

The Criminal Injuries Compensation Acts: Do they Discriminate against Female Victims of Violence?

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Using the Western Australian Criminal Injuries Compensation Act 1985 by way of example, in this article I argue that the remedies provided by the state and territory Criminal Injuries Compensation Acts discriminate against female victims of intentionally inflicted physical violence in two interrelated ways. First, the central paradigms upon which the Acts are founded fail to reflect women's experiences as victims of violence. Second, the Western Australian Act grants the Assessor of Criminal Injuries Compensation unfettered discretion to deny or reduce awards of compensation with virtually no public accountability. This discretion is not infrequently used to discriminate against claims made by female victims of violence.

Introduction

A 1995 survey of Australian community attitudes to violence against women reported that 80% of women were worried about violence.¹ There is good cause for this concern, as the statistics demonstrate that there is no "safe place" for women. Women are equally at risk of violence in their homes as on the streets. In Western Australia, for example, 49% of attacks on women in 1994 took place in the woman's own or someone else's home.² Further, 82.9% of women murdered in Western Australia in 1994 were killed by their spouse, a family member, or a

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¹ Australian Department of the Prime Minister and Cabinet: Office of the Status of Women, *Community Attitudes to Violence Against Women* (Canberra: AGPS, 1995), 21.

² (43% and 6% respectively). Only 10% of incidents against men occurred in a residential location. Ferrante, Anna, et al, *Measuring the Extent of Domestic Violence* (Sydney: Hawkins Press, 1995), pp 60-61.

friend.³ Eighty-six percent of violence against both men and women in Western Australia is perpetrated by men.⁴

One-third of female victims of these attacks sustained injuries as a result of the violence against them.⁵ These injuries result in pain and suffering, medical expenses, lost time from work and psychological damage. Because these injuries are the result of *intentionally inflicted acts* of physical violence, the victims are entitled to monetary compensation for their injuries.

Currently, Western Australian law⁶ offers victims of intentionally inflicted acts of physical violence two main avenues of compensation for their losses: a common law tort claim (for example, in assault, battery or false imprisonment); and a claim pursuant to the *Criminal Injuries Compensation Act (WA) 1985* ["the Act"]. In this article, I argue that the remedy provided by the Act (and similarly, corresponding Acts in other Australian jurisdictions) discriminates against female victims of intentionally inflicted physical violence ["female victims of violence"] in two interrelated ways. First, the central paradigm upon which the Act is founded fails to reflect women's experiences as victims of violence. Second, the Act grants the Chief Assessor and Assessors of Criminal Injuries Compensation ["Assessor"]⁷ unfettered discretion

³ Only 42.5% of men were murdered in these circumstances. *Id.*, p 27.

⁴ *Id.*, p 60. The incidents of violence included in this study were stealing by threat or force, personal attacks, threats, sexual assaults, and/or being hit, pulled, pushed, or punched. *Id.*, p 59.

⁵ *Id.*, p 60.

⁶ This article deals specifically with Western Australian law. However, the problems identified herein are not peculiarly Western Australian. The Criminal Injuries Compensation Acts of most other Australian jurisdictions, although varying considerably in their details, raise similar problems to those identified in this article, because of similarities in their provisions. Accordingly, most of the conclusions in relation to the Western Australian Act apply to the corresponding provisions of the Acts of other Australian jurisdictions. In the discussion in part II, below, I will identify these corresponding provisions.

⁷ Prior to amendments to the Act in November 1996, the Act provided only for the position of "Assessor of Criminal Injuries Compensation". This position was filled by a permanent Assessor except during the periods of 11 January 1995-May 1995, and September 1995-present, when the position has been filled by an Acting Assessor. Because of numerous complaints regarding the backlog of claims, section 5 of the Act was amended, and section 5B added, to create the positions of

to deny or reduce awards of compensation with virtually no public accountability. This discretion is not infrequently used by the Acting Assessor to discriminate against claims made by female victims of violence.

In support of these assertions, in part 2, I identify the remedy available under the Act to female victims of violence, focusing on the wide discretionary powers provided to the Assessor to reduce or deny awards of compensation, and the mechanisms which insulate the Assessor's decisions from public scrutiny.

In part 3, I identify differences in how female and male victims of violence experience violence and report such violence to the police. Then, I argue that the central paradigm upon which the Act is founded is a Stranger Violence Model, and I discuss how sections 23 and 24 of the Act reflect this model. Finally, I demonstrate how reliance on this model of violence results in discrimination against claims made by female victims of violence.

In part 4, I review several decisions where the Assessor reduced awards of compensation made to female victims of violence on the basis of inappropriate victim blaming. Then, I review two recent decisions of the Acting Assessor which denied compensation to female victims of violence on the basis of unreasonable refusal to believe their claims. I conclude that because the Act itself provides no guidance into the exercise of the broad discretion under the Act, and permits the Assessor to insulate its decisions from critical review, it discriminates against female victims of violence in its grant of such wide discretionary powers under the Act.

Finally, in part 5, I conclude that the remedy provided by the Act discriminates against female victims of violence,

Chief Assessor and an unspecified number of Assessors. As of June 1997, however, there had been no permanent appointments to any of these positions. The position of Acting Chief Assessor (pursuant to section 5A) is currently filled by the same person who was previously Acting Assessor. Any references to "Assessor" in this article is a reference to the generic positions of Chief Assessor/Assessors created by the Act. Any references to the "Acting Assessor" is a reference to the current holder of this temporary appointment.

and consider what changes might remedy this discrimination.

Remedy available under the Act

The Act provides a system of compensation whereby persons suffering loss or injury in consequence of the commission of a criminal "offence" may apply to an Assessor for an award of compensation for the injury or loss.⁸ Applications for compensation under the Act are made to the Assessor in writing,⁹ and must be made not later than 3 years after the commission of the offence.¹⁰ The maximum award payable under the Act is currently \$50,000.¹¹

An "offence" within the meaning of the Act is a crime, misdemeanour or simple offence for which a person has been convicted.¹² Before making an award of compensation the Assessor must be satisfied *on the balance of probabilities* that the claimed loss or injury occurred, and that it occurred in consequence of the commission of an offence.¹³ The decision as to whether the victim has proved the claim on the balance of probabilities is completely within the discretion of the Assessor.¹⁴

Where the accused has not been convicted (and, accordingly, there has been no "offence"), compensation is still available in limited circumstances. For example, where:

- (1) the person charged with the alleged crime has been acquitted because of unsoundness of mind;¹⁵
- (2) the person charged with the alleged crime is incapable of understanding the proceedings at trial;¹⁶

⁸ *Criminal Injuries Compensation Act (WA) 1985* ["Act"] s 7(1).

