Paragraph 61 lists the questions which the Commission regarded as the most important, and upon which it sought the views of those interested.

DISCUSSION AND RECOMMENDATIONS

Compensation orders

5. The Commission considers that the basic purpose of the *Criminal Injuries (Compensation) Act* is to provide a simple means whereby a victim of a crime of violence can

obtain some compensation for the injury suffered. From this point of view the structure of the present Act is defective and should be amended.

6. At present, a compensation order is made against the offender (s.4(1)), and the victim is required to approach the Government for the exercise of a discretionary power to make payment in his favour (s.7(3)). In paragraphs 12 to 16 of the working paper the Commission discussed the question whether the order should be made against the Consolidated Revenue Fund in the first instance, and concluded that it should because -

(a) the purpose of the legislation is to compensate the victim, not further punish the offender; and

(b) offenders rarely have the means to pay the amount of the award, and the victim almost invariably looks to the State for payment.

The Commission pointed out that to make the Consolidated Revenue Fund primarily liable would bring the form of the remedy into line with current practice and experience (paragraph 16).

7. All those who commented on this question, including the Law Society, the Crown Law Department and the Commissioner of Police, agreed that the order should be made against the Consolidated Revenue Fund (with the State possibly having some right of recourse against the offender: see paragraphs 31 to 34 below). This is the position in Victoria and the United Kingdom. It was also the position in New Zealand before compensation for criminal injuries was absorbed into the scheme created by the *Accident Compensation Act 1972*: see working paper, paragraph 10.

The Commission recommends that the Act be recast accordingly.

8. If the Act is to be amended so as to make the compensation payable directly out of Consolidated Revenue, it would appear to follow that it is not necessary to link, as at present, the determination of an award of compensation to the offender's criminal trial. The existing statutory scheme makes no provision for the case where the assailant is unknown or cannot be found, or is unfit to plead, or, probably, is acquitted on the ground of insanity: see paragraphs

38 to 40 of the working paper. There is at present a non-statutory ex gratia scheme (see paragraph 4 of the working paper) to provide some cover in this area, but it is seldom used, possibly because it is little known. However, it cannot, because of its very nature, be as satisfactory as a statutory scheme, which can lay down rights and liabilities and prescribe the procedure by which applications are to be determined.

9. It would also appear to follow that the final decision as to whether the State should pay compensation should not be made confidentially, as it is at present, after taking into account reports not disclosed to the applicant. It should be made by a body before which the applicant can argue his case and exercise the opportunity of rebutting any unfavourable evidence. Whether such a body should be the original trial court or an independent tribunal is an important matter, about which the Commission had no settled views at the time of the working paper. For reasons set out below (see paragraphs 11 to 26), however, the Commission is now firmly of the opinion that an independent tribunal, not involved in the criminal trial, is the appropriate body. Accordingly, in the Commission's view, the present approach, under which an application for compensation is decided partly by a court and partly by a Minister and which potentially accommodates certain deserving cases only by means of an ex gratia scheme, should be replaced by one whereby all questions are decided by an independent tribunal, as in Victoria and the United Kingdom.

10. The majority of commentators, including the Commissioner of Police, the Department for Community Welfare, Mr. Justice St. John of the Australian Industrial Court, and an officer of the Crown Law Department, favoured the tribunal approach. The Law Society, Mr. R.H. Burton, S.M., another officer of the Crown Law Department and the Australian Labor Party (W.A. Branch) considered that the function should remain with the trial court.

The tribunal approach

11. The question of what body should determine the question of compensation is discussed in paragraphs 45 to 47 of the working paper.

12. The Commission considers that generally, and with particular regard to the implementation of some of its other proposals, there are many positive advantages in setting

up a separate tribunal (to be called the Criminal Injuries Compensation Tribunal) to deal with such claims. These advantages include the following.

(a) A tribunal could determine claims in cases where there has been no criminal trial.

(b) A tribunal could, more readily than trial courts, evolve a consistency of approach.

(c) A tribunal could more conveniently apply a uniform limit of compensation in all cases, regardless of the jurisdiction in which the criminal charge was heard.

(d) A tribunal could, more appropriately and easily than trial courts, conduct its proceedings informally.

(e) The existence of a tribunal would ensure that the question of guilt or innocence was kept as separate as possible from the question of compensation.

(f) A tribunal could, more readily than trial courts, make interim orders for compensation where appropriate, and generally should be able to deal with claims more quickly.

These points are elaborated in paragraphs 14 to 26 below.

13. Against the foregoing it could be argued that a tribunal would need to hear *de novo* the material evidence which a trial court has already heard. This would be time-consuming and wasteful.

In most cases, however, the fact that the applicant had suffered injury as a result of a criminal offence would not be in dispute; a tribunal could ascertain this adequately by perusing the transcript of the criminal proceedings or examining the material parts of the police file. (In Victoria there is a standing administrative practice by which the Tribunal is accorded access to such files: see paragraph 30 below.) Moreover, the matters that normally might be in dispute in the compensation daim would usually not have been dealt with as such in the

criminal trial: for example, the precise extent of the victim's injury or whether his conduct contributed to his injury. A tribunal could hear fresh evidence upon such matters.

