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December 2010, Wellington, New Zealand | REPORT 121

COMPENSATING CRIME VICTIMS

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COMPENSATING CRIME VICTIMS

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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The Hon Simon Power
Minister Responsible for the Law Commission
Parliament Buildings
WELLINGTON

7th December 2010

Dear Minister,

NZLC R121 – COMPENSATING CRIME VICTIMS

I am pleased to submit to you Law Commission Report 121, *Compensating Crime Victims*, which we submit under section 16 of the Law Commission Act 1985.

Yours sincerely

Hon Justice Grant Hammond
President

FOREWORD

In April 2008 the Commission received a reference from the Government to consider whether improvements could be made to existing schemes for compensating victims of crime.

Our Terms of Reference were as follows:

> The Commission is to consider the adequacy of the existing schemes for compensating and making reparation to victims of crime and make proposals for any changes that may be necessary or desirable.
>
> In undertaking this work, the Commission is specifically asked to consider the recommendations in the report of the Justice and Electoral Committee 'Inquiry into Victims' Rights'.

In October 2008 we released an Issues Paper upon which we consulted widely. We are grateful for the feedback we received, particularly from victim support groups.

We have concluded that the current arrangements for awarding compensation to victims are appropriate and ought not to be changed. In reaching that conclusion, we have been very aware of the fact that victims are often not fully compensated for the injury, loss or damage that they have suffered as a result of an offence, and sometimes get no compensation at all. That is generally because offenders are either not identified or have no resource to pay them in the foreseeable future.

The issue we have had to confront is whether the state should do more to compensate victims when offenders do not or cannot. For the reasons set out in chapters 2 and 3, we do not think it should.

However, we believe that there is room to improve current mechanisms for enforcing orders for compensation. In particular, we recommend in chapter 4 that there should be an ability for the prosecution to obtain an order restraining defendant's property when a charge involving loss of or damage to the property of another has been or is to be laid.

This would mirror the restraining order regime that applies when applications for forfeiture orders have been made under the Criminal Proceeds (Recovery) Act 2009.

Warren Young and Val Sim were the lead Commissioners on the project. Allison Bennett and Julia Rendell were the policy and legal advisors who undertook much of the background research and writing.

Hon Justice Grant Hammond
President

Compensating crime victims

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Chapter 1
Introduction

INTRODUCTION

1.1 The Law Commission has been asked to consider the law relating to compensating victims of crime. The terms of reference ask the Commission to consider the adequacy of the existing schemes for compensating and making reparation to victims of crime and make proposals for any necessary or desirable changes. The Commission is specifically asked to consider the recommendations of the Justice and Electoral Committee's *Inquiry into Victims' Rights*.[1]

1.2 The Committee's inquiry was a self-initiated one and its terms of reference were to examine the place of, and outcomes for, victims of crime and their families in the criminal justice system by:

- reviewing legislation affecting victims, including the Victims' Rights Act 2002;
- considering the terminology used for victims;
- identifying services available to victims;
- examining the concept that criminals owe a debt to individuals, as well as society;
- including issues of compensation and reimbursement of costs;
- examining the effect of the current court system on victims, including the role and status of complainants during court proceedings and the adequacy of courtroom layout and facilities;
- examining the place of restorative justice programmes in the criminal justice system and their impact on victims; and
- considering any other relevant matters.

1.3 The Committee's Report was released in December 2007.

1 Justice and Electoral Committee "Inquiry into Victims' Rights: Report of the Justice and Electoral Committee" [2007] AJHR I.7C.

1.4 In 2008, the Law Commission published an Issues Paper, *Compensating Crime Victims*.[2] This Paper looked at the position of victims of crime and the compensation available to them. In particular, the Issues Paper considered options in relation to:

- extending entitlements for personal injury under the accident compensation scheme;
- extending entitlements for mental injury under the accident compensation scheme;
- improving mechanisms for recovering reparation from offenders;
- providing state-funded reparation;
- increasing funding for special purpose schemes; and
- imposing an offender levy.

1.5 The Issues Paper also asked submitters generally whether there were any other issues of concern to crime victims.

1.6 We received 25 submissions on the Issues Paper. A number of these submissions were from victims of crime and shared personal experiences with the Law Commission. Others were from organisations or individuals involved in working with victims of crime or in the criminal justice system more generally. Many of these submissions focused on broader issues relating to the position of crime victims in New Zealand and in the justice system, rather than just on issues related to compensation for such victims.

1.7 Broader issues about the role of victims in the criminal justice system are within the scope of the review of victims' rights being undertaken by the Ministry of Justice. The submissions we received on these issues were shared with the Ministry of Justice. Moreover, since the publication of the Issues Paper, there have been a number of policy changes to address these broader issues which we will explain briefly below. For these reasons, this report will primarily focus on core issues related to compensating victims of crime: that is, victims' state-funded entitlements (under the accident compensation scheme, and through any state-funded reparation) and mechanisms to improve the enforcement of reparation orders.

2 New Zealand Law Commission *Compensating Crime Victims* (NZLC IP 11, Wellington, 2008).

NEW DEVELOPMENTS

1.8 There have been a number of developments in relation to victims' rights and the role played by victims in the criminal justice system following the Report of the Justice and Electoral Committee, as noted above. These developments address many of the broader concerns about the position of victims raised by submissions on our Issues Paper.

Ministry of Justice review

1.9 The Ministry of Justice is reviewing victims' rights. This review aims to improve government agencies' responses to victims of crime and enhance victims' role in criminal justice processes. The Ministry of Justice released a discussion document in December 2009, which included the following preliminary proposals:[3]

- establish a Victims' Service Centre;
- develop a code of practice against which all criminal justice agencies can be made more accountable;
- establish a Victims of Crime Complaints Officer to improve the complaints process and assist in enforcing the Code of Practice;
- require all criminal justice sector agencies to include in their Annual Report to Parliament information about the use of services by victims and any complaints received from victims;
- improve victims' role within the criminal justice process by providing for more communication between victims and prosecutors to ensure victims have the opportunity to be more involved in the case;
- provide further victim information to the court by giving victims the right to say more in their Victim Impact Statement and to read their statement to the court;
- improve the Victim Notification System for victims of serious offences by tailoring the system so victims can choose their level of involvement;
- clarify the rights of victims of child and youth offenders by ensuring the Victims' Rights Act is more explicit as to how it applies to cases in the youth jurisdiction.

3 Ministry of Justice *A Focus on Victims of Crime: a Review of Victims' Rights: Public Consultation Document* (Ministry of Justice, Wellington, 2009).

Changes announced by the Minister of Justice

1.10 The Minister of Justice has not yet announced any final decisions on these proposals. However, in October 2009, he did announce a number of new initiatives to support victims of crime that have all now been implemented.

1.11 First, additional support has been provided for families of homicide victims:

- a top up funeral grant for families of homicide victims, which is administered by the Accident Compensation Corporation;
- financial assistance to allow up to five members of the family of a homicide victim to attend High Court proceedings at a rate of $124 a day and $62 a half day per person (introduced in January 2010);[4]
- an enhanced homicide support service provided by Victim Support, which has funded four regional homicide co-ordinators from July 2010;
- an increase in the discretionary grant for the families of homicide victims from $1,500 to $5,000.[5]

1.12 Secondly, additional support has been provided for victims of sexual violence:

- a Court support service for victims of sexual violence, which provides victims with a trained court advisor and is being rolled out over three years starting from July 2010;
- a new grant for victims of crimes of sexual violence committed on or after 1 January 2010 of up to $250 for dealing with the immediate effects of the crime and the investigation, for example, to cover clothing and personal belongings, temporary accommodation or house repairs.[6]

1.13 Thirdly, the amount of funding for the cost of family members travelling to a court parole hearing has been tripled. The travel assistance scheme is aimed at the victims of serious crime (and their unpaid support persons). If the victim is the family member of a homicide victim, up to 5 family members can be funded. The grant is to a maximum of $3,000 per person to attend court or $1,500 per person to attend a parole hearing.[7]

1.14 The amount of information available to victims of crime has also been improved, including a newly released DVD and three pamphlets providing information on the criminal justice system. The Victims' Charter, released in 2008, sets out the standard of service that people affected by crime can expect from government agencies.[8] A website of information for victims was launched the same year.[9] A victims' telephone line was also launched in 2008 to provide information about the services available to victims and the criminal justice system.

4 See www.victimsupport.org.nz/sites/default/files/Financial%20Assistance.pdf.

5 See Ibid.

6 See Ibid.

7 See Ibid.

8 www.justice.govt.nz/publications/global-publications/v/victims-charter-booklet-a-guide-to-the-victims-charter/documents/23510-Victims-Booklet-13-0.pdf

9 www.victimsinfo.govt.nz

1.15 Many of these initiatives increase the funding for the special purpose schemes discussed in our Issues Paper or create new special purpose schemes.[10] They are in line with many of the submissions that we received on this issue. Given that they have been the subject of both policy and budgetary consideration very recently, we make no further comment about them. Nor do we think that there is any value in making further recommendations for the funding of special purpose schemes of this nature.