⁹ s 16.

¹⁰ s 17.

¹¹ *Criminal Injuries Compensation Amendment Regulations (WA) 1991* ["Regs"] reg 12.

¹² *Criminal Injuries Compensation Act* s 3.

¹³ s 7(3).

¹⁴ The only check on the Assessor's discretion is an appeal to a District Court Judge. Act s 41. No further appeals are allowed. Act s 43.

¹⁵ *Criminal Injuries Compensation Act* s 8.

¹⁶ s 9.

- (3) the person charged with the alleged crime dies before the verdict is rendered;¹⁷
- (4) the complaint or indictment is withdrawn or a *nolle prosequi* is entered in respect of the complaint, or the person charged with the alleged crime is otherwise not brought to trial;¹⁸ or
- (5) no person is charged with the alleged crime;¹⁹

compensation may be available if the Assessor is satisfied on the balance of probabilities that the claimed loss or injury occurred, and that it occurred in consequence of the commission of the alleged offence.²⁰ Again, the decision as to whether the victim has proved the claim on the balance of probabilities is completely within the discretion of the Assessor.

Further, where the accused is acquitted of the crime, and the victim claims that the accused was not the offender, the Assessor may also make an award of compensation. To do so, however, the Assessor must be satisfied upon the balance of probabilities that the alleged offence was committed by someone *other than the person acquitted*, and that the claimed loss or injury occurred in the consequence of the commission of the alleged offence.²¹

Where the accused is acquitted because the Crown has failed to satisfy the required criminal standard of proof, the Act provides no remedy for the victim unless the Attorney General certifies that a claim may be made. The victim may make such an application under section 15 of the Act. This section permits the Attorney General to allow a claim to be made where:

- (1) it would be unjust not to allow a claim to be made; or
- (2) the accused has not been convicted of the offence because the proceedings have been commenced out of time or for other technical reasons not going to the merits of the case.

¹⁷ s 10.

¹⁸ s 11.

¹⁹ s 12.

²⁰ Or, as in the case of section 8, that it occurred in the consequence of the alleged act; s 13.

²¹ s 14.

Again, the discretion accorded the decision is very wide.²²

The Assessor has wide discretionary powers to award or deny compensation under the Act. Section 27 of the Act provides that the Assessor may consider such factors and circumstance "as *he*²³ thinks relevant".²⁴ The Act provides no guidance as to what is relevant. Likewise, the Act provides no guidance as to what is *not* relevant. For example, nothing prevents the Assessor from examining and evaluating a rape victim's sexual history when determining whether to award compensation, so long as the Assessor deems it relevant. This discretion provides wide opportunity for discrimination against female victims of violence in the decision whether or not to award compensation.

The Assessor's discretionary powers are enhanced by sections 23, 24, and 25 of the Act. Section 23 of the Act provides that :

²² See contrary provisions in the Victorian and NSW legislation. Under sections 5 and 6 of the *Victims Compensation Act (NSW) 1996*, a person is eligible for statutory compensation if they are either a primary, secondary, or family victim of an "act of violence". s 6. An "act of violence" is defined as act(s) that have "apparently occurred in the course of the commission of a [criminal] offence". s 5(1)(a). Thus, conviction or acquittal of an offender is not a determinative factor. Rather, the Assessor only must be convinced on the balance of probabilities that a criminal offence has been committed. Similarly, the *Victims of Crime Assistance Act (Vic) 1996* provides that compensation is available to victims of "an act of violence" where "act of violence" is defined as a criminal act directly resulting in death or injury. Sections 3, 7 & 8. This includes an act or omission where the accused is incapable of being criminally responsible because of age, mental impairment, legal incapacity, or the existence of a lawful defence.

²³ Note Parliament's reference to the Assessor using the masculine pronoun "he". This is consistent throughout the Act. The Western Australian Parliament's refusal to conform to gender-neutral language which has become standard in Australia suggests an obvious impediment to equality for female victims of violence. It is especially peculiar considering that for years the Assessor of Criminal Injuries Compensation in Western Australia was, in fact, a "she".

²⁴ s 27 (emphasis added). Corresponding provisions in other jurisdictions include: s30(1)(e) *Victims Compensation Act (NSW) 1996*; s54(f) *Victims of Crime Assistance Act (Vic) 1996*; s10(1) *Crimes (Victims Assistance) Act (NT) 1982*; s5(1) *Criminal Injuries Compensation Act (Tas) 1976*; s25(7) *Criminal Offence Victims Act (Qld) 1995*; s7(9) *Criminal Injuries Compensation Act (SA) 1978*; s15(2)(i) *Criminal Injuries Compensation Act (ACT) 1983*.

“The Assessor shall not make an award of compensation to an applicant if he considers that, by reason of any relationship or connection between the person who committed the offence or alleged offence and the applicant or a close relative of the deceased person, as the case may be, any compensation awarded is likely to result in a benefit or advantage to the person who committed the offence or alleged offence.”²⁵

This section requires the Assessor to deny compensation (which is otherwise entitled) where the Assessor believes that the offender is likely to benefit from the award of compensation. The Act provides no guidelines on how this discretion should be exercised, and does not require the Assessor to have first considered whether the offender’s access to the award could be restricted.