At present, the Supreme Court and the District Court are empowered to hear further evidence as to compensation at any time after the conclusion of the criminal trial: see the *Criminal Practice Rules*, Order XXC. But no comparable power exists with regard to courts of petty sessions. Moreover, it is questionable whether a court which has received and assessed certain evidence for one purpose - that of criminal guilt - is necessarily the best body to receive and assess further evidence bearing upon closely-related matters for another purpose - that of civil compensation. This is particularly so where a different standard of proof would, if the Commission's recommendation is adopted, be applicable: see paragraph 23 below.

(a) Cases where there has been no criminal trial

14. In paragraphs 38 to 40 of the working paper, the Commission discussed whether compensation should be able to be awarded in cases where the offender is not in fact brought to trial. From the victim's point of view it makes no difference whether the offender has or has not been brought to trial. The Commission asked for comment on the question "whether victims of offences by persons who are not brought to trial should be compensated."

All those who commented on this question, including the Crown Law Department, the Law Society, the Community Welfare Department, the Commissioner of Police and the Australian Labor Party (W.A. Branch), agreed that compensation should be available in such circumstances. The Commission agrees, and so recommends.

15. On that basis, a tribunal would be better able to deal with such claims than would the ordinary courts. The commission had tentatively suggested (see paragraph 47 of the working paper) that, if this amendment were to be made and yet jurisdiction were to be left with the ordinary courts, the application could be made to the court which, if there had been a trial, would have had jurisdiction. However, such a rule would be exceedingly difficult to apply in practice. Its application would be contingent upon the unknown and perhaps unknowable factor of what charge would be laid against the particular offender if he were identified and apprehended: see *R. v. Grieve* (1975) 10 S.A.S.R. 265 for some of the difficulties involved in applying such a rule.

The Law Society suggested that a District Court judge be nominated to determine applications for compensation where there was no trial. But if this suggestion were followed, it would seem reasonable to follow it with regard to all such cases: see paragraphs 27 and 28 below.

(b) Consistency of approach

16. Consistency becomes of increasing importance as the maximum limits of compensation are raised, particularly if the adjudicating body is empowered to have regard to any money payable to the victim in respect of the same injury from any other source: see paragraph 38 below, and note s.17 of the *Criminal Injuries Compensation Act 1972* of Victoria.

A single tribunal would better be able to evolve a consistency of approach than would a multiplicity of courts. As pointed out in paragraphs 27 and 28 below, the particular form of tribunal the Commission recommends - consisting of a District Court judge - would be particularly well placed in this regard.

(c) Uniform limit of compensation

17. The present limits of compensation are $300 or $2,000, depending upon the status of the court which hears the criminal charge: see paragraphs 27 to 33 of the working paper. As the Commission pointed out, the nature of the charge is not invariably a reliable indication of the injury inflicted upon the victim. Indeed, since the issue of the working paper, at least two cases have occurred where very serious injuries arose out of offences which were tried summarily, thus limiting the victim's compensation to a maximum of $300: see *Biasi v. O'Neil* (Manjimup Court of Petty Sessions, No. 176 of 1974); *Carey v. Williams* (Perth Court of Petty Sessions, No. 1404 of 1974).

The Commission considers that it is unjust to victims to provide different limits of compensation according to the jurisdiction and status of the trial court. But to give a summary court the same powers to award compensation as a superior court obviously would be to cut across the general approach to jurisdictional matters. The Commission recommends that, whatever the upper limit of compensation be, it should be the same for all cases. This recommendation can most aptly be implemented within a tribunal approach.

(d) Informal procedure

18. The Commission regards it as particularly desirable that the procedure on an application for compensation should be kept as simple as possible in the hope that most cases can be disposed of without a formal hearing. Not only is this desirable as reducing costs but also it could encourage persons to make application on their own behalf. The Commission noted the comments of a Crown Law Department officer, who has been involved in most of the applications for compensation in this State. He said that in the few years since the Act had been in operation, he had seen "too many examples of victims being swamped by legalism required at times by courts and other times by solicitors, and too often the immediate and urgent needs of the victim have been forgotten." He went on to say that there seemed to him to be a distinct tendency of the courts to elevate the application into a full scale damages action.

19. In New Zealand, by a 1969 amendment to the *Criminal Injuries Compensation Act 1963*, the former Crimes Compensation Tribunal was empowered, unless the applicant objected, to "make such inquiries as it thinks fit as to the circumstances surrounding the injury or death.… and as to the nature and extent of any such injury....or as to any other matter to which the application relates" (s.12(1)). With the prior consent of the applicant, the Tribunal had power to make an award of compensation without a hearing (s.12(1A)).

The United Kingdom Criminal Injuries Compensation Board has adopted the same approach. It takes the initiative in seeking further information as to the circumstances of the injury and, where necessary, medical matters relating to it. If the applicant is dissatisfied with the initial decision of one member of the Board, he may seek a hearing before the full Board: see the *Criminal Injuries Compensation Scheme*, published by the Criminal Injuries Compensation Board.

In Victoria, the Tribunal is required to "expeditiously and informally hear and determine applications....having regard to the requirements of justice and without regard to legal forms and solemnities and [it] shall be free to act without regard to or to observe legal rules relating to evidence or procedure" (*Criminal Injuries Compensation Act 1972*, s.11(l)). The Tribunal there disposed of 774 cases in the year ending 30 June 1975, and made awards totalling

$611,828. By contrast, it should be noted that in the total period of its operation the Western Australian scheme has led to only 26 awards totalling $23,226.50.