Imposing an offender levy

1.16 The Issues Paper discussed imposing a levy on offenders at sentencing as a way to raise revenue that could be used for victims' services.[11] Since the publication of the Issues Paper, the Sentencing Act has been amended to impose a $50 levy on offenders who have been convicted of an offence.[12] It came into force on 1 July 2010. The Act provides that if payment of reparation or a fine by the offender is also outstanding, payments are to be applied first to reparation, then to the offender levy, and finally to the fine.

1.17 The levy must be paid into a separate victims' services bank account. The money collected from the offender levy contributes to funding the additional entitlements and services detailed in paragraphs 1.10 to 1.15.

1.18 We expressed reservations in the Issues Paper about the justification for and cost effectiveness of an offender levy scheme. However, given that it has been introduced, we make no further comment about it.

Providing state-funded trauma counselling

1.19 The Issues Paper discussed the limited funding available for the ongoing counselling of victims who suffer trauma as a result of offending. We asked whether free counselling should be available for either the victims of specified serious crime or all crime victims who suffer "significant emotional trauma".

1.20 All submitters supported state-funded trauma counselling in at least some circumstances, although views as to the appropriate eligibility criteria differed.

1.21 Since the publication of the Issues Paper, there have been two relevant developments. First, the government has restricted the availability of trauma counselling for sexual abuse victims through the accident compensation scheme, although it has recently taken some steps to refine and relax that restriction.

1.22 Secondly, the Victims' Service Centre proposed in the Ministry of Justice review would, if implemented, have the function of co-ordinating the contracting of services to victims and facilitating a network of agencies providing services to victims.

10 New Zealand Law Commission, above n 2, at [2.40]–[2.46] and [4.70]–[4.72].

11 Ibid, above n 2, at [4.73]–[4.81].

12 Sentencing (Offender Levy) Amendment Act 2009

1.23 Both of these developments indicate that services to victims (including counselling) are being actively considered and that they are largely an issue of budget priorities. We have therefore given them no further consideration in this Report.

Focus of this report

1.24 In view of the developments outlined above, we have confined this report to the core issues raised by our terms of reference: the adequacy of existing arrangements for compensating victims of crime and enforcing sentences of reparation imposed by the courts. Chapter 2 sets out the principles that have guided our consideration of the issues; Chapter 3 discusses whether victims' entitlement to compensation should be enhanced; and Chapter 4 recommends changes to improve the effectiveness of the mechanisms for enforcing sentences of reparation.

Chapter 2
Underlying principles

INTRODUCTION

2.1 In the Issues Paper we discussed the principles that underlie any discussion about compensating crime victims. This discussion is substantially repeated here for ease of reference.

2.2 The amount of compensation available to victims of crime has greatly increased since the 1960s, in particular, through the development of the accident compensation scheme and the use of reparation in the criminal justice system. These developments over the last half century are a significant departure from the traditional position, derived from the common law, where victims were required to sue offenders in tort in order to receive any compensation for their loss. Nevertheless, the position of victims in the criminal justice system, and the adequacy of compensation available to them, continues to be a matter of debate and controversy.

2.3 As a starting point for our consideration of the issue, this chapter sets out the relevant principles underlying the extent to which there should be an obligation on the State to compensate victims, beyond minimum welfare entitlements.[13]

TRADITIONAL POSITION

2.4 Traditionally in common law, a clear distinction existed between crime and tort. Crimes were public wrongs against the community at large, resulting in punishment to express society's disapproval, to deter future offending, and to provide community protection. Accordingly, criminal proceedings and their outcome were not designed to be reparative or compensatory in nature. Instead, where an individual suffered injury, loss or damage through the commission of an offence, the onus rested on him or her to recover compensation by suing the offender in tort. In short, criminal proceedings were between the state and the offender for the purpose of determining guilt beyond reasonable doubt and imposing sanctions for wrongdoing against the community. In contrast, proceedings in tort were between the offender and the victim to determine whether the burden of the loss should be shifted from the latter to the former.

13 For a more detailed discussion of the underlying principles see New Zealand Law Commission above n 2, at chapter 1.

MORE RECENT DEVELOPMENTS

2.5 The relatively delineated processes that criminal law and tort law provided for addressing the consequences of crime have undergone significant changes over the last 40 years in three key respects:

- the accident compensation scheme has substantially replaced tort law as the means for compensating for personal injury;
- victims' ability to obtain compensation from the offender through the criminal justice system has been enhanced;
- there is greater participation by victims in the criminal justice process, both prior to trial and at time of sentence.

Accident compensation scheme

2.6 Prior to 1974, the primary mechanisms for securing compensation for personal injury (whether caused by intentional or negligent conduct) were common law remedies in tort. However, in order to address some of shortcomings of these remedies, they were supplemented by compulsory third party motor vehicle insurance in 1928, a workers' compensation scheme in 1954, a criminal injuries compensation scheme in 1963, and social security benefits for the sick or invalid and dependants in the case of death.

2.7 In its 1967 report, the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand (the Royal Commission) asserted that "[t]he toll of personal injury is one of the disastrous incidents of social progress… ".[14] It identified a number of weaknesses with the mechanisms available for dealing with personal injury, including particular problems with tort law. The problems with tort law in cases of personal injury included:

- the difficulty of establishing liability for loss and of attaching a monetary value to that loss, resulting in the law being seen as, at best, uncertain and in some cases arbitrary and capricious;
- the unsatisfactory nature of lump sum awards in cases where the medical future of the victim was uncertain;
- the cumbersome nature of the court process, which was "absorbing for administration and other costs as much as $40 for every $60 paid to successful claims";[15]
- the long delays inherent in the court process which could hinder the rehabilitation of injured persons;
- the limited availability of compensation for accident victims through the tort system, since only those people who could prove wrongdoing could recover damages and then only if the tortfeasor had the means to pay.

14 Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand *Report* (Government Printer, Wellington, 1967) at 1.

15 Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand, above n 14, para 485.

2.8 As a result of these problems, and of the shortcomings of the specific purpose compensation schemes, the Royal Commission recommended an entirely different approach based on the principle of community responsibility. The Commission believed that it was in the interests of the community as a whole that injured persons are rehabilitated and, accordingly, argued that the community should be responsible for ensuring that this occurs. On that basis, the accident compensation scheme replaced the traditional "loss-shifting" structure of proceedings by way of tort action (that is, the shifting of the burden of loss from victim to wrongdoer) with a comprehensive no-fault scheme that spreads the losses associated with personal injury by accident amongst the community as a whole through a system of compulsory levies and general taxation. In effect, the accident compensation scheme is a form of social insurance against all personal injury by accident. Its rationale is that the spreading of losses from accidents across all members of the community has overall social utility, that is, that the overall social and economic benefits of doing so outweigh the costs. This rationale applies regardless of the cause of the injury.

Sentence of reparation

2.9 Since 1985, there have been a number of statutory changes designed to enable victims to be compensated through the criminal justice system for property loss or damage or emotional harm suffered in the context of crime and not covered by the accident compensation scheme. In particular:

- the sentence of reparation was introduced by the Criminal Justice Act 1985, replacing the little-used compensation order;
- a presumption in favour of reparation was introduced by the Sentencing Act 2002, resulting in the sentence being used more frequently;
- procedures for determining quantum and means to pay reparation were established;
- enhanced mechanisms for enforcing sentences of reparation were introduced.

2.10 The rationale for the sentence of reparation is that it would be both unfair to the victim, and costly for the victim and the State, to require the victim to prove wrongdoing by the offender and establish the quantum of loss in separate civil proceedings when this can be done as part of the criminal proceedings.

2.11 However, the sentence of reparation is still a "loss-shifting" mechanism and is subject to some of the same limitations as tort law. It is justified on the basis of being less expensive to the victim than separate proceedings in tort, but its ability to compensate a victim is still dependent upon the attribution of fault to the offender and his or her means to pay. It is not in any sense a system that is designed to spread loss; it merely transfers the loss from victim to offender, as tort law does, and thus depends upon the ability of the offender to accept that transfer. The criminal justice system now more explicitly incorporates a reparative element, but only in terms of the relationship between the offender and the victim; it does not alter the relationship between the victim and the State.

Role of the victim in the criminal justice system

2.12 Victims of crime have also been given much more recognition as key participants in the criminal justice process. The Victims' Rights Act 2002 extended to victims a number of rights within the criminal justice process, including rights to information and the ability to have input into sentencing decisions through victim impact statements. The Sentencing Act 2002 also recognises the potential of restorative justice processes to make offenders more accountable to victims and enables a court to take both financial and non-financial offers of amends by an offender into account.

2.13 These initiatives have given the victim status, albeit in a fairly limited way, as a participant in proceedings that were previously confined to the state and the offender. However, again, they do not in any way change the nature of the relationship between State and victim.