Further, section 24 provides that:

“Where —

- (a) an application for compensation is made in respect of the commission of an offence or an alleged offence; and
- (b) the Assessor is of the opinion that the applicant or a close relative did not do any act or thing which he ought reasonably to have done to assist in the identification, apprehension or prosecution of any person alleged to have committed that offence or alleged offence,

²⁵ s 23. Corresponding provisions in other jurisdictions include: s15(2)(h) *Criminal Injuries Compensation Act (ACT) 1983*; s32(2) *Victims Compensation Act (NSW) 1996*; s54(e) *Victims of Crime Assistance Act (Vic) 1996*. Note that in the Victorian and NSW legislation, the benefit to the person who committed the offence or alleged offence is only a factor the Tribunal/Assessor must have regard to in deciding whether or not to make an award. It is not an outright barrier to compensation. The provisions have not been in existence long enough to ascertain whether the effect in practice is the same.

- (c) the Assessor shall not make an award to that applicant or for the benefit of the close relative."²⁶

This provision leaves entirely to the Assessor's discretion what an applicant "ought reasonably to have done" to assist the police in apprehending and/or prosecuting the offender. The Assessor is subject to no guidelines here, and is not required to consider any extenuating circumstances that might make failure to cooperate with police acceptable under some circumstances.

Likewise, section 25 provides that :

"In determining the amount of an award of compensation the Assessor shall have regard to any behaviour, condition, attitude or disposition of the applicant or deceased person which contributed, directly or indirectly, to the injury or loss suffered by him or to his death, as the case may be, and may reduce the amount which he would otherwise award by such a percentage as he thinks just."²⁷

This section provides the Assessor with the unfettered discretion to assess the behaviour of the victim and attribute blame for the crime. It encourages the notion that criminal behaviour is caused by the victim rather than the offender, yet provides the Assessor with no guidelines on what type of behaviour should be considered contributory. It invites the Assessor to engage in victim blaming which may not have a justifiable basis.

²⁶ s 24. Corresponding provisions in other jurisdictions include: s30(1)(b) & (d) *Victims Compensation Act (NSW) 1996* (where such factors must be considered by the Assessor in determining whether or not to make an award); s52(a)(i)&(ii) *Victims of Crime Assistance Act (Vic) 1996* (where the Tribunal must refuse to make an award unless it considers that "special circumstances brought about that result"); s12(b) & (c) *Crimes (Victims Assistance) Act (NT) 1982*; s5(3A) *Criminal Injuries Compensation Act (Tas) 1976*; s7(9a) *Criminal Injuries Compensation Act (SA) 1978*; s20 *Criminal Injuries Compensation Act (ACT) 1983*.

²⁷ s 25. Corresponding provisions in other jurisdictions include: s30(1)(a) *Victims Compensation Act (NSW) 1996*; s54(a), (c) & (d) *Victims of Crime Assistance Act (Vic) 1996*; s10(1) & (2) *Crimes (Victims Assistance) Act (NT) 1982*; s5(3) *Criminal Injuries Compensation Act (Tas) 1976*; s7(9)(a) *Criminal Injuries Compensation Act (SA) 1978*; s15(1) *Criminal Injuries Compensation Act (ACT) 1983*; s25(7) *Criminal Offence Victims Act (Qld) 1995*.

The wide discretion afforded to the Assessor is especially troubling given that the reasons for the awards made or declined by the Assessor are not subject to public scrutiny. Under the Act, the Assessor is under no obligation to publish written decisions justifying an award or the failure to make an award of compensation.²⁸ To the contrary, section 47 of the Act provides that the Assessor may, if in the public interest, order that there be no published report of the reasons for the refusal of an award of compensation.²⁹ Section 21 of the Act provides only that if the Assessor refuses to make an award of compensation, s/he must provide the *applicant* with the reasons for that refusal.³⁰

The decisions of the Assessor are not reported, and, unlike unreported decisions of the District and Supreme Courts, copies of the Assessor's unreported decisions are not made available to Western Australian legal practitioners in the Supreme Court Library. The Acting Assessor has taken full advantage of the privacy provisions of the Act, and denies all access to nearly all of his decisions.³¹ The exception is the decisions of the current year, which are kept on file at the office of the Assessor, and are available for perusal by the public. However, photocopying these decisions is not permitted. Accordingly, public scrutiny of the nature of the discretion exercised by the Assessor is severely restricted.

Paradigms of violence

In part II, I identified the remedy available under the Act to female victims of violence. In this section, I argue that

²⁸ This is also true of the Acts in other Australian jurisdictions.

²⁹ See also section 43 *Victims of Crime Assistance Act (Vic) 1996*.

³⁰ s 21(2). Further, if requested by the applicant or *other interested person* in writing, the Assessor must furnish to *that person* the reasons for the decision to award compensation. *Criminal Injuries Compensation Act* s 21(1). "Person interested in an application" is defined by section 18 of the Act as the applicant, the alleged assailant, the chief executive officer of the department of the Public Service principally assisting the Minister in the administration of the Act, and any other person who satisfies the assessor that s/he has a substantial interest in the proceedings. See also section 29(4)-(6) *Victims Compensation Act (NSW) 1996*.

³¹ I refer specifically to the Acting Assessor. The previous Assessor did allow access to her decisions for academic research purposes, but the Acting Assessor refused such access.

this remedy discriminates against female victims of violence because the central paradigm upon which it is founded fails to reflect women's experiences as victims of violence.

In support of this argument, in part A of this section, I identify differences in how female and male victims of violence experience violence and report such violence to the police in Western Australia. In part B, I argue that the central paradigm upon which the Act is founded is a Stranger Violence Model, and I discuss how sections 23 and 24 of the Act reflect this model. In part C, I demonstrate how reliance on this model of violence in Western Australia results in discrimination against claims made by female victims of violence because it fails to reflect men's and women's different experiences of violence identified in part A.