20. The Commission considers that similar procedural features could, with advantage, be incorporated into the criminal injuries legislation of this State, and could most readily be incorporated if proceedings were to be before a tribunal. It would be extremely difficult for ordinary criminal courts to relax their procedures to the extent required, or to initiate investigations where necessary.

The adoption of an informal approach to the mechanics of proof would, of course, be without prejudice to the standard of proof, which should be the balance of probabilities: see paragraph 23 below.

(e) Separation of criminal trial from compensation claim

21. The tribunal approach has what appears to be a crucial further advantage over the trial court approach. Mr Justice St. John pointed out in his comments one of the dangers of vesting the two functions in the one court. He referred to his experience as defence counsel in cases where the alleged victims, having been informed by the police of their potential rights to compensation, tended to firm up the evidence which they gave for the prosecution.

In his Honour's view, "the right to compensation should not be dependant on conviction because it gives an alleged victim an interest in the criminal proceedings which is likely to cause the victim to exaggerate the extent of injuries received and in some cases to fabricate evidence.....The reporting of and giving evidence about crime should remain a public duty uncontaminated by self-interest."

22. Although in Western Australia conviction does not automatically lead to compensation nor acquittal automatically bar it, there is nevertheless an association in that, most typically, compensation is awarded following a conviction. It seems to the Commission that Mr. Justice St. John's argument that the systems of criminal trial and of victim compensation should be quite separate is a strong one. It is vitally important for our system of justice that a witness should not appear to have, nor see himself as having, a pecuniary

interest in the outcome of a trial. This point is best met by a tribunal approach to criminal injuries compensation.

23. A further argument in favour of separation arises out of the Commission's view, already expressed in paragraphs 13 and 20 above, that the standard of proof in compensation claims should be the civil one, inasmuch as such claims are analogous to claims in tort. A court which has applied the criminal standard to a set of facts in criminal proceedings may find difficulty in applying the civil standard to closely related evidence for the purposes of a compensation claim.

(f) Interim orders; speed

24. The Victorian Crimes Compensation Tribunal has referred to the occasional need to make interim orders: see the 1974-75 report of the Tribunal, tabled in the Victorian Parliament, where reference is made to 38 cases in which advance payments were made to meet financial urgency. Although the Commission does not consider such a need would arise often (in Victoria, the 38 cases referred to amount to about five per cent of total applications), it would seem that such a power is desirable. It would be more appropriate for a tribunal, which would not become in anyway involved with the criminal trial, to make such orders than for the actual or potential trial court to do so.

25. Similarly, where an alleged offender has been apprehended and charged, the fact that jurisdiction is vested in a tribunal means that the matter can, if necessary, be dealt with before the trial itself takes place. The evidence in the compensation proceedings would, of course, on general principles be inadmissible in criminal proceedings. Where an alleged offender has not been identified or apprehended, but the police are still hopeful of doing so, there will similarly be no necessity for undue delay. The Commission understands that one reason why the existing ex gratia scheme available in such circumstances is so inactive is that the Crown is reluctant to resort to it while there is a chance that the statutory scheme may become applicable following the trial of the offender.

26. The Commission considers that a tribunal - which, if set up, must be given power to determine its own procedures - would be likely, in the sort of case where a criminal trial relating to the relevant incident is pending, to await its completion so that the evidence of that

trial would be available in transcript form. Usually this would be an efficient manner of familiarising itself with the basic facts and perhaps being alerted to others that may require further investigation. But the Commission also considers that, where appropriate, the tribunal should not await the criminal outcome. In Victoria, the Tribunal may in its discretion decide to exercise its jurisdiction in such circumstances whenever it is satisfied that, regardless of the outcome of the trial of the accused, there can only be one result in the claim for compensation, i.e. one in favour of the applicant.

Implementation of the tribunal approach

27. One of the supposed disadvantages of creating a special tribunal is the expense; it might be thought that it would be necessary to make a special appointment of a suitably qualified person as chairman of the tribunal, and to recruit a registrar and other administrative staff to service it. However, under the Commission's proposals no fresh appointment need be necessary at all. The tribunal could consist of a District Court judge nominated for that purpose by the Chairman of Judges: cf. the Hire Purchase Licensing Tribunal set up under the *Hire Purchase Act Amendment Act 1973*.

The Commission considers that it is highly desirable that the functions of the tribunal be carried out by a judge appointed for a fixed term of, say, two or three years. However, the Commission recognises that there may be exceptional circumstances in which it would be necessary for the Chairman of Judges to be empowered to appoint other judges to determine particular applications on an ad hoc basis.

The Registrar of the District Court could carry out the administrative functions connected with the tribunal's work. The hearings themselves could take place in the District Court premises, either in a courtroom or in chambers. The extra demands made on the particular judge's time would partially be compensated for by the general saving in the time of other judges and courts.

28. At present, the District Court deals with the vast majority of tort claims for personal injuries in this State and thus a great deal of experience in assessing damages. Typically, the assessment of damages will be the main function of a tribunal in claims for compensation for a criminal injury. In the view of the Commission, the basis of assessment should be

essentially as in tort (see paragraph 37 below), albeit with a maximum imposed as a cut-off point: see paragraphs 43 and 44 below.