Summary of developments

2.14 In summary, under the current legal framework, crime victims, like other accident victims, are compensated for personal injury under the accident compensation scheme. As a result, losses from personal injury are shared by the community as a whole. In contrast, other losses, including property loss and damage and emotional harm, which are not covered by the accident compensation scheme, are not shared in this way. Victims may recover compensation from offenders who are convicted or sued (and can afford to pay). If they choose, potential victims may also distribute the risk of loss or damage as a result of offending through private insurance, leaving the insurer to shift the distributed loss to the offender to the extent that this is practicable. In this respect, the position of crime victims does not differ from any other person who suffers loss or damage to property, whether as a result of their own negligence or the actions of others.

THE CASE FOR A CHANGE

2.15 Despite these relatively recent initiatives, the status and treatment of victims within the criminal justice system have remained a focus of political and public concern. So too has the extent to which, and the procedures by which, victims receive compensation for their injury or loss. For example, the Justice and Electoral Committee, whose 2007 Report led to this reference to the Law Commission,[16] concluded that existing systems did not compensate victims effectively, and recommended that the government should develop a compensation regime that prioritises victims' losses and adequately compensates them.

2.16 Any change to the existing arrangements in order to materially improve the position of crime victims would necessarily involve a move, to a greater or lesser extent, away from a loss-shifting framework to a framework that spreads the loss amongst the community at large, whether through an expanded social insurance arrangement or a requirement of compulsory insurance.

16 Justice and Electoral Committee, above n1.

2.17 It is difficult to identify good arguments in favour of a "loss-spreading" framework that would be confined to crime victims. Indeed, in the context of overseas criminal injuries compensation schemes, a number of legal commentators have argued that no coherent justification can be found at all, and that this calls into question whether such schemes should exist.[17] Peter Duff, writing about the criminal injuries compensation scheme in the United Kingdom, observed:[18]

> The British Scheme is not alone in its theoretical incoherence. All criminal injuries compensation schemes suffer from this difficulty. The fundamental problem is that it is impossible to find any rationale which satisfactorily justifies singling out the victims of violent crime from other groups of unfortunates for special treatment by the state. […] It is generally accepted that the various arguments traditionally put forward to justify the payment of criminal injuries compensation do not stand up to close scrutiny.

2.18 However, three arguments have been advanced from time to time in both the academic literature and in calls for reform: the obligations of the State arising from the "social contract"; social utility; and the symbolic value of tangible community recognition of victims' losses.

The obligations of the state arising from the "social contract"

2.19 It is sometimes argued that when a crime is committed the State has failed in its responsibility to prevent that crime and is, therefore, obligated to provide full redress to the victim for the injury or loss that he or she has suffered. Proponents of this view appear to rely on social contract theory.[19] The argument runs that, under the implied contract between the State and its citizens that underpins the formation of societies, individuals have ceded to the State their freedom to live as they choose in furtherance of their own self-interest; in return, all citizens are guaranteed certain fundamental rights and freedoms and receive protection from the State against the violation of those rights. A number of submitters who commented on our issues paper were of the opinion that the State has the responsibility to ensure security of the person and, on this basis, victims of crime should be distinguished from victims of accident.

17 See, for example, PS Atiyah *Accidents, Compensation and the Law* (Weidenfeld & Nicolson, London, 1970) at 317–326; David Miers *Responses to Victimisation: A Comparative Study of Compensation for Criminal Violence in Great Britain and Ontario* (Professional Books, Abingdon, Oxon, 1978) at 75– 81; Andrew Ashworth "Punishment and Compensation: Victims, Offenders and the State" (1986) 6 Oxford Journal of Legal Studies 86 at 99–107.

18 Peter Duff "Measure of Criminal Injuries Compensation: Pragmatism or Dog's Dinner" (1998) 18 Oxford Journal of Legal Studies 105–14 at 106.

19 Social contract theory was first introduced by High Grotius in the early 17th century and was refined by the Republican philosophers of the 18th century, notably Jean-Jacques Rousseau and John Locke.

2.20 However, this characterisation of the relationship between the State and its citizens is a misrepresentation of social contract theory and distorts the nature of the protections that the State under such a theory is obligated to provide. As Thomas Hobbes, one of the main early exponents of social contract theory, recognised, the notion of a social contract is a fiction – a useful, but ultimately limited, heuristic device for explaining the nature of the principles of justice and fairness that ought to characterise social arrangements. It does not signify what people who participate in a particular society have agreed to (since they are generally placed in a particular position in that society at birth rather than voluntarily entering it). Rather, as one of the most influential modern social contract theorists has put it, it sets out the principles "to which [people] would agree if they were free and equal persons whose relationships with one another were fair".[20]

2.21 Looked at in this light, a principle of justice and fairness that required complete protection by the state from crime, and full redress in the event of a failure to provide that protection, would be untenable. In terms of the fictional development of a social contract underpinning the formation of a "state", reasonable people simply would not agree to a contract under which the State guaranteed to its citizens that they would not be affected by crime, given that the State cannot control everything its citizens do, and cannot afford even to try. Moreover, such a principle would actually conflict with many of the other principles of justice which "free and equal persons" would see as essential to fair social arrangements. In particular, the fundamental freedoms that we all enjoy necessarily imply that there will be some crime, because the complete prevention of crime, or even the attempt to achieve that end, would entail unreasonable limits on those fundamental freedoms. It is for this reason that, while states now accept some responsibility for investigating crime and detecting and punishing offenders, they have generally been careful (for example, in the context of establishing criminal injuries compensation schemes) not to accept responsibility for all of the consequences of the commission of crimes.[21]

2.22 The State may, of course, accept an obligation to take reasonable steps to prevent crime in specific situations, and may then be liable for a failure to take those steps.[22] But that cannot be translated into an obligation to provide full or even partial protection of all potential victims.

20 John Rawls *A Theory of Justice* (Harvard University Press, Cambridge, 1971).

21 Andrew Ashworth, above n 4, 99; Peter Duff, above n 5, 112; David Miers "Criminal Injuries Compensation: The New Regime" (2001) 4 JPIL 371.

22 For example, in *Couch v Attorney-General* [2008] NZSC 48, the Supreme Court left open the possibility that the Department of Corrections could be liable for a failure to provide adequate supervision of a parolee who committed murder and other serious violent offences.

Social utility

2.23 If the State has no duty to provide compensation to victims of crime founded on social contract, it may instead be argued that loss-spreading specifically for crime victims may be justified on the grounds of overall social utility.

2.24 As noted above (paragraph 2.8), this appears to have been the main justification for the decision to spread loss associated with personal injury across the community under the accident compensation scheme. There are obvious social benefits in assisting people who are injured back into the workforce as soon as is practicable and, where impracticable, at least ensuring that victims can participate in society to the fullest extent possible. For that reason, the Commentary on the Royal Commission's Report suggested that the establishment of the accident compensation scheme may be justifiable on the basis of the economic benefits that would accrue alone:[23]

> Even if the premise of 'community responsibility' is not accepted, it might be argued that every individual nevertheless has such a stake in the safety, rehabilitation, and maintenance of the work force as to justify the introduction of a comprehensive compensation scheme on those grounds.

2.25 That argument, of course, would not have been enough on its own, since it would not have explained why more than minimum welfare entitlements were justified and why personal injuries justified a different approach from illnesses. The crucial additional element of the argument, which fundamentally altered the calculation of costs and benefits in providing comprehensive cover for those injuries, was the expensive, unpredictable and unfair lottery of personal injury litigation.

2.26 The merits of social utility as a justification for spreading other types of loss (such as property loss or damage) across the community cannot be assessed as a matter of general principle. They can only be determined by consideration of the social and economic costs and benefits of specific policy proposals.

2.27 Whatever those merits might be, however, they will not generally attach only to a particular class of person (such as a crime victim) who suffers a specified type of loss. That is because the social utility of "loss-spreading" focuses upon the costs and benefits to the community as a whole, rather than the rights of the person who has experienced the loss or the reasons why the loss occurred.

2.28 Thus, while the social utility principle can be used to advance schemes with equitable coverage like accident compensation, it is unlikely to afford a coherent rationale for special provision for crime victims alone.

23 Department of Labour *Personal Injury: A Commentary on the Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand* [1969] AJHR H50 9. See also, Geoffrey Palmer *Compensation for Incapacity: A Study of Law and Social Change in New Zealand and Australia* (Oxford University Press, Wellington, 1979).

2.29 There is one important qualification to this general proposition. There may be some costs and benefits to the community as a whole that can be seen as specific to a particular class of person or a specific kind of loss. For example, in the context of crime victims there may be some benefit in providing specific redress as a means of maintaining or restoring community confidence in the criminal justice system. However, a specific benefit of this sort really relates to the symbolism of victim redress. We therefore consider this type of benefit below.

The symbolic value of tangible community recognition of victim losses

2.30 This then leads to the third possible argument in favour of an extension of loss-spreading arrangements specifically for crime victims: that it is a symbolic expression of the community's concern and sympathy for them. It is on this basis, for example, that overseas criminal injuries compensation schemes have been justified:[24]

> The faith which the public and crime victim have in society and its institutions is greatly damaged by violent crime. Criminal injuries compensation schemes are designed to help restore that faith by demonstrating, in a tangible form, public solidarity with the unfortunate victim. Society is seen to recognise and sympathise with the innocent victim's suffering and this serves to re-affirm that the victim's faith, and that of the general public, in society and its institutions has not been misplaced. In other words, criminal injuries compensation is a medium through which an attempt is made to repair – or, at least, mitigate – the social damage caused by crime.