Differential experiences of violence

Perpetration of violence

Female victims of violence in Western Australia are, on the whole, more likely than men to suffer violence at the hands of someone they know. For example, in 1994, only 21.7% of female victims of serious assault (including grievous and aggravated bodily harm) reported to police that their assailant was a stranger to them. To the contrary, 53.5% of male victims reported that their assailant was a stranger. Of all serious assaults reported by women, 62.2% were perpetrated by a spouse, family member, or friend. For men, the figure was only 17.6%.³²

Male victims of common assault reported victimisation by strangers in 60.7% of attacks. Women reported common assaults by strangers in only 33.1% of attacks. Forty-one

³² Ferrante, et al, already cited n 2 p27. Note that "Serious Assaults" did not include sexual assaults. Sexual assaults are the exception to the general trend that female victims of violence are more likely than men to suffer violence at the hands of someone they know. Of all sexual assaults against women reported to the police in Western Australia in 1994, 43.2% were perpetrated by a spouse, family member or friend of the victim. Men, on the other hand, were sexually assaulted by a spouse, family member or friend in 60.2% of cases. However, the number of men sexually assaulted by a spouse, family member or friend is still substantially less than the number of women (74 and 366, respectively). Ibid.

percent of common assaults reported by women were perpetrated by a spouse, family member or friend. The figure for men was 9.1%.³³

“Further, 82.9% of all women killed in Western Australia in 1994 were killed by a spouse, family member, or friend. This is nearly twice the figure for men (42.5%).”³⁴

These statistics suggest that female victims of violence are, on the whole, less likely than men to be a victim of stranger violence. Moreover, much of the violence perpetrated against women is at the hands of persons with whom they have a relationship: a friend, family member, or spouse.

Reporting violence

Men and women have differential reporting rates for violence perpetrated against them. One victimisation study found that 54% of male victims of violence reported to police incidents of violence which caused them to sustain substantial, permanent or major injuries. Where their injuries were “slight”, 26% of male victims reported such attacks to police. Where they suffered no injury at all, male victims reported to the police 22% of incidents of violence against them.³⁵

The figures for female victims of violence are quite different. Only 30% of female victims who suffered substantial or permanent injuries as a result of violence reported such incidents to the police. Where they suffered slight injuries, or no injury at all, only 22% of female victims reported the incidents. These figures suggest that women are less likely than men to report violence to police where that violence causes physical injuries.³⁶

A major factor influencing whether a woman reports an offence to police is whether the offence was committed by a spouse or family member. Women are less likely to report incidents of domestic violence (20%) than non-domestic

³³ Id, p 27.

³⁴ Ibid.

³⁵ Id, p 62.

³⁶ Ibid.

incidents (31%).³⁷ Women attributed their failure to report domestic incidents to fear, and to perceptions that the incident was “too trivial” to report. However, women also tend to undervalue the seriousness of domestic violence committed against them. Only 50% of women perceived that violence perpetrated against them by a domestic partner was “considerable” or “major” in seriousness. In incidents involving other offenders, they perceived that 63% of such attacks were of considerable or major seriousness.³⁸ In reality, domestic assaults, on the whole, are not “trivial”. Victims of domestic assault are more likely to suffer injury than victims of non-domestic violence (two-thirds versus one-third).³⁹

Paradigm underlying the Act

A paradigm is a fundamental model or scheme that provides a frame of reference for analysis.⁴⁰ In this section, I identify the central paradigm upon which the Act is founded, and discuss how sections 23 and 24 of the Act reflect this paradigm.

I argue that the central paradigm upon which the Act is founded is what I term the “Stranger Violence Model”. The Stranger Violence Model assumes that the form of violence most commonly perpetrated on all victims of violence (and thus, most worthy of recompense) is stranger violence: where the victim is unknown to the assailant. It assumes that most violence does not arise out of an interpersonal relationship between the victim and the assailant. It is not the result of provocation by the victim. Rather, from the victim’s point of view, it is a random act of violence. The victim has no emotional ties to the assailant, is not reliant upon the assailant for financial support or shelter, and is unlikely to encounter the assailant again outside the criminal justice system.⁴¹

³⁷ Id, p 70.

³⁸ Id, p 71.

³⁹ Id, p 74.

⁴⁰ Babbie, Earl, *The Practice of Social Research*, Wadsworth Publishing Co (4th ed), Belmont 1986, p 37-38.

⁴¹ This Stranger Violence Model is reflected in discussions of contributory conduct in relation to the Act in Jurevic, L, “Between a Rock and a Hard Place: Women Victims of Domestic Violence and the Western

An examination of sections 23 and 24 supports this argument. Section 23 of the Act allows the Assessor to deny an award of compensation where the Assessor considers that the victim's relationship with the offender makes it "likely" that the offender will benefit from such an award. Parliament is justified in its concern that offenders not be rewarded for their crimes through access to their victims' awards of compensation. However, the focus on the *relationship* or *connection* between the parties in this provision suggests that Parliament's real concern is about collusion between the parties in circumstances where the victim and offender are related. This inherent suspicion of violence between intimates supports the Stranger Violence Model for compensation under the Act.

Section 24 of the Act allows the Assessor to deny compensation where the victim has not, in the Assessor's view, done what was "reasonably expected" to assist police in apprehending and prosecuting an offender. The Assessor interprets this to mean, at the least, reporting the offence to the police. Accordingly, where the crime has not been reported to police, the Assessor will not grant compensation.

The Assessor's strict interpretation of "reasonably expected" in section 24 also supports the Stranger Violence paradigm. It presumes that there are no emotional factors (such as a relationship between the victim and the offender) which may prevent or discourage the victim from reporting the criminal act. Rather, it presumes that any failure to report the incident results from indifference, disrespect, or disregard for the law, and, accordingly, the victim does not "deserve" compensation.

Result: Discrimination

As discussed in part A, stranger violence is the predominant form of violence against men in Western Australia. However, this is not true of violence against women. Further, women are less likely to report incidents of violence within the family than violence committed by a

stranger.⁴² Men are more likely than women to report violence against them to police, particularly where the violence results in physical injuries.⁴³

Because stranger assaults are more common among men than women, sections 23 and 24 are less likely to be a factor in claims made by men than women. Thus, women's claims are in practice more likely to bear the impact of sections 23 and 24. There is a greater likelihood that these sections will be barriers to compensation for women rather than men.