The other main sort of problem which will face the tribunal is that of evaluating evidence - for example, as to the effect of the victim's conduct.

Both of these matters are appropriate for determination by a District Court judge.

Standard and means of proof

29. In recommending that the standard of proof be the civil one (see paragraph 23 above), the Commission is not unmindful of the possibility that fraudulent claims may be made in circumstances where no criminal trial eventuates. In the working paper, the question of safeguards against such claims was raised. The Crown Prosecutor submitted that in such cases corroboration should be required as a matter of law. The Commission does not consider that it is desirable to go this far, as this may mean that a meritorious claim could be defeated on a technicality.

30. In Victoria, there is a firm administrative arrangement by which the Crimes Compensation Tribunal is permitted access to the police file: see amendment No. 982 to the Standing Orders of the Victorian Police Force. Whilst this practice relates to all claims, it is particularly important in cases where there has not been a criminal trial. The Victorian Tribunal has informed the Commission that it considers it is appropriate for it to examine all relevant material in the police file, whether it is beneficial or prejudicial to the claimant. By this means the Tribunal has been able to obtain corroboration of the facts in ninety-five per cent of justifiable claims.

The Victorian Tribunal considers that, if such access were not available, it would be necessary for the Tribunal to be supported by an investigatory team, which would be expensive and wasteful. The Commission accordingly recommends that there should be a statutory right to such access, and that the Commissioner of Police and the tribunal, which it is recommended should be established in this State, should enter into a suitable administrative arrangement for its implementation.

If this recommendation were adopted, the ordinary processes by which the cogency of evidence is assessed in judicial proceedings would be able to apply in proceedings before a tribunal of the sort recommended. The experience of a District Court judge is such as to enable him to evaluate evidence in such cases and to apply the proper standard of proof to them.

Right of recourse against offenders

31. At present, if the Crown makes an award to a victim, the Under Secretary for Law takes over the victim's rights against the offender to the extent of the payment: s.9, and see paragraphs 48 and 49 of the working paper. Section 4(4) of the Act provides that an order against the offender may be enforced as a fine. The Crown has so far not attempted to use this method of enforcement. In point of fact most offenders cannot make more than a token repayment, particularly if they have been sentenced to imprisonment.

32. If the award is to be made out of Consolidated Revenue in the first instance, the question arises as to whether the Crown should have a right of recourse against the offender, and if so, what should be the procedure for its exercise. Most commentators agreed that there should be a right of recourse against the offender, but that it should be enforced in civil proceedings including bankruptcy, rather than in criminal proceedings. The Commission agrees, and so recommends.

33. As far as procedure is concerned, one possibility is for an order to be made against the offender in favour of the Crown at the same time as an award is made against the victim. However, this would tend to make those proceedings too formal. The better course, in the view of the Commission, is to adopt the Victorian approach under which the Crown may apply to the Tribunal for an order directing the offender to refund the whole or part of the amount of compensation; Vic. s.21. Any such order may be for the payment of a lump sum or periodical payments, or both: Vic. s.21(2). There does not appear to be a time limit in Victoria, but the Commission recommends that application should not be able to be made later than six years after the award was made in favour of the victim.

In Victoria, no application has been received for recovery from the offender since the Tribunal's inception two years ago. But in twenty-two cases the victim's application for

compensation was adjourned until he had taken steps to obtain compensation from the offender. The Commission understands that, typically, this occurs in cases where the claim, although not fraudulent, appears to arise out of an essentially personal dispute between parties known to each other and where there is no reason to believe that the alleged offender does not possess sufficient means to meet any claim which is established. The Commission recommends that a comparable power to adjourn be available to a tribunal in Western Australia. This would also have the advantage of protecting the Consolidated Revenue from unnecessary claims.

34. In accordance with general principles, the offender, if he wishes to defend the recourse proceedings, should be able to argue his case without being estopped by any decision of the tribunal in relation to the victim, or by the criminal proceedings in which the offender was convicted.

Nature of the award

35. The questions whether the basis of the award should be the same as in a tort action, and whether it should include pecuniary loss are discussed in paragraphs 17 to 20 of the working paper.

36. Most commentators were of the view that the basis of an award should be the same as in tort, although the Crown Law Department considered that hospital and medical expenses should not be recoverable, and that compensation should not be awarded for indignity or outrage: see paragraph 20 of the working paper.

37. The Commission considers that the general principle should be that compensation as for a tort action should be payable, excluding exemplary or aggravated damages, and subject to any maximum that might be imposed. Section 15(1) of the Victorian Act provides a satisfactory precedent for adoption in this State. The subsection is as follows -

> "(1) Compensation may be awarded by the Tribunal under this Act in respect of any one or more of the following matters:-

(a) Expenses actually and reasonably incurred as a result of the victim's injury or death;

(b) Pecuniary loss to the victim as a result of total or partial incapacity for work;

(c) Pecuniary loss to dependants as a result of the victim's death;

(d) Other pecuniary loss resulting from the victim's injury, and any expenses which, in the opinion of the Tribunal, it is reasonable to incur;

(e) Pain and suffering of the victim. "

Insofar as the foregoing section addresses itself to the problem of compensation payable to the victim himself, the commission endorses it and recommends that it be adopted in Western Australia.