2.31 The fact that criminal injuries compensation schemes have a purely symbolic function has also been put forward as the explanation for their restriction to victims of violent offences (which are the crimes most likely to damage the faith of people in society and its institutions) and for denying "unworthy" victims compensation.[25]

2.32 It may be doubted whether the symbolic value of victims' compensation is really a sufficient basis for changing our current arrangements. It is in essence an emotional rather than rational argument. The difficulty is that there are many victims of other misfortunes who are also deserving of society's recognition and compassion: people whose uninsured houses are damaged by flood; parents whose children suffer cancer; and so on. If more than the usual welfare entitlements are provided to crime victims, why are these other victims precluded? And where should we draw the line? Should there be additional entitlements for all crime victims or only some? These are difficult questions, and the answers to them are bound to produce illogical and anomalous distinctions.

24 Peter Duff "Criminal Injuries Compensation: The Symbolic Dimension" (1995) 40 Juridical Review 102 at 107. See also Peter Duff, above n 5, 106–108, 113, and the justifications provided for the establishment of the Crimes Compensation Tribunal in New Zealand: Hon J R Hanan (13 August – 27 September 1963) 336 NZPD 1865–1868; (1 October – 31 October 1963) 337 NZPD 2631, 2632–2638.

25 Peter Duff, above n 24, at 107.

2.33 If the symbolic aspect of victims' compensation is accepted as a sufficient basis for change, the extent of that change would need to be determined by a case-by-case consideration of a host of complex and sometimes competing factors. These include:

(a) the amount of State resources that should appropriately be spent on victims' compensation initiatives when looked at against other social assistance priorities;
(b) how to prioritise victims' needs for compensation;
(c) the possible mechanisms for delivering compensation to victims; and
(d) the effectiveness of any measure that may be implemented.

2.34 In summary, therefore, we conclude that the spreading of the losses of crime victims to the community at large cannot be justified on the basis of social contract theory. Nor is it likely to be justified on social utility grounds if the loss-spreading is confined to crime victims alone. There may be some room for a separate arrangement for crime victims based on the symbolic value to the community of singling them out for special recognition. However, that is debatable, and can only be considered case-by-case.

Chapter 3

Increasing entitlements to compensation for victims

INTRODUCTION

3.1 The Issues Paper explored three options that would increase crime victims' entitlements from the State: greater entitlements to compensation for personal injury, through the accident compensation system or otherwise; greater cover for mental injury, either through the accident compensation system or otherwise; and a State-funded reparation system, which could either be fully or partially funded. These options are explored in greater detail below.

ACCIDENT COMPENSATION SCHEME

3.2 The accident compensation scheme provides compensation for personal injury, including personal injury suffered by victims of crime. The purpose of the Accident Compensation Act 2001 is to:[26]

> [E]nhance the public good and reinforce the social contract represented by the first accident compensation scheme by providing for a fair and sustainable scheme for managing personal injury that has, as its overriding goals, minimising both the overall incidence of injury in the community, and the impact of injury on the community (including economic, social, and personal costs).

3.3 One of the ways of achieving this is through "ensuring that, during their rehabilitation, claimants receive fair compensation for loss from injury, including fair determination of weekly compensation and, where appropriate, lump sums for permanent impairment".[27]

26 Accident Compensation Act 2001, s 3.

27 Accident Compensation Act 2001, s 3(d).

Cover

3.4 A person is eligible for cover under the Accident Compensation Act 2001 for "personal injury" suffered as a result of an "accident".[28] "Accident" is broadly defined and covers criminal conduct.[29] "Personal injury" is defined to cover:[30]

- the death of a person;
- physical injuries suffered by a person;
- mental injury suffered by a person because of physical injuries suffered by the person;
- mental injury suffered by a person as a result of a criminal offence listed in Schedule 3 of the Act;
- work-related mental injury; and
- damage (other than wear and tear) to dentures or prostheses that replace a part of the human body.

3.5 Victims of crime are, in general, not entitled to greater entitlements than other persons who have suffered personal injury.

Entitlements

3.6 The entitlements provided under the Accident Compensation Act 2001 are:[31]

- rehabilitation, comprising treatment, social rehabilitation, and vocational rehabilitation;
- first week compensation for loss of earnings;[32]
- weekly compensation for loss of earnings;
- lump sum compensation for permanent impairment;
- entitlements for fatal injuries.

3.7 Rehabilitation is a process designed to restore a "claimant's health, independence, and participation".[33] Treatment includes physical and cognitive rehabilitation.[34] "Social rehabilitation" is designed to assist in restoring a claimant's independence to the maximum extent practicable.[35] To this end, the Corporation may provide aids and appliances, attendant care, child care, education support, home help, modifications to the home, training for independence, and transport for independence.[36] "Vocational rehabilitation" is designed to assist a claimant to maintain or obtain employment, or to regain or acquire vocational independence.[37]

28 Accident Compensation Act 2001, s 20.

29 Accident Compensation Act 2001, s 25.

30 Accident Compensation Act 2001, s 26.

31 Accident Compensation Act 2001, s 69.

32 Accident Compensation Act 2001, s 98.

33 Accident Compensation Act 2001, s 6.

34 Accident Compensation Act 2001, s 6.

35 Accident Compensation Act 2002, s 79.

36 Accident Compensation Act 2001, s 81. See also Accident Compensation Act 2001, Sch 1, cl 12 for definition of aid and appliance as "any item likely to assist in restoring a claimant to independence".

37 Accident Compensation Act 2001, s 80.

3.8 The claimant's employer is generally entitled to pay the first week's compensation.[38] After that, the Corporation is liable to pay weekly compensation assessed at 80% of the claimant's weekly earnings.[39] The Corporation can reassess the incapacity of the person receiving weekly compensation, but there is no cut-off point until the person reaches the qualifying age for New Zealand Superannuation.

3.9 "Lump sum" compensation is available for permanent impairment resulting from personal injury. Potential payments range from $3,078.46 (to a person whose whole-person impairment is 10%) to $123,138.28 (to a person whose whole-person impairment is 80%).[40]

3.10 Entitlements for fatal injury are:[41]

- a funeral grant of up to $5,541.23;
- a survivor's grant to surviving spouses, children or other dependants;
- weekly compensation to a surviving spouse, child, or other dependant;
- childcare payments for children of the deceased claimant.

3.11 As of November 2009, a top-up funeral grant will be available for the families of homicide victims to a maximum of $10,000 (including the original funeral grant).[42]

Accident compensation and common law damages

3.12 As discussed in chapter 2, the accident compensation scheme was introduced as a way to address the inadequacies of the common law system in providing compensation for injuries. Once the scheme was established, it became no longer possible to sue for compensatory damages in common law for injury or death. Section 317 of the Accident Compensation Act 2001 provides a statutory bar on proceedings for common law damages. This is designed to prevent double recovery.[43]

3.13 However, there are some exceptions to the statutory bar, in particular, claims for punitive or exemplary damages.[44] Damages for breach of the New Zealand Bill of Rights Act 1990 may also be available, provided that the quantum of damages is not assessed by reference to the victim's personal injury, since that is covered under the accident compensation scheme.[45]

38 Accident Compensation Act 2001, s 98.

39 Accident Compensation Act 2001, s 100. "Weekly earnings" has a specific meaning under the Accident Compensation Act.

40 Accident Compensation Act 2001, Sch 1, cl 56.

41 Accident Compensation Act 2001, Sch 1, cls 63–78.

42 The top-up funeral grant is not an entitlement under the Accident Compensation Act, but rather, is administered by an ACC subsidiary on behalf of the Ministry of Justice.

43 *Queenstown Lakes District Council v Palmer* [1999] 1 NZLR 549 (CA) at 555.

44 Accident Compensation Act 2001, s 319.

45 *Simpson v Attorney-General* ("*Baigent's Case*") [1994] 3 NZLR 667; *Wilding v Attorney-General* [2003] 3 NZLR 787. See also *Attorney-General v Udompun* [2005] 3 NZLR 204 at [16].

Should there be greater entitlements for victims of offences causing physical injury?

3.14 In the Issues Paper, we considered whether crime victims should receive greater entitlements to compensation for personal injury than other accident victims. Submitters who commented on this issue were equally divided on whether crime victims should receive greater entitlements. A number of submitters felt that every victim of injury should receive equal treatment for equal problems, so that greater entitlement for victims of crime could not be justified. In contrast, others appeared to think that victims of crime could and should be distinguished from other victims by virtue of the criminal act. Those who did favour an increase in entitlements specifically mentioned matters such as loss of earnings, costs associated with court attendance, child care, accommodation, travel expenses, and funeral costs.