Parliament's (unfounded) reliance on the Stranger Violence Model discriminates against women in two ways. First, for the reasons discussed above, it discriminates against women because women's claims are more likely than men's claims to be denied on the basis of section 23 and 24. This makes women's claims (on average) less valuable. Second, it discriminates against women because it refuses to acknowledge their perspectives in the "person" of law. It assumes without investigation that men's experiences are the *norm*, and any departure from the male experience is *deviance*. It marginalises women's experiences as "other", deviant because they do not conform with the male "standard". It denies women a voice in the law.⁴⁴ For these reasons, I conclude that the Act discriminates against female victims of violence.

Abuse of discretion

In part III, I argued that the Act discriminates against female victims of violence because the central paradigm upon which the Act is founded fails to reflect women's experiences as victims of violence in Western Australia. In this section, I argue that the Act discriminates against female victims of violence because it grants the Assessor unfettered discretion to deny or reduce compensation with

⁴² Ferrante, et al, already cited n 2 p70.

⁴³ Id, p 62.

⁴⁴ Feminist theorists have written extensively on the "maleness" of law and the exclusion of women's experiences. See, for example, Graycar & Morgan, *The Hidden Gender of Law*, Federation Press, Sydney, 1990; Naffine, N, "Sexing the Subject of Law" in Thornton, M (ed), *Public and Private Feminist Legal Debates*, Oxford University Press Australia, Sydney, 1995; Naffine & Owens (eds) *Sexing the Subject of Law* (The Law Book Company Ltd, Sydney, 1997).

virtually no public accountability, and the Assessor uses this discretion to discriminate against claims made by female victims of violence. This discrimination takes the form of inappropriate victim blaming, and an unreasonable refusal to believe women's claims of injury.

In support of this argument, I examine the few available examples of the Assessor's exercise of the wide discretionary powers granted by the Act. In part A, I review several decisions where the Assessor reduced awards of compensation made to female victims of violence on the basis of inappropriate victim blaming. In part B, I review two recent decisions of the Acting Assessor which denied compensation to female victims of violence on the basis of unreasonable refusal to believe their claims. In part C, I conclude that because the Act itself permits the Assessor to insulate its decisions from critical review, and fails to provide any guidelines for the exercise of discretion, it discriminates against female victims of violence in the grant of such wide discretionary powers.

Blaming the victim

Section 25 of the Act provides the Assessor with unfettered discretion to assess the behaviour of the victim, attribute blame for the crime, and reduce or deny an award of compensation accordingly. The Assessor's *Statutory Reports to Parliament* reveal that section 25 is a factor in a significant number of applications which are reduced or denied by the Assessor. Between 1991 and 1995, 198 applications for compensation were reduced or refused by the Assessor on the basis of section 25 of the Act.⁴⁵

Because of the limits on access to the Assessor's decisions discussed in part II, there is almost no publicly available information in relation to the Assessor's exercise of discretion in these 198 applications. However, a recent article describing a 1994 investigation into all applications for compensation made pursuant to the Act during 1992 reveals a few rare examples of the Assessor's exercise of discretion under section 25.⁴⁶ This article describes claims

⁴⁵ Assessor of Criminal Injuries Compensation, *Statutory Report-Criminal Injuries Compensation Act 1985, 1991-95*.

⁴⁶ Jurevic, already cited n 41. Ms Jurevic's research was conducted while the Assessor was the head of the Assessor's Office (rather than the

for compensation made by female victims of violence which were reduced by the Assessor on the basis of contribution in the following circumstances:

- where the victim asked an abusive male visitor to leave her home and then pushed him towards the door. The offender proceeded to punch her twice in the jaw and once in the head, breaking her jaw. (10% reduction for contributory behaviour);⁴⁷
- where the victim threatened the offender the day before the criminal incident, and argued with him and punched him immediately before the criminal incident. The offender backhanded the victim onto the bed and cut her neck and forehead with a knife. (20% reduction for contributory behaviour);⁴⁸
- where the victim, afraid that the offender (who had been violent to the victim a number of times before) would hurt her after threatening her in the middle of an intense argument, picked up a knife to defend herself. The offender bashed her in the face and head twice with a chopper. (20% reduction for contributory behaviour);⁴⁹
- where the victim threw half a glass of wine on the offender after he repeatedly accused her of infidelity. The offender immediately head butted the victim, breaking her eye socket and cheekbone. The following day he pushed her head into a wall with such force that it broke a hole in the asbestos panelling. (15% reduction for contributory behaviour).⁵⁰

In these cases, the Assessor exercised the discretion to reduce the victims' awards of compensation on the basis that the victims "directly or indirectly" contributed to their injuries. This exercise of discretion under the above facts constitutes an abuse of the discretion granted to the Assessor under the Act because the victims suffered

Acting Assessor). The Assessor allowed Ms Jurevic's research assistant to access her files for the purpose of this academic research.

⁴⁷ Id, para 27.

⁴⁸ Id, para 31.

⁴⁹ Id, para 37.

⁵⁰ Id, para 39.

serious injuries, and their “provocation” was insignificant when compared with the force of the “retaliation”.⁵¹

In attributing blame for the violence perpetrated against the victims described above, it appears that the Assessor viewed the parties as engaging in mutual combat: engaging in violence of their own free will, after having chosen an opponent of similar size and physical capacities.⁵² However, this was not the case. In two instances, the victims’ “provocative behaviour” consisted of mere assertion of the right to protect themselves or their property. In the other two instances, the victims engaged in minor physical provocation (a punch, and the throwing of wine on the offender), but the retaliatory attack was considerably more violent and harmful than the provocation. Under these circumstance, the victims’ behaviour can not reasonably be characterised as mutual combat.⁵³ The Assessor’s reduction of these claims for contribution was unreasonable and discriminatory.

The sample of cases discussed above is insufficient to draw sweeping conclusions. However, it certainly illustrates that the Assessor was willing to misuse the discretion granted by the Act to robustly attribute blame to victims in circumstances where victim blaming was inappropriate. Although not conclusive, these decisions represent strong evidence of the Assessor’s discrimination against female victims of violence.

Failure to believe women’s claims

In part A, I provided examples of the Assessor’s abuse of the wide discretionary powers provided by the Act in attributing blame to female victims of violence. In this section, I provide two examples of another abuse of this

⁵¹ Id, para 36.