38. The tribunal should, however, take into account in fixing the amount of compensation, money paid or payable to the victim under any other benefit scheme - e.g. workers' compensation: see also Vic. s.17. In the case of criminal injuries inflicted by a motor vehicle, insofar as the Motor Vehicle Insurance Trust covers such cases there should be no recovery under the criminal injuries compensation scheme.

The Commission considers that the tribunal should have a discretion to take account of money payable to the victim from other sources as a consequence of his injury - e.g. private insurance which he himself has taken out. This departure from ordinary principles of damages in tort seems justified in view of the policy underlying victim compensation - to give some measure of remedy to persons who are victims of criminal injuries to the extent that they are thereby prejudiced. This approach has been taken by the Victorian Tribunal even though the Act (see s.17) would equally seem to entitle it to deal with the problem in the converse way.

39. In Victoria, compensation with regard to the loss of or damage to personal property is expressly excluded: see Vic. s.15 (2) (b). The Commission considers, however, that the replacement or repair cost of such items as dentures, spectacles, hearing-aids or clothing

damaged in an assault should be recoverable (cf. *Workers' Compensation Act*, 1st Schedule, c1.1), and it so recommends.

Interim awards and periodical payments

40. In paragraph 24 above, the Commission assumed that a need for interim awards may sometimes arise. Accordingly, it recommends that the tribunal be empowered to make such awards in circumstances where it seems appropriate to the tribunal to do so. In any such case, such award should not be able to be set aside, in subsequent proceedings, unless perhaps it was induced by fraud. Interim payments should, of course, be taken into account in final awards.

Periodical payments may also sometimes be appropriate, as in workers' compensation. As with interim awards, such payments should be set off against the final compensation order. No harm is done, and some good may be achieved in particular cases, by empowering the tribunal to dispose of claims in as flexible a manner as possible.

Power to re-open claims

41. The Victorian Tribunal has power to re-open a claim: s.19(1). The Commission understands that this power is utilised so as to enable the Tribunal to compensate for injury to the extent then apparent without foreclosing the possibility of further compensation should the victim's condition deteriorate. A provision such as this seems desirable, and the Commission recommends that a comparable power be included in the Western Australian legislation.

The maximum amount

42. This question is discussed in paragraphs 21 to 33 of the working paper, and comments were invited.

All those who commented on this question considered that the present limits ($2,000 for offences tried on indictment and $300 for offences tried summarily) were too low and should

be raised. The Law Society suggested it should be raised at least to $10,000 and possibly to as high as $20,000. The Australian Labor Party (W.A. Branch) and one other individual commentator suggested it should be set at $10,000. The Community Welfare Department and Mr. Burton, S.M., considered that there should be no upper limit at all. The Crown Law Department suggested a maximum of $5,000.

43. The Commission considers that an overwhelming case can be made for a substantial increase in the amount that can be awarded. Simply to take account of inflation since the first enactment of the legislation the maximum would have to be raised to $4,000. In Victoria the limit, set in 1973, is $3,000, and in New South Wales it is $4,000, set in 1974.

The Commission considers, however, that it would not be enough merely to restore 1970 monetary relativities, i.e. by increasing the maximum to $4,000. When first introduced, the system was avowedly experimental and tentative: see 188 W.A. Parl. Deb. (1970) 1364-1371; 1588-1590. Its utility seems now to be established and accepted. Experience here and in other jurisdictions does not suggest that the average amount awarded approaches anywhere near the maximum: see , for example, Victoria where the average award during the past two years has been approximately $800 or just over twenty-five per cent of the maximum. Yet the Commission's researches revealed that there are occasional cases where the maximum does in fact operate as a cut-off point: see paragraph 24 of the working paper. It is in such cases that the worst hardships occur.

On the other hand, the Commission believes that it is too early, in the light of the relatively limited experience of criminal injuries compensation in this State, to recommend unlimited compensation to the extent of a full indemnity, as in an ordinary tort action. The Commission also believes that it is too early to go so far as in workers' compensation, where the maximum recovery is $32,490: see also the Police Assistance Compensation Act 1964, s.5, discussed in paragraph 6 of the working paper. It is necessary to arrive at a figure which is acceptable to the community at the present time. Having had regard to all the comments received on this matter, the Commission believes that the scheme should provide a level of compensation which would be reasonable in the majority of cases and yet which would not expose the Consolidated Revenue Fund to unlimited liabilities. On this basis, the Commission recommends that the maximum limit be raised to $7,500.

44. In recommending this maximum, the Commission wishes to re-affirm that it should, as now, be treated as a cut-off point, not the maximum in a scale: see working paper, paragraph 21. The Victorian Tribunal evidently found itself in a dilemma at first in this regard (see Practice Note, 47 *Law Institute Journal of Victoria* 358), but it subsequently has affirmed that the upper limit is to be treated as a cut-off point. The Commission recommends that, to avoid any ambiguity, legislation should make it explicit that the maximum figure is a cut-off point, damages being prima facie assessed on a tort basis with modifications, as set out in paragraphs 37 and 38 above.