3.15 We believe that increased entitlements for crime victims would be difficult to justify and would be problematic for four reasons:[46]

- Unlike other accident victims, crime victims can obtain compensation through the sentence of reparation for injury or harm that is not otherwise covered. This recognises the special status of a crime victim as a person wronged.
- The accident compensation scheme is designed to reflect the balance between fair compensation and an affordable scheme and increases in one area would need to be offset by decreases in other areas.
- Increased entitlements for crime victims reintroduce the notion of fault in determining eligibility. This would potentially add to the victim's trauma, since there would need to be proof that a crime had taken place before the victim could access his or her entitlement.
- If the entitlements were related to pain and suffering, there would be practical difficulties in determining the quantum of fair compensation.

3.16 For these reasons, we do not propose that any change be made to the current entitlements to compensation for physical injury.

Extending eligibility for compensation for mental injury

3.17 The Accident Compensation Act provides cover for "mental injury" (defined as a "clinically significant behavioural, cognitive, or psychological dysfunction"[47]) suffered by a person because of a physical injury, but generally does not provide cover for mental injury alone, except where the mental injury arises from an offence listed in Schedule 3 (primarily sexual offences such as sexual violation and unlawful sexual connection),[48] or is work-related.[49] In relation to mental injury caused by Schedule 3 offences, cover is available whether or not a person has been charged with or convicted of the offence.[50]

46 New Zealand Law Commission, above n 2 at [4.6]–[4.10].

47 Accident Compensation Act 2001, s 27.

48 Accident Compensation Act 2001, s 21.

49 Accident Compensation Act 2001, s 21B. The coverage for work-related mental injury is limited to mental injury arising from a single traumatic event that falls within the scope of this provision.

50 Accident Compensation Act 2001, s 21(5). See for example, *A v The Roman Catholic Archdiocese of Wellington and Ors* [2007] 1 NZLR 536 at 509.

3.18 At first sight, the exceptions for Schedule 3 offences and work-related accidents appear to run counter to the underpinning principle of the accident compensation scheme that all victims of equivalent injuries should receive compensation regardless of their cause. The work-related mental injury exception also has the potential to create serious anomalies. For example, those who suffer mental injury as a result of a bank robbery receive compensation if they witness it as a bank teller, but not if they witness it as a customer.

3.19 There are, however, reasons for the current position. First, there are issues of cost and affordability. In the development of the 2001 amendment to the accident compensation scheme, extending cover to witnesses of traumatic events was considered and rejected on the ground that it was unaffordable.[51]

3.20 Secondly, although a "mental injury" must be a "clinically significant dysfunction", it is often difficult to assess whether such an injury exists and whether it is a result of an event rather than unrelated personal factors. There is, therefore, a significant risk of over-inclusiveness and unnecessary intervention if all mental injury were included in the scheme.

3.21 In relation to crime victims, there has been an attempt to address this difficulty by confining coverage to a particular category of offence where mental injury routinely reaches a threshold that justifies intervention in cost-benefit terms. The mental injury arising from Schedule 3 offences can be seen as sui generis and in a different category from other injuries, thus justifying the exception. In relation to work-related mental injury, the difficulty has been addressed by a test that requires a single traumatic event that "could be reasonably be expected to cause mental injury to people generally." As the provisions have only recently come into force, it is unclear how this test will operate in practice and whether it will enable consistent distinctions to be drawn between qualifying and non-qualifying mental injuries.

3.22 Thirdly, there is a symbolic argument in relation to Schedule 3 offences that supplement the social utility arguments underpinning the exception: while most victims of criminal injury suffer compensable physical injury, victims of sexual crimes are likely to suffer mental injury without any physical injury and deserve an expression of tangible support in recognition of that injury.

3.23 These three arguments provide a rationale for providing some exceptions to the general rule that mental injury as a category in its own right is excluded from compensation. The question is whether the current exclusions are appropriate and whether they should be reduced or expanded. The Issues Paper suggested three options in relation to mental injury:[52]

- retain the status quo;
- expand the Schedule 3 exception to further categories of crime victims (including witnesses) who are traumatised by serious crime; or
- compensate mental injury for all events (including offences) that could reasonably be expected to cause mental injury to people generally.

51 Cabinet Business Committee "Injury Prevention, Rehabilitation, and Compensation Act 2001: Proposal to Provide Cover for Mental Injury Caused by a Work-Related Traumatic Event" (6 July 2007) CBC (07) 131; Cabinet Minute "Policy Package for ACC Legislation" CAB (17 May 2000) CAB (00) M 19/8, 5.

52 New Zealand Law Commission, above n 2, at [4.35]–[4.40].

3.24 A strong majority of submitters who commented on this issue believed that there should be more extensive entitlement to compensation for mental injury alone. Reasons advanced included the fact that workplace cover is anomalous, that the cost of not treating mental injury may be high, and that it would be consistent with the position in overseas jurisdictions such as New South Wales, Victoria and Ontario. However, some concern was expressed about the cost of extending coverage. Some submitters suggested a phased approach in light of the potential cost of extending compensation.

3.25 A few submitters favoured the second option for extending the entitlement to compensation for mental injury alone – that is, applying it only to other specific categories of crime victims. However, most submitters favoured the third option – that is, extending it to all events that could reasonably be expected to cause mental injury. This option was supported because it treats all victims in the same way, regardless of the cause of the injury, and does not, as one submitter put it, "involve ad hoc and preferential arrangements limited to victims of crime". One submitter noted that the nature and degree of trauma depends on more factors than just the event that caused the mental injury.

3.26 Notwithstanding these submissions, we are unable to agree with the view that further exceptions should be made. While we think that there is a case for providing compensation for mental injury caused by the current offences in Schedule 3, we do not favour extending that to other categories of crime victims. People respond in different ways to traumatic events, and there are no categories of offence equivalent to those in Schedule 3 that obviously call for special treatment. Arguably, the only way to avoid anomalies and artificial restrictions on entitlement would therefore be to extend entitlement to victims of all offences (or at least all serious offences) who could show mental injury. We think that this would open the floodgates to claims, the merits of which would be very difficult to assess. Furthermore, we do not think that there can be any general justification for treating victims of crime differently from victims of accidents that cause mental injury.

3.27 If entitlements to compensation for mental injury were to be extended, therefore, we would favour extending it to cover all events. This would be the approach that is most consistent with the spirit and intent of the accident compensation legislation. It would also address what many would see as an anomaly in the approach taken to workplace injury by comparison with other injury.

3.28 However, we have real concerns about the practicability and affordability of such a scheme. It would potentially substantially increase costs, and the contributions to fund them, without producing corresponding benefits.

3.29 On balance, therefore, we recommend the retention of the status quo.

REPARATION UNDER THE SENTENCING ACT

3.30 The Sentencing Act contains a strong statutory presumption in favour of reparation and provides that if a court can lawfully impose a sentence of reparation, it must do so, unless satisfied that the sentence "would result in undue hardship for the offender or the dependants of the offender, or that any other special circumstances would make it inappropriate".[53] An offender's lack of means may be a reason for not imposing a sentence of reparation or may be relevant to the amount of reparation that is imposed and the manner and time in which it is paid.

3.31 A sentence of reparation can be imposed if an offender has, through or by means of the offence of which the offender was convicted, caused:[54]

- loss of or damage to property;
- emotional harm; or
- loss or damage consequential on any emotional or physical harm or loss of, or damage to, property.

3.32 Reparation can only be imposed for emotional harm if the emotional harm has been suffered by a "victim".[55] "Victim" is broadly defined in the Sentencing Act and covers the immediate family of the primary victim.[56]

3.33 Consequential loss or damage is designed to cover indirect loss such as taxi fares as a result of a theft of a car, lost earnings, medical expenses, or funeral expenses.[57] Under section 32(5) of the Sentencing Act, reparation cannot be made in respect of consequential loss or damage for which the court believes that the victim has entitlements under the Accident Compensation Act 2001. In *Davies v Police*, the Supreme Court considered whether a court could order reparation for the 20% shortfall between the payments made to the victim under the Accident Compensation Act, and the full loss of earnings suffered through the injuries.[58] The High Court and the Court of Appeal had held that "entitlements" in section 32(5) did not prevent such compensation and the word only covered what was actually paid under the accident compensation scheme.[59]

3.34 The majority of the Supreme Court took a different view and held that reparation was not available for loss of earnings consequential on physical harm. They concluded that the Sentencing Act is not designed to undermine the integrity of the system of compensation in the Accident Compensation Act; that "[i]t would be anomalous if victims of crime were able to obtain 'top-up' compensation by way of reparation, above that available under the Act";[60] and that the purpose of the exclusion in section 32(5) "is to ensure that, where compensation is available for any head of loss under the Accident Compensation Act, reparation is addressed exclusively under that legislation".[61]

53 Sentencing Act 2002, s 12.

54 Sentencing Act 2002, s 32.

55 Sentencing Act 2002, s 32(2).

56 Sentencing Act 2002, s 4.

57 See, for example, *R v Donaldson* CA 227/06, 2 October 2006 at [17]–[19]

58 *Davies (Peter) v Police* [2009] NZSC 47, 3 NZLR 189.

59 *Davies (Peter) v Police* [2007] NZCA 484, [2008] 2 NZLR 645; *Davies v Police* HC CHCH CRI-2006-409-000203, 19 December 2006.