⁵² Ibid; This “pub fight” model of violence is supported by the Acting Assessor’s own description of the application of section 25. In a telephone interview, the Acting Assessor described the application of section 25 in the context of pub and nightclub fights, and explained that one factor which he took into consideration under section 25 was whether victims could have avoided injury had they not been using alcohol or drugs. Telephone interview with the Acting Assessor of Criminal Injuries Compensation (12 May 1996).

⁵³ Id, para 24.

discretion: the unreasonable refusal to believe women's claims of injuries.

1. *In re M*⁵⁴

In *M*, the applicant [Ms M] alleged that she was sexually assaulted by a doctor [Dr G] on 11 occasions while attending on him for medical treatment and expert evidence in relation to a neck injury and claim for compensation arising out of a motor vehicle accident. The Acting Assessor denied compensation for all but one incident. In his reasons for decision, the Acting Assessor demonstrated his inability to appreciate Ms M's life position and experience, and an eagerness to replace her version of events with one which conformed with his own notions of how a victim of this sort of attack should respond.

Ms M claimed that on 11 different occasions, Dr G touched her breasts and vagina. In the affidavit supporting her application, Ms M gave evidence that:

"On my next visit at his West Perth rooms, on an unknown date, he put his hand on my vagina and touched me there. He did not penetrate me. I told him to stop it because I did not like it and he said "It's just a bit of fun". I told him that I would report him and he replied "Go ahead" as nobody would believe me because I was [ethnicity deleted], a recent widow and "unstable as a result of my medical condition". *He also stated he had to continue to see me as he was the only person who could provide a medical report to support my motor vehicle accident claim* (emphasis added). [The third incident].

In 1988, following resolution of my motor vehicle accident claim, I went approximately a year without any treatment at all. Finally, however, because of the pain, I returned to Dr G at St John of God Hospital in Belmont. I consulted Dr G on eight occasions from January 1989 to June 1990, and on

⁵⁴ *In re M* Criminal Injuries Compensation Assessor, unreported, 1 November 1995.

each occasion, Dr G touched my breasts and/or vagina. Annexed hereto and marked "DC3" are copies of my records from St John of God Hospital in Belmont relating to the following dates: 18 January 1989, 26 April 1989, 31 May 1989, 30 August 1989, 25 October 1989, 7 March 1990, 21 March 1990, 27 June 1990. [The 4th-11th incidents]."

The Acting Assessor held that Ms M failed to satisfy him on the balance of probabilities that all but the third incident occurred. He held that he was satisfied on the balance of probabilities that the third incident occurred because Ms M's description of that incident "is detailed with a description of not only what she alleged Dr G did, but her reactions and concerns. It showed, in my view, a clear realisation by Ms M *at the time the incident had occurred* and [sic] that *it was unwarranted*" (emphasis added). In relation to the other incidents, the Acting Assessor held that "there is insufficient detail, description or indication of any *reactions or concerns* by Ms M" (emphasis added).

These statements by the Acting Assessor emphasised above suggest that he was more concerned with whether Ms M *consented* to Dr G's attacks, rather than whether they in fact occurred. In explaining why he considered that Ms M met the burden of proof in relation to the third incident, he focused on the fact that Ms M clearly *realised* that the assault occurred, and that it was unwarranted. In holding that she did not meet the burden of proof in relation to the fourth through eleventh incidents, he mentioned not only that she provided no detail of what occurred in those assaults, but also that she gave no indication of her "reactions or concerns".

This preoccupation with Ms M's reactions and concerns suggests that the Acting Assessor's real concern was why Ms M would return to Dr G eight times after he had already sexually assaulted her. The implication is that Ms M was somehow to blame, that she "quasi-consented" to the fourth through eleventh incidents because she subjected herself to the risk of further assault by continuing to attend on Dr G, and accordingly did not deserve compensation. The Acting Assessor stated that "notwithstanding her allegations against Dr G, Mrs M

chose to re-attend on him for treatment...with the knowledge and clear realisation that he had previously sexually assaulted her” (emphasis added).

These statements demonstrate the Acting Assessor's inability to understand how a woman in Ms M's position might feel compelled to return to Dr G for treatment, and to submit to his attacks to relieve her physical pain. Ms M provided evidence that at the time of the assaults, she was abused, disempowered, injured, recently widowed, and only able to achieve pain relief through Dr G. Rather than accept Ms M's explanation for why she returned to Dr G eight more times, the Acting Assessor chose to disbelieve her, because her explanation did not conform with what his experience told him was “rational”. Rather than articulate this as his reason for denying her claim, the Acting Assessor sought refuge in the lack of detail provided in relation to the fourth through eleventh claims, and held that Ms M failed to establish those claims on the balance of probabilities.

The Acting Assessor then went on to discuss the implications of Ms M's failure to report any of the incidents to the police. Ms M submitted that she failed to report Dr G because “she had a much lower standing in the community to that of Dr G, the fact that Dr G was treating her, his treatment was important in resolving her motor vehicle accident claim and the threat [that she would be] incarcerated in a mental institution”. The Acting Assessor's response to this was “I do not agree.” He advised that even if he had believed Ms M in relation to the fourth through eleventh incidents, he would not have made an award of compensation in relation to those incidents because:

“I am of the view that Mrs M had the wherewithal to report the matter to the police if she had chosen to do so. Nothing in the evidence or information which has been placed before me has demonstrated to me that Mrs M had a psychological or physical disability which prevented her reporting her claims of sexual assault by Dr G to the police.”

These statements again demonstrate the Acting Assessor's inability to understand how a woman in Ms M's position might feel compelled to keep the matter to herself in light

of Dr G's threats and clear position of power over her. Ms M provided evidence that Dr G threatened her, had the power to destroy her motor vehicle compensation claim, and that she perceived his credibility to be far superior to her own. However, the Acting Assessor chose to disbelieve Ms M because her explanation did not conform with what his experience suggested was rational.