45. With regard to methods of adjusting the maximum amount from time to time in line with the fall in the value of money, there seem to be three main alternatives -

(i) by amendment of the legislation itself from time to time;
(ii) by variation by the Governor-in-Council;
(iii) by indexation of some kind.

The Commission considers that, if its recommendation to increase the maximum to $7,500 is accepted, there would be a proper and continuing need to assess the scheme and its impact upon the Consolidated Revenue Fund. Accordingly, any provision for automatic increase, by way of indexation (as was suggested by the Australian Labor Party) or otherwise, would be inappropriate. On the other hand, the pressure of Parliamentary time is such that to provide that the maximum could only be increased by amendment of the principal Act would be to build in an element of inertia. In inflationary economic conditions, this is undesirable. Accordingly, the Commission recommends that the maximum should be adjustable by the Governor-in-Council, thus providing governmental control as well as flexibility.

46. The Commission also recommends that the Criminal Injuries Compensation Tribunal report annually to parliament through the appropriate Minister, as the Victorian Tribunal is required to do: see Vic. s.28. In this way, the information necessary for informed public debate upon the maximum level and all other aspects of the criminal injuries compensation scheme would become publicly available.

Who should be compensated?

47. At present it appears that only the immediate victim may claim compensation. In paragraphs 34 to 37 of the working paper the Commission discussed whether the estate of a deceased victim or persons other than the immediate victim (for example his dependants if he dies) could claim.

Estate of deceased victim

48. The majority of the commentators were of the view that the estate of a deceased victim should have no claim. However, the Commission considers that the estate should be put in the same position as regards pecuniary loss as it would have been but for the injury or death. If the victim dies, whether from a cause connected with the offence or otherwise, the estate should be able to claim for expenses and for loss of earnings during any period the victim was under a disability. This is the same principle as that adopted in s.4 of the *Law Reform (Miscellaneous Provisions) Act 1941*, which provides that a cause of action survives the death of a person, but that exemplary damages, and damages for pain and suffering or curtailment of expectation of life are not compensable.

Dependants of deceased victim

49. Most commentators considered that the dependants of a victim who was killed as a result of a criminal offence should be able to claim. The Crown Law Department and the Commissioner of Police, however, did not. The Commission considers that designated relatives of the victim who were financially dependant on him at the time of his death should be eligible for compensation. This is the position in Victoria (see paragraph 37 above), New Zealand and the United Kingdom.

Such a provision would cover compensation for loss of services: e.g. a wife's housekeeping services.

In accordance with the recommendation in paragraph 38 above, the adjudicating body would have a discretion not to make an award to dependants if they were entitled to receive adequate compensation from other sources, such as insurance.

Other Persons

50. In paragraph 35 of its working paper, the Commission also drew attention to the problem of whether, for example, an innocent bystander who suffers severe nervous shock at a brutal assault should be compensated. The Commission recommends that such a person should not be eligible. It seems beyond the basic purpose of the Act to compensate such persons. No commentator suggested that such third parties should be eligible.

Expenses incurred by persons other than the victim

51. Victoria permits a compensation claim for any expenses which in the opinion of the Tribunal it is reasonable to incur: see paragraph 37 above. Examples include funeral expenses, by whomsoever reasonably incurred. In practice the Victorian Tribunal adopts the view that expenses are reasonably incurred if there was a legal obligation to incur them or if the expenditure was otherwise warranted in the circumstances. The Commission considers that a comparable provision should be enacted in Western Australia, and it so recommends.

Contributing Conduct

52. It was pointed out in paragraph 52 of the working paper that it appears that, under s.4 of the present Act, if the victim contributed by his conduct to the injury suffered by him, he is not entitled to any award at all: see *Re Hondros* [1973] W.A.R. 1; see also *Palfrey v. Patterson*, District Court, No. 3 of 1974. All those who commented on this aspect said that contributing conduct should be a ground for reducing the amount of the award, rather than for barring it altogether. The Commission agrees, and so recommends. Reduction of compensation in proportion to a person's contributing conduct is a well established principle in tort actions.

Relationship of victim to offender

53. Under the present Act, in deciding whether to make an award, the court is to take into account whether the victim is or was a relative of the offender, or was, at the time of the

commission of the offence, living with the offender as wife or husband or as a member of the offender's household: see s.4(2); see also paragraphs 53 to 55 of the working paper.

54. All those who commented on this question considered that the victim should not be barred from recovery merely because of his or her relationship with the offender. The Law Society and the Crown Law Department said that such relationship should be a matter to be taken into account in assessing compensation.

55. The Commission confirms the tentative view expressed in paragraph 55 of the working paper that compensation should not be denied or reduced merely because the victim was related to the offender or living with him or in his household. In the Commission's view, the real questions are whether in such a case the victim contributed to his injury or whether the offender would benefit from a compensation order. The question of contributory conduct has already been discussed: see paragraph 52 above. The Commission recommends that where the adjudicating body is satisfied that to award compensation to the victim was really to award it to the offender, compensation should be denied. An award could, however, be made subject to conditions which would prevent the offender benefiting. For example, where the victim is a child of the offender, arrangements could be made to pay the award to the Public Trustee to be held in trust for the victim until he attained his majority, with provision for the Public Trustee to make payments for the child's education. The Commission recommends that provision for such arrangements should be included in the Act.