60 *Davies (Peter) v Police*, above n 58, at [22] per Elias CJ, Blanchard and Anderson JJ.

61 Ibid, at [26].

3.35 We see merit in the position adopted by the High Court and the Court of Appeal. Whatever the legislative intent might have been, we acknowledge the force of the argument that victims should not be out of pocket as a result of offences committed against them, and that offenders should therefore make up any shortfall in accident compensation payments. We note, too, that there are already exceptions to the principle that where the accident compensation scheme provides compensation, it should be addressed exclusively under that legislation. In particular, emotional harm reparation is available under the Sentencing Act 2002, even though the mental injury to which it relates may be associated with a personal injury and therefore covered by the accident compensation scheme. The Government has also recently decided to amend the Sentencing Act to make clear that court orders of reparation can include consequential injury costs that are not covered by ACC entitlements. We understand that this amendment is to be included in a Victims' Rights Amendment Bill.[62]

3.36 Ultimately, however, we agree with the Supreme Court that a "top-up" of the type sought in *Davies* would be contrary to the principle on which the accident compensation scheme is based. Under that scheme, the victims of crimes and torts have forfeited their right to bring civil suits for damages with the attendant costs and risks associated with such suits. In return, they receive a certain but fixed entitlement to compensation. While the level at which that entitlement is fixed might be lower than the quantum of damages that might have been received if civil suits had been available, that can be justified by the fact that the payment of compensation is guaranteed. Given this underlying premise, it would be wrong to single out crime victims for a special "top-up". They have received the benefits of the accident compensation scheme in the same way as all other victims, and should receive compensation on the same basis. While there may already be anomalous exceptions to the principle upon which the accident compensation scheme is based, we think that it would be undesirable to extend them.

PROVIDING STATE-FUNDED REPARATION

3.37 In chapter 4, we discuss ways of enhancing the mechanisms for enforcing sentences of reparation. However, even if significant enhancements can be made, the only way of ensuring full reparation to victims would be to require that it be paid by the State. Since the bulk of reparation sentences are imposed for property offences, any State-funded scheme of this nature would operate primarily to compensate victims for the loss or damage arising from such offences.

3.38 In the Issues Paper[63], we canvassed two possible options for such a scheme: a state-advances reparation scheme; and a fully funded state reparation scheme.

62 www.beehive.govt.nz/release/reparation+and+acc+entitlements

63 New Zealand Law Commission, above n 2 at paras 4.56–4.69

A State-advances reparation scheme

3.39 Under a State-advances reparation scheme, the State would establish a fund which would be used to make immediate payment of reparation sentences where the offender was unable to do so. That would ensure that victims obtained full reparation in a timely way. The State could then recover the costs from the offender, including an amount of interest. None of the other jurisdictions we examined (England and Wales, Ontario, New South Wales and Victoria) has this type of scheme.

3.40 This scheme has some superficial attraction. It would maintain the current loss-shifting framework, in that it would still expect the offender ultimately to pay the cost of the victim's loss. It would therefore continue to leave liability where it properly belongs, while providing a State guarantee that the liability would be met. For this reason, a majority of submitters supported it.

3.41 However, our Issues Paper pointed to three drawbacks in a scheme of this sort.[64] First, it would involve substantial costs, which would have to be funded by the taxpayer. There would be some recovery from offenders, but significant sums of reparation might never be recovered. Moreover, the very existence of the scheme could lead some judges to impose reparation despite an offender's lack of means, knowing that the State would pick up the tab. Furthermore, apart from the costs of paying reparation, there would also be significant costs associated with establishing and administering the scheme.

3.42 Secondly, there are issues about how the scheme would mesh with private insurance. This relates particularly to reparation for property loss or damage. A Ministry of Justice study into victims' experiences and needs indicates that many victims of crime do not have private insurance when the crime that caused their loss or damage is committed. It found that 38 per cent of victims who had suffered property loss or damage through crime were covered by insurance, although that figure was higher in relation to offences involving vehicles (48 per cent).[65] In this context, there are two permutations of a State-advances reparation scheme that can be considered:

- The scheme would only cover uninsured harm or loss.
- The scheme would cover all property loss or damage caused through offending. Where the victim had insurance, the State would reimburse the insurer, and where the victim was uninsured, the State would compensate the victim.

64 New Zealand Law Commission, above n 2 at paras 4.58–4.63

65 Ministry of Justice *Victims' Experiences and Needs: Findings from the New Zealand Crime and Safety Survey 2006* (Wellington, 2008) 17.

3.43 If the scheme only covered uninsured loss, it is probable that insurance companies would exclude from cover situations where reparation was available from the State. However, if insurance companies continued to provide cover, an issue of equity between the insured and uninsured would arise because the uninsured would receive reparation from the State without paying any premium.

3.44 If the State were to cover all property loss or damage, when it came to insured victims of crime, the State could pay the amount of the excess, or it could reimburse the insurance company for the full cost of the loss or damage. Again, and in both these cases, the equity issue would arise; the uninsured victim would receive a comparative advantage over the insured victim because he or she would receive State-funded insurance without paying any insurance premium.

3.45 Thirdly, a State-advances reparation scheme would also unjustifiably discriminate between victims on the basis of whether offenders were brought to justice. Victims in whose favour a sentence of reparation was imposed would receive full State-funded reparation, while those victims who could not obtain reparation because the offender had not been prosecuted would not receive any financial assistance at all.

3.46 The submissions in support of a State-advances reparation scheme did not satisfy us that these objections could be overcome. In our view, the objections are fundamental and demonstrate that such a scheme would not only be costly but also result in arbitrary inequities. We therefore do not recommend it.

A fully State-funded reparation scheme

3.47 The alternative option would be to develop a fully funded State reparation scheme that would, in effect, make the State the insurer in respect of loss caused by offending. This would spread the costs of property loss from crime across the community as a whole, much as occurs with the costs of personal injury under the accident compensation scheme. Victims would therefore be compensated independently of court-ordered reparation. There could be a cost recovery process against any offender convicted of the offence, but compensation would not be contingent upon a conviction.

3.48 Although a few submitters favoured this option, most did not.

3.49 We ourselves are not convinced of the utility of full provision of State compensation to victims. As we said in the Issues Paper, there do not appear to be any particular social benefits from State funding of property loss or damage.[66] The ownership of property is a private matter and so are the impacts of its loss or damage. Moreover, if the community were to bear this kind of loss, it is difficult to see why it should do so in relation to crime victims only and not also people who suffer property loss or damage from other causes, such as third party negligence. The symbolic benefits of State intervention for crime victims alone, which, as noted above, are arguable in relation to physical injury, are even more tenuous in relation to property loss or damage.

66 New Zealand Law Commission, above n 2 at para 4.65

3.50 The costs of such a scheme would also be significant. There would be the costs associated with establishing and administering the scheme. There would also be the costs of the reparation awards themselves. If the State paid reparation to all victims, including those in relation to which the offender was not identified, it may be expected that a large proportion of the reparation paid would not be recoverable. There would be considerable potential for fraudulent claims. Enforcement mechanisms would be necessary for both ensuring maximum recovery from the offender and protecting against fraudulent claims, as insurance companies currently do. This would add to the overall costs of the scheme.

3.51 These costs would be borne by the taxpayer. It would inevitably require either a reduction in the funding of other State services or an increase in taxation. While State insurance would provide some cover for people who cannot afford private insurance, the overall benefits of the adoption of such a role by the State are dubious. For example, it is a matter of debate whether the State could provide insurance more efficiently than the private sector. In particular, if the State were the insurer, there might be an increase in fraudulent claims because the State is likely to be less concerned with enforcement than the private insurance market. Furthermore, State-funded insurance would remove individual choice around how to redistribute risk, including the choice to opt out of insurance.

3.52 There is no international precedent for what would largely be a State-funded property insurance scheme. As in New Zealand, the other jurisdictions we examined proceed on the basis that the choice of distributing the risk of property loss or damage through private insurance is a matter of individual choice. The scheme would have significant repercussions for private insurance. As with the State-advances reparation scheme, there would be a real disincentive to take out private insurance for the particular harm and loss that was covered through a sentence of reparation. The disincentive effect might be compounded if the State-funded reparation scheme were more generous than private insurance. Most insurance companies do not cover full loss as there is usually some excess. There would also be disincentives on private individuals to take sensible precautions to avoid the risks of property loss or damage (such as incurring costs associated with avoiding loss or damage, for example, installing burglar alarms) through crime because any loss or damage would be fully compensated by the State.

3.53 These problems are fundamental and demonstrate the undesirability of a fully funded reparation scheme in terms of cost effectiveness. We therefore do not recommend it.

Compulsory Insurance

3.54 As an alternative to State funding, it would be possible instead to introduce a system of compulsory insurance for property loss caused by offending. This would ensure that victims received compensation for this kind of loss, while still retaining at least some of the efficiencies of competition in the private market. However, the vast majority of submitters did not support this, believing that it would unduly impinge on freedom of choice. In any case, we think that there would be significant difficulties in administering and enforcing such a requirement. We do not recommend it.