In several other claims with nearly identical facts, the District Court of Western Australia held that reasons such as these were valid justification for failure to comply with the requirements of section 24. In *Grant v Giles*,⁵⁵ for example, O'Sullivan J stated that "It seems from the evidence before me that the applicant did not [report the matter to the police] because she was embarrassed and concerned that no one would believe her. In all the circumstances I am satisfied that the applicant should not be denied relief upon the grounds that she ought reasonably to have done more to assist in the detection, apprehension or prosecution of Dr [G]. I think that her reasons for not taking the matter further were understandable."⁵⁶ In *PHO v KEG*,⁵⁷ Williams J stated that "it was the evidence of the applicant she did not feel able to report the respondent to the Australian Medical Association or the authorities because she was of the view that no-one would believe her over such a prominent doctor. She also felt so ashamed and dirty that she could not bring herself to speak about it with anybody, least of all anybody in authority... I accept her evidence in that respect. In my view the applicant did not fail to do any act or thing which she ought reasonably to have done to assist in the detection, apprehension or prosecution of the alleged offender."⁵⁸ The Acting Assessor clearly ignored these District Court precedents in using section 24 as support for his decision to deny Ms M's fourth through eleventh claims.

Ms M failed to report the third incident to the police, as well. However, the Acting Assessor did not deny Ms M

⁵⁵ *Grant v Giles* District Court, unreported, 16 August 1995, 85/1995, SCLN 4568.

⁵⁶ *Id.*, at 5.

⁵⁷ *PHO v KEG* District Court of Western Australia, unreported, 25 July 1995, 5086/1994, SCLN 4528.

⁵⁸ *Id.*, pp 5-6.

compensation on this ground. He did not come to this conclusion in reliance on the nearly identical District Court precedents, nor because he considered Ms M's failure to report the third incident "reasonable" within the meaning of section 24. Rather, he stated that "I believe that at that time, having warned Dr G that she was going to report him, *notwithstanding what she claims he said in reply, she was likely more preoccupied about her own pain and her motor vehicle claim being resolved that she simply put the incident to one side and omitted to report it.*" (emphasis added).

In other words, the Acting Assessor allowed the third claim despite Ms M's failure to report it because he considered that she "forgot" about it in the excitement of her motor vehicle claim and injuries. Ignoring Ms M's clear and rational evidence as to why she failed to report the claim, the Acting Assessor substituted what in his view was a "rational" reason for her failure to report the incident, and determined her claim on this basis.

These examples demonstrate an inability on the part of the Acting Assessor to understand, appreciate, and/or allocate any credibility to a person whose life experiences do not correspond with his own. The Acting Assessor failed to comprehend any of Ms M's reasons for her dealings with Dr G. Rather than conclude that they were a product of her overall life experiences, he simply ignored them and replaced them with his own version of events. This behaviour demonstrates the Acting Assessor's disrespect for the victim and her plight. The result of the Acting Assessor's failure to believe Ms M was discrimination against Ms M in the amount of her award of compensation.

2. *In re S*⁵⁹

In *S*, the victim [Ms S] was a 21 year old student who alleged that she was sexually assaulted on 20 November 1991 as she walked home from the Maylands railway station. Following the assault, Ms S went to a friend's house, but did not disclose to her friend that she had been attacked. Ms S did not report the incident to the police until 27 November 1991, when she was urged to do so by

⁵⁹ Criminal Injuries Compensation Assessor, unreported, 17 March 1995.

her doctor. Ms S was able to provide significant detail of her assault in her report to police. On that date she also attended upon the Sexual Assault Referral Centre for treatment and counselling and provided the Sexual Assault Referral Centre with a report as to the events. In her report to the Sexual Assault Referral Centre, she speculated that the assailant may have been the same man who had raped her several years earlier.

Ms S was a psychologically troubled young woman who had been sexually abused as a child, and raped at age 13. One week before the 20 November 1991 assault, she reported to police that she was being stalked by a man who she believed was responsible for the assault on her at age 13. When she reported the 1991 assault to the Sexual Assault Referral Centre on 27 November 1991, she suggested that the assailant might have been this same man. Her doctors speculated that this may be so, or merely that the fear engendered by the 1991 assault had caused Ms S to perceive the assailant to be the same. They did not express any particular concern about this aspect of Ms S's allegations.

Beyond the evidence of the victim herself, the Acting Assessor had before him reports made by the police, the Sexual Assault Referral Centre, the victim's general practitioner, and one of the victim's psychiatrists. Of all the evidence before the Acting Assessor the only evidence which questioned the veracity of the victim was a report by one of the victim's psychiatrists, which provided that the victim was a "very disturbed, manipulative girl".

Despite the fact that there was no other evidence to the contrary, the Acting Assessor denied Ms S's claim for compensation on the basis that she failed to convince him on the balance of probabilities that the assault occurred. The Acting Assessor cited a number of reasons for his conclusion:

1. that the statement made by the victim to the doctor at the Sexual Assault Referral Centre was not consistent with the report the victim gave to police;
2. that the victim went to the home of a friend following the assault but did not tell the friend what had occurred;

3. that the description of the attack was too detailed;
4. that six days before the attack she reported to police that someone (possibly the man who raped her when she was 13) was harassing her and stalking her;
5. that one of the victim's psychiatrists believed that the victim was "attention seeking and manipulative".

I discuss each of these reasons in turn.

The "inconsistency in the statements" referred to by the Acting Assessor relates to Ms S's failure to advise the police that she thought her assailant was the same man who had assaulted her when she was 13. She mentioned this fact to the Sexual Assault Referral Centre after she gave her statement to the police. More accurately an "omission" rather than an "inconsistency", this issue caused concern to no one involved in the criminal investigation of the assault, or in Ms S's treatment arising out of the assault. There was no evidence that it was anything other than an accidental omission, and the Acting Assessor's reliance on it as evidence of Ms S's deception was unfounded.

The Acting Assessor relied heavily on the fact that Ms S did not tell her friend about the assault on the night that it occurred as evidence that the assault did not occur. However, this pattern is not unusual. Only about 17% of sexual assaults in Australia are ever reported to police.⁶⁰ The fact that Ms S did not tell a friend about the assault later that evening is not indicative of whether or not the assault occurred.