Multiple offenders, multiple orders

56. As the Commission pointed out in paragraph 56 of the working paper, several co-defendants may each be ordered to compensate a victim up to the maximum. This was held in the South Australian case of *Re Poore* (1973) 6 S.A.S.R. 308. The South Australian Act, under an order is made against the offender in the first instance, has since been amended to provide that in such a case only one order may be made (although each co-defendant could be made jointly and severally liable under it).

In Western Australia, since the issue of the Commission's working paper, a case has occurred where orders totalling $5,000 were made against several co-defendants in a multiple rape case: *The applicant v. Larkin and Others*, decision of Wickham J., 8 October 1975.

57. The Commission considers that if the Act is to be restructured so that compensation orders in favour of the victim are made against the Consolidated Revenue Fund and not, as now, against the offender (see paragraph 7 above), the legislation should provide that the limit of compensation should be related to the incident giving rise to the injury, and should not be dependant on the relatively fortuitous factor of the number of offenders. Most commentators agreed. The Commission recommends accordingly.

The Commission also recommends that, in cases where there are multiple offenders, the tribunal should, for the purposes of recourse proceedings, be required to determine the amount payable by each offender in accordance with his degree of responsibility for the injury.

Costs of application

58. The question whether the tribunal should have power to award costs is discussed in paragraph 51 of the working paper. All but one commentator considered that the adjudicating body should have power to award costs in favour of an applicant.

The Commission agrees with this view, but considers that the award should lie in the discretion of the tribunal. The Commission considers that its proposals, if implemented, should enable cases to be presented quite simply, not infrequently by the applicant himself. On the other hand, victims should not be deterred from seeking compensation because they feel that, whilst they can best do so in the particular case with the aid of a legal practitioner, the costs may be prohibitive. To permit the tribunal to award costs where it seems appropriate to do so would seem to be a proper compromise. Where costs are awarded, they should be on the District Court scale and in addition to compensation.

Where a recourse order is made against an offender, the amount of that order should normally include the amount of the costs forwarded to the victim as well as the amount of the compensation itself, and the Commission so recommends.

59. The corollary is that costs should also be able to be awarded against the applicant. The Commission considers, however, that this should not happen *ipso facto* if the claim is unsuccessful but only where in the opinion of the tribunal the claim, or the manner of

pursuing it, was in all the circumstances without merit. A fraudulent claim, for example could result in such an order.

Rights of appeal

60. The question of what the rights of appeal should be for the victim, the offender and the Crown are discussed in paragraph 50 of the working paper.

61. Most of those who commented on this question were not in favour of full rights of appeal. The Crown Law Department and the Australian Labor Party considered that to give any right of appeal would run counter to the basic purpose of the Act. The Law Society's submission was in similar terms, but it said it was possible that rights of appeal might be appropriate, depending upon how the Act was finally framed.

In Victoria, the applicant can appeal to the County Court in a case where the Tribunal refuses to make an award: see s.13(3).

62. Bearing in mind that the purpose of the Act is to provide a simple and expeditious means for the obtaining of compensation, it appears to the Commission that to grant a right of appeal to an applicant would not undermine this purpose. The Commission does not contemplate that many such appeals would be made, and it is likely that the appellate court (which should be the Full Court) would only concern itself with matters of principle. The Commission accordingly recommends that a right of appeal should be available, but limited to the applicant. The Commission also considers that the tribunal should be permitted, at any stage of proceedings, to state a case to the Full Court: cf. *Workers' Compensation Act*, s.29(9).

63. The Commission considers that, if the claimant is to be granted a right of appeal, it is important that the right should extend to an allegedly insufficient award as well as to a refusal to make an award. It could perhaps be argued that such appeals should be confined to matters of law. However, the Commission considers that the difficulty of maintaining the distinction between appeals on matters of law and appeals on other points is such that it would be preferable to permit the applicant a full right of appeal.

64. As far as the offender is concerned, if the Commission's recommendation in paragraph 33 above is accepted, the occasions when it will be considered worthwhile to seek an order against the offender will probably be few. When such an order is made, however, the offender should have full rights of appeal (i.e. on fact, law and discretion), just as he would have if a civil action had been brought against him in the ordinary way.

Publicity

65. The Commission pointed out in paragraph 57 of the working paper that the present Act seemed little utilised, possibly because it was little known. Incidents which have received some publicity since the working paper was issued tend to confirm that members of the public are insufficiently informed of their existing rights to compensation, and no system exists by which they may be informed.

As at 10 October 1975, only 35 claims have been made since the Act came into force. By contrast in Victoria 835 applications were made for compensation during the period 1.7.74 to 30.6.75.

The Commission recommends that the Government consider the following ways of achieving adequate publicity for the scheme -

(a) distribution of pamphlets or application forms by the police;
(b) distribution of pamphlets or application forms to hospitals, legal aid officers, solicitors, welfare workers;
(c) advertisements in the press ;
(d) the dissemination of public information by the Criminal Injuries Compensation Tribunal.