Chapter 4

Improving mechanisms for recovering compensation from offenders

SUMMARY

In this chapter we consider the options for improving the mechanisms available for the enforcement of reparation orders. We discuss a current proposal being developed by the Ministry of Justice to align the regimes for recovering reparation ordered in the High Court and District Courts respectively, which we suggested in our Issues Paper. We also outline a proposal to enable the making of restraining orders in relation to an accused person's property prior to the determination of criminal proceedings to prevent an offender's assets being dissipated prior to the award of reparation.

INTRODUCTION

4.1 Sometimes it can be difficult to recover the money awarded as reparation, which can have a negative effect on victims and increase their stress.[67] This chapter examines how reparation orders are enforced and considers whether there are any ways to improve enforcement.

4.2 Our Issues Paper considered whether the mechanisms for recovering reparation from offenders could be improved. We suggested aligning the regimes for recovering reparation awarded in the High Court and District Courts respectively (discussed in greater detail below). The majority of submitters supported this proposal.

4.3 We also concluded, after examining enforcement mechanisms in overseas jurisdictions, that there were no obvious other ways of improving the system for recovering reparation,[68] and that an increase in the proportion of reparation paid

67 See Justice and Electoral Committee above n 1.

68 New Zealand Law Commission, above n 2 at page 49.

to victims would necessitate greater acceptance of responsibility for providing redress by the State.[69] Most submitters who commented on the issue disagreed with our conclusions on the latter point.

4.4 We ourselves have also revisited our previous position and have identified two other measures that could facilitate recovering reparation from offenders. The first measure involves a mechanism to restrain the defendant's property pending conviction and sentencing. This mechanism prevents a defendant disposing of property before an order for reparation is made. The second measure is "criminal bankruptcy". We explore how these measures might work and assess their feasibility in more detail below.

ALIGNING THE REGIMES FOR THE ENFORCEMENT OF REPARATION

4.5 In New Zealand, there is a strong statutory presumption in favour of reparation under the Sentencing Act 2002.[70] A sentence of reparation is enforced as if it were a fine. Fines are enforced either under Part 3 of the Summary Proceedings Act 1957, which applies to fines imposed by a District Court, or under sections 19–19F of the Crimes Act 1961, which applies to fines imposed by the High Court.

4.6 Part 3 of the Summary Proceedings Act sets out an extensive code for the enforcement of fines. If a fine has not been paid, the Registrar has a variety of actions available, which include issuing a warrant for the seizure of the property, making an attachment order that deducts money from the offender's salary or wages, or issuing a deduction notice requiring the bank to deduct money from the offender's account.[71] If the amount remains unpaid, the matter may be referred to a Judge who can impose a sentence of home detention, community detention or community work or issue a charging order, which allows the Crown to collect the proceeds of a voluntary sale of the offender's real property.[72]

4.7 In contrast, the provisions in the Crimes Act are more limited. If a fine is not paid, the court may issue a writ of sale against the offender's personal property (the only power available to the High Court but not a District Court), or a warrant for the collection of the fine.[73] If a person is in default of payment of a fine, the court can impose a period of imprisonment, community work, community detention, or home detention.[74] But there is no power to issue seizure warrants, attachment orders or deduction notices.

4.8 Legislation allows for records of unpaid fines to be matched with customs and immigration information.[75] In particular, "specified fines defaulters" may be intercepted at the airport and prevented from leaving the country. "Specified

69 New Zealand Law Commission, above n 2 at page 50.

70 Sentencing Act 2002, s 12.

71 See Summary Proceedings Act 1957, ss 83, 87, 87A, 92, 93, 94A, 95, 104A, 105.

72 Summary Proceedings Act 1957, s 88.

73 Crimes Act 1961, ss 19B and 19C.

74 Crimes Act 1961, ss 19D, 19DA and 19E.

75 Customs and Excise Act 1996, ss 280C–280F; Immigration Act 1987, ss 141ADD–141AG.

fines defaulters" are defined as a person who owes more than $5,000, or any amount of reparation, for whom a warrant to arrest has been issued in respect of the default.[76] This excludes fines or reparation imposed in the High Court because the Crimes Act does not provide for the issue of a warrant to arrest for fines enforcement other than to impose an alternative sentence.[77]

4.9 There is thus a lack of consistency between the enforcement scheme under the Summary Proceedings Act, and that under the Crimes Act. We recommend that these two schemes be aligned and set out in one piece of legislation.

4.10 We understand that the Government has recently decided to align the District Court and High Court enforcement regimes.

RESTRAINING ORDERS

Restraining orders under the Criminal Proceeds (Recovery) Act 2009

4.11 The Criminal Proceeds (Recovery) Act 2009 replaced the Proceeds of Crime Act 1991 and establishes a regime for the forfeiture of property that has been derived from or represents the benefits of significant criminal activity, or is an instrument of crime. While restraint of property is not necessary in order for a forfeiture order to be made,[78] it is possible under this regime to obtain a restraining order in respect of such property pending determination of the application for a forfeiture order.

4.12 A restraining order ensures that a proposed forfeiture order is not rendered worthless due to the property in question being disposed of before the forfeiture order can be made and enforced, by preserving the property that is the subject of the application for a forfeiture order. In particular, a restraining order prevents a person from disposing of the property or dealing with it other than in accordance with the terms of the restraining order. All "restrained property" is placed under the custody and control of the Official Assignee.[79]

4.13 When a forfeiture order is made, the property that is the subject of that order is forfeit to the State. The restraining order regime is therefore concerned with protecting the interest of the State in forfeiting that property in order to ensure that the respondent does not benefit from it.

4.14 The interests of victims are not entirely overlooked in this process. In particular, upon the making of an assets forfeiture order, a profit forfeiture order or an instrument forfeiture order, the property in question must be applied to payment of outstanding fines and sentences of reparation (after payment of the costs of the Official Assignee and payment of any legal aid due to the Legal Services Agency) before payment of any remaining money to the Crown.[80] However, this recognition of the interests of victims is both limited and incidental to the primary focus of the orders, which is forfeiture of property to the Crown.

76 Customs and Excise Act 1996, s 280F.

77 Crimes Act 1961, s 19DA.

78 Criminal Proceeds (Recovery) Act 2009, s 11.

79 Criminal Proceeds (Recovery) Act 2009, ss 24, 25, and 26. This is in contrast with the Proceeds of Crime Act 1991, where the Court had a discretion as to whether to place restrained property under the custody and control of the Official Assignee.

80 Criminal Proceeds (Recovery) Act 2009, ss 82(1), 83(1), and 85.

4.15 Thus, while the Criminal Proceeds (Recovery) Act provides for restraining orders to be made in relation to property that is the subject of an application for forfeiture to the Crown (with outstanding reparation being met from the proceeds of the forfeited property), there are no equivalent provisions permitting restraint of property specifically for the purpose of meeting a reparation order in favour of a victim. We now turn to consider whether there ought to be.

Restraining property for the purposes of meeting reparation orders

4.16 The Criminal Proceeds (Recovery) Act is concerned with protecting the State's interest in ensuring that property that has been derived from or represents the benefit of significant criminal activity, or is an instrument of crime, is recoverable in the event of a forfeiture order being made in favour of the State.

4.17 As a matter of principle, there is no reason why the State's interest in a respondent's property should receive greater protection than the interest of a victim in having a reparation order able to be enforced to his or her benefit. Taking alleged wrongdoing in the financial services sector as an example, such cases are likely to involve lengthy investigations due to their inherent complexity. Currently, there are limited tools available to prevent dissipation or concealment of assets while the investigation is carried out and any criminal charges determined. In addition to the rarely used mechanism of statutory management, there is provision under the Securities Act 1978 and the Securities Markets Act 1988 for a court order to be made freezing assets or appointing a receiver while an investigation proceeds.[81]

4.18 We acknowledge that the fact that a restraining order cannot be obtained until just before a charge is laid, means that it cannot always operate as a fully effective tool to protect against dissipation of assets prior to the determination of criminal proceedings. This is particularly so where there is a lengthy period between the commencement of an investigation and the laying of a charge. However, the fact that restraining orders will not be fully effective in protecting assets in every case is not, in our view, a reason not to implement them in cases where they will be at least partially effective. The possibility of restraint of assets in this context is likely to be as useful as it is in cases where an application for a forfeiture order has been made after a lengthy investigation into the respondent's affairs.

4.19 In our view, restraining orders are, in principle, an appropriate tool in this context. Indeed, if they can be justified to protect the interests of the State in recovering property subject to forfeiture orders even where there is no direct victim of criminal activity, there is arguably an even greater justification for using them to protect the interests of victims who have suffered direct loss or damage as a result of criminal offending. Accordingly, if the restraining order model can be made workable in this context, we favour its adoption for the purposes of reparation orders.