The Acting Assessor's third complaint was that Ms S's recollection of the assault was too detailed. He focused on this as evidence that it did not occur.⁶¹ There was no evidence in support of this position. Neither the police nor the Sexual Assault Referral Centre (both of which have significant experience in evaluating such evidence) made

⁶⁰ Walker, John, *Crime in Australia as Measured by the Australian Component of the International Crime Victims Survey 1992*, Australian Institute of Criminology, Canberra, 1993, p 19.

⁶¹ Compare this with the decision in *M*, where the Acting Assessor failed to believe the victim because her account of the attacks lacked detail.

any comments suggesting that the clarity of Ms S's recollection was beyond that which she should be expected to have one week after the incident. There was no suspicion on the part of anyone who heard the evidence that it was anything other than a true account of Ms S's attack. This basis for discrediting Ms S has no support.

The Acting Assessor also placed great emphasis on the fact that one week before the 1991 assault, Ms S reported to police that she was being stalked by a man who she thought was the same man who raped her at age 13. The Acting Assessor considered this to be evidence that the 1991 attack did not occur, despite the fact that Ms S's doctors and police failed to arrive at this conclusion. Her doctors suggested that the trauma of the various sexual assaults caused Ms S to become confused. They did not suggest that it was indicative of doubt as to whether the assault occurred. Police reported that her concerns about the stalker were "genuine".

Finally, the Acting Assessor expressed great concern about the comments made by one of Ms S's psychiatrists that Ms S was "attention seeking and manipulative". However, this was the only such evidence presented. No other evidence was presented that supported the view that Ms S's veracity should be questioned. Although this report of Ms S's psychiatrist gave the Acting Assessor reason to be alive to the issue of veracity, the lack of any other evidence supporting this conclusion should have been sufficient to weigh the balance of probabilities in favour of Ms S. It is insufficient evidence on its own to support the conclusion that the assault did not occur.

The Acting Assessor's ultimate conclusion that Ms S did not convince him on the balance of probabilities that the assault occurred is puzzling. Although her case was complicated by her psychological problems, there was no evidence that the assault did not occur. Further, none of the experts (other than one psychiatrist) had any concerns about the veracity of Ms S or the truthfulness of her claim. Ms S provided sufficient evidence to meet her burden of presenting a prima facie claim. In the absence of any conflicting evidence, she should have been awarded compensation for her claim. The Acting Assessor's decision that this case did not establish an offence on the balance

of probabilities suggests that his standard of proof for sexual assault victims exceeds the balance of probabilities.

Conclusions: Abuse of discretion

In part A, I provided examples of the Assessor's abuse of the wide discretionary powers provided by the Act in attributing blame to female victims of violence. I argued that these decisions constituted discrimination because they blamed the victim for the assault, even where the force of "retaliation" was far in excess of the "provocation".

In part B, I provided evidence of further abuse of the discretion granted by the Act: the unreasonable refusal to believe women's claims of injuries. I argued that the decisions in *M* and *S* demonstrated discrimination because the Assessor failed to adequately understand and appreciate the life experiences and positions of the victims, and evaluate the reasonableness of their evidence accordingly.

The Assessor's lack of public accountability makes it extremely difficult to monitor the discretion exercised by the Assessor pursuant to the Act. Because the Act itself permits the Assessor to insulate decisions from critical review, and provides no guidelines for the exercise of discretion, I conclude that the Act discriminates against female victims of violence in its grant of such wide discretionary powers.

Conclusions

Although on its face, the Act does not appear to directly discriminate, in application it does clearly discriminate against female victims of violence in two ways: the central paradigm upon which the Act is founded fails to reflect women's experiences as victims of violence in Western Australia; and the Act grants the Assessor unfettered discretion to deny or reduce awards of compensation with virtually no public accountability. This discretion is not infrequently used by the Acting Assessor to discriminate against claims made by female victims of violence. The result is discrimination in awards to women under the Act. Because of similarities between the Western Australian Act

and the Acts in other Australian jurisdictions, this discrimination is not limited to Western Australian law.

What can be done to remedy this discrimination? I set out below some suggestions which, if implemented, should diminish the discrimination identified in this article.

1. The Acts should be amended to reflect the fact that women are very often assaulted by someone they know (specifically, a friend or family member), and that this fact affects whether the crime is reported, but does not affect the victims need for compensation arising out of the incident. Specifically:
 - (a) the Acts should be amended to prevent the Assessor from denying compensation on the basis of a relationship between the offender and the victim unless there is evidence on the balance of probabilities that the parties have colluded to achieve an award under the Act;
 - (b) the Acts should be amended to allow compensation where the victim has not reported the crime to the police, or has refused to cooperate with the prosecution of the offender, under circumstances where the victim believes it is reasonable, including specifically (but not exclusively): where the victim is humiliated by the assault; where the victim is afraid to report the assault; where the victim does not want to break up the family; or any other reason which reflects an understanding of why female victims of violence fail to report such matters to the police.
- (2) The Assessors or members of Tribunals responsible for awarding Criminal Injuries Compensation should not be appointed unless by reason of training, experience, and personality, the person is a suitable person to deal with women's claims and the special problems arising from women's experiences of violence.
- (3) Existing Assessors and members of Tribunals should be educated about the facts of women's experiences of violence so that they are sensitive to the special problems arising from women's claims.

- (4) The wide discretionary powers provided to the Assessors or Tribunals responsible for awarding Criminal Injuries Compensation should be limited to prevent personal prejudices and biases from resulting in discrimination under the Act.
- (5) The decisions of the Assessors or Tribunals responsible for awarding Criminal Injuries Compensation, in a form consistent with the preservation of the privacy of the victims, should be held in a collection located at the Library of each State Supreme Court and be available to members of the public, as well as the legal community, to increase accountability in decision-making under the Act.

By implementing the above recommendations, I argue that awards of compensation made to female victims of violence in Western Australia and other states will be more likely to reflect the nature of their injuries and their compensation needs. Australia's commitment to promoting equal rights of all persons demands that we take all steps necessary to ensure that women are commanded the full rights of citizenship, including the right to adequate compensation for their injuries. The above recommendations will assist in meeting this obligation.