SUMMARY OF RECOMMENDATIONS

66. The Commission recommends that -

Award against Consolidated

(a) the Act should be restructured so that a compensation order is made against the Consolidated Revenue Fund in the first

Revenue instance;

(paragraph 7)

(b) (i) the function of determining the question of compensation should be given to a nominated District Court judge sitting as a separate tribunal to be called "The Criminal Injuries Compensation Tribunal";

(ii) the appointment of such judge should be for a fixed term, and in addition the Chairman of Judges should be empowered to appoint other judges on an ad hoc basis in exceptional cases;

(paragraphs 9 and 27)

(c) the Act should provide for compensation orders to be able to be made in cases where there has been no criminal trial and where there is an acquittal, whether or not on the grounds of insanity;

(paragraph 14)

Limit of compensation

(d) the limit of compensation should be raised to $7,500 (paragraph 43) which -

(i) should apply in all cases, irrespective of the status of the trial court, the nature of the offence or the number of the offenders;

(paragraphs 17 and 57)

and

(ii) should operate as a cut-off point, not as the maximum in a scale;

(paragraph 44)

(e) the amount should be adjustable by the Governor-in-Council;

(paragraph 45)

Right of recourse

(f) the Crown should have a right of recourse against the offender, by way of application to the Tribunal, and -

(i) any such order should be enforceable only in civil proceedings and not as a fine;

(paragraph 32)

(ii) application should not be able to be made later than six

years after the award was made in favour of the victim;

(paragraph 33)

(iii) the offender should not be estopped by a previous decision of the Tribunal, or by any criminal proceedings;

(paragraph 34)

(iv) in the case of multiple offenders, the Tribunal should be required to determine the amount payable by each of them;

(paragraph 57)

(v) any costs that are awarded in favour of an applicant (see (1) (viii) below) should also be recoverable by the Crown;

(paragraph 58)

Heads of Loss

(g) the compensation award should be as in a tort action for personal injury, including the cost of repair of certain personal items but excluding exemplary or aggravated damages and subject to the limit as in (d);

(paragraphs 37 and 39)

(h) in fixing the amount of compensation the Tribunal should -

(i) take into account money payable to the victim under any other benefit scheme, including, where applicable, that payable by the Motor Vehicle Insurance Trust; and

(ii) have a discretion to take into account any other money payable to the victim as the result of his injury;

(paragraph 38)

Who may claim

(i) in addition to the immediate victim -

(i) the estate of a deceased victim, and the dependants of a deceased victim, should be able to claim compensation for financial loss, but the Tribunal should be able to take into account any money payable to dependants from other sources;

(paragraphs 48 and 49)

(ii) other persons should be able to claim for expenses reasonably incurred as a result of the injury or death;

(paragraph 51)

(j) a victim's contributing conduct should be a ground for reducing the amount of the award, rather than for barring it altogether;

(paragraph 52)

(k) (i) the relationship between the offender and the victim should not be a ground *per se* for reducing or barring an award; and

(ii) the Tribunal should be empowered to order that the award be paid to the Public Trustee for the benefit of a child victim;

(paragraph 55)

Tribunal proceedings

(1) as far as proceedings before the Criminal Injuries Compensation Tribunal are concerned -

(i) the procedure for determining compensation should be informal and the Tribunal should be able to make such enquiries as it thinks fit;

(paragraph 20)

(ii) the Tribunal should be empowered to examine the relevant material on police files relating to the offence, and the Tribunal and the Commissioner of Police should enter into suitable administrative arrangements to this end;

(paragraph 30)

(iii) the civil standard of proof should apply;

(paragraphs 20 and 23)

(iv) the Tribunal should be empowered to determine its own procedures, should be required to deal with claims expeditiously, and should not be bound to await the outcome of the criminal trial;

(paragraphs 20 and 26)

(v) the Tribunal should be empowered to make interim awards and periodical payments, which should not be able to be set aside , at least in the absence of fraud;

(paragraph 40)

(vi) the Tribunal should be empowered to re-open a claim;

(paragraph 41)

(vii) the Tribunal should be empowered to require the applicant to seek recovery from the offender and to adjourn the proceedings until this had been done;

(paragraph 33)

(viii) the Tribunal should be empowered to award costs on the District Court scale in favour of an applicant, and, if the application is without merit, against him;

(paragraphs 58 and 59)

(ix) the Tribunal should be empowered to state a case to the Full Court;

(paragraph 62)

(m) the Tribunal should be required to report annually to Parliament through the appropriate Minister on the operation of the scheme;

(paragraph 46)

Rights of appeal

(n) the applicant for compensation and the offender against whom an order has been made should have full rights of appeal to the Full Court;

(paragraphs 62 and 64)

Publicity

(o) the Government should consider various ways of achieving adequate publicity for the scheme.

(paragraph 65)

(*Signed*) R.W. HARDING *Chairman*

ERIC FREEMAN *Member*

DAVID K. MALCOLM *Member*

28 October 1975

APPENDIX I

List of persons who commented on the working paper-

Australian Labor Party (W.A. Branch)
Mrs. M. Buckroyd
Mr. R.H. Burton, S.M.
Commissioner of Police
Crown Law Department
Department for Community Welfare
His Hon. Judge D.C. Heenan
Law Society of Western Australia
Parliamentary Commissioner for Administrative Investigations
The Hon. Mr. Justice St. John
Mr. B.G. Tennant
Professor W.T. Westling