4.20 We acknowledge that in the vast majority of cases the accused will have few assets and/or the costs of restraining them will likely far outstrip any benefit to the victim. We further acknowledge that we are not aware of evidence of offenders routinely divesting themselves of property in order to avoid the

81 Securities Act 1978, ss 60G and 60H; Securities Markets Act 1988, ss 43P and 43Q.

consequences of a sentence of reparation. We are not suggesting that making restraining orders available for the purposes of preserving assets to meet sentences of reparation will make a difference in most cases. However, this is not a reason for making no provision for it in those cases where it might protect a victim's right to receive reparation. There will be occasional cases where, for example, significant loss or damage is suffered due to fraud and the offender appears to have significant assets but does not meet his or her reparation obligations, or does not meet them in a timely manner. Such an experience is likely to engender a strong sense of injustice.

4.21 There might seem to be sufficient parallels between sentences of reparation and orders under the Criminal Proceeds (Recovery) Act to suggest that the restraining order regime from that Act can be largely transplanted to ensure enforcement of reparation orders. However, reparation differs from orders made under the Criminal Proceeds (Recovery) Act in two key respects that complicate the application of the restraining order regime to it.

4.22 In order to understand the nature of these complications it is necessary to understand the types of orders that the Criminal Proceeds (Recovery) Act is currently concerned with. These are:

- an "assets forfeiture order" in respect of property that has been wholly or partly acquired, or directly or indirectly derived from "significant criminal activity";[82]
- a "profit forfeiture order" in respect of benefits that have been unlawfully derived over the period of 7 years preceding the date of the application for a restraining order in respect of that property, or where there is no application for a restraining order, the date of the application for the profit forfeiture order itself;[83] and
- an instrument forfeiture order in respect of property used to commit or to facilitate the commission of an offence.[84]

4.23 It is important to note that neither assets forfeiture orders nor profit forfeiture orders are conditional upon a criminal conviction.[85] These orders may be used as an alternative to prosecution and conviction. By way of contrast, an instrument forfeiture order may only be made where a conviction has been entered.[86]

4.24 The first possible complication in simply applying the restraining order regime to assist the enforcement of reparation lies in the nature of forfeiture order proceedings. Applications for assets forfeiture orders and profit forfeiture orders are directed towards forfeiture of property, so that the restraint is directly connected to the nature of the proceedings. With respect to instrument forfeiture orders, although the proceedings upon which the restraint is based are criminal in nature, the court must also be satisfied that there are reasonable grounds to believe that the property being restrained was used to facilitate the commission of the offence. Accordingly, even with instrument forfeiture orders there is a clear connection between the property being restrained and the nature of the proceedings.

82 Criminal Proceeds (Recovery) Act 2009, s 50.

83 Criminal Proceeds (Recovery) Act 2009, s 55.

84 "Instrument of crime" is defined in s 5 of the Criminal Proceeds (Recovery) Act 2009.

85 Criminal Proceeds (Recovery) Act 2009, s 15.

86 Sentencing Act 2002, ss 142A-142Q.

4.25 By way of contrast, although a charge that leads to a sentence of reparation may be based upon loss or damage to a particular victim, there is nothing in that charge to suggest that reparation will be sought or imposed, and there is not necessarily any connection between the loss or damage and any property held by the accused that is available for restraint. This potentially means that the process of obtaining a restraining order in advance of a sentence of reparation is inherently more uncertain and problematic.

4.26 The second possible complication arising from the use of restraining orders for the purpose of enforcing reparation orders relates to the costs of restraint. Since assets forfeiture orders, profit forfeiture orders and instrument forfeiture orders all involve the forfeiture of property to the Crown, the costs of restraining that property and managing it during the period of restraint can set off against the benefits obtained by the Crown upon forfeiture. As a result, the Crown will only incur real costs from restraint if either a forfeiture order is not subsequently made, or the cost of restraint outweighs the value of the property (which, incidentally, is unlikely to occur as the Crown will not make an application for forfeiture in these circumstances).

4.27 On the other hand, sentences of reparation are imposed in favour of the victim. Accordingly, it may be more difficult to ensure that the costs to the Crown of obtaining the restraining order and managing the property during the period of restraint can be met. It is true that the costs of restraint could still be a first charge on the proceeds of any property that is disposed of to meet the sentence of reparation ordered. However, that would be likely to generate discontent amongst victims if the consequence were that the full value of the loss or damage was not recovered. Moreover, there would likely be pressure from victims to obtain restraining orders even in circumstances where the costs of the restraint were likely to outweigh the value of the property available for disposition.

4.28 It is sometimes thought that the restraint regime under the Criminal Proceeds (Recovery) Act is aimed at preventing offenders from benefiting from the proceeds of crime. A scheme that instead allowed restraint of lawfully acquired property for the purposes of ensuring a subsequent monetary sanction could be recovered might be seen as contrary to the presumption of innocence and causing injustice. However, that would be a fundamental misunderstanding of the scope and purpose of the Criminal Proceeds (Recovery) Act. That Act authorises restraint of all of a respondent's property or any specified part of it in order to protect a prospective profit forfeiture order even though no connection between the property and the significant criminal activity necessarily exists. Similarly, the Act authorises the restraint of an instrument of crime (such as a family farm used for the cultivation of drugs) even though it may have been lawfully acquired. If restraint is objectionable because it has implications for property rights in advance of the substantive determination of the issues, then that is a problem that exists with the current legislative regime in the Criminal Proceeds (Recovery) Act.

The process under the Criminal Proceeds (Recovery) Act 2009

4.29 Before considering how a restraining order regime for the purposes of meeting reparation orders can be devised in a way that addresses these inherent difficulties, we will now briefly outline the process under the Criminal Proceeds (Recovery) Act.

4.30 Proceedings under the Criminal Proceeds (Recovery) Act are civil in nature.[87] Property that is sought to be forfeited need not be the subject of a prior restraining order.[88] Restrained property that has been converted into another form remains restrained property under the Act, despite the fact that it was not the property originally subject to the restraining order.[89]

4.31 The Commissioner of Police may apply for a restraining order in relation to an assets forfeiture order or a profit forfeiture order, and a prosecutor may apply for a restraining order that relates to an instrument of crime.[90]

4.32 The Act also authorises the Court to "go behind the corporate veil". In particular, the Commissioner of Police may apply for an order that certain property be treated as if the respondent has an interest in it, even if the respondent does not have such an identifiable legal interest. Where the Court is satisfied that the respondent has effective control over the property, it may make such an order. The property is then included in any restraining order and subsequent profit forfeiture order that is made against the respondent.[91]

4.33 The application must identify the proposed restrained property; the respondent (if any); and any other persons who, to the knowledge of the applicant, have an interest in the restrained property.[92] Section 20 of the Criminal Proceeds (Recovery) Act provides that an application for a restraining order in relation to an assets forfeiture order or a profit forfeiture order must be made in the High Court; and in the case of instruments of crime, in the Court in which the charge with which the instrument is associated is to be tried.

4.34 The applicant must serve a copy on any person who, to the knowledge of the applicant has an interest in the property (including, if applicable, the respondent) and serve a copy on the Official Assignee.[93] However, on the request of the applicant, the court may consider the application without notice, if the court is satisfied that there is a risk of the proposed restrained property being destroyed, disposed of, altered, or concealed if notice were given.[94] The applicant, any person who has an interest in the property, and the Official Assignee are entitled to appear and adduce evidence at the hearing.

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87 Criminal Proceeds (Recovery) Act 2009, s 10. However, proceedings relating to instrument forfeiture orders (but not the restraining orders that relate to them) are proceedings under the Sentencing Act 2002, and as such, criminal in nature.

88 Criminal Proceeds (Recovery) Act 2009, s 11.

89 Criminal Proceeds (Recovery) Act 2009, s12.

90 Criminal Proceeds (Recovery) Act 2009, s 18.

91 Criminal Proceeds (Recovery) Act 2009, s 58.

92 Criminal Proceeds (Recovery) Act 2009, s 19.

93 Criminal Proceeds (Recovery) Act 2009, s 21.

94 Criminal Proceeds (Recovery) Act 2009, s 22.

4.35 Where the application to restrain property relates to an assets forfeiture order, the Court may make the restraining order if it is satisfied that it has reasonable grounds to believe that any property is "tainted property".[95] Where the restraining order relates to a profit forfeiture order, the Court may order restraint where satisfied that it has reasonable grounds to believe that the respondent has benefited from significant criminal activity.[96] A court may make a restraining order in relation to instruments of crime:

- if the respondent has been charged with a qualifying instrument forfeiture offence[97] and the Court is satisfied it has reasonable grounds to believe that the property referred to in the application is an instrument of crime used to facilitate that qualifying instrument forfeiture offence; or
- if the Court is satisfied that it has reasonable grounds to believe that the respondent will be charged with a qualifying instrument forfeiture offence within 48 hours and that the property referred to in the application is an instrument of crime used to facilitate that qualifying instrument forfeiture offence.[98]

4.36 If a restraining order is made against property of a kind covered by an enactment that requires registration of title to property or charges over property, the authority responsible for maintaining that register must, if requested to do so by the applicant, record on the register the particulars of the restraining order on the register. Any person who deals with the property is then deemed to have notice of the restraining order.[99]

4.37 The restraining order can be made subject to conditions including that the following may be met out of the restrained property:[100]

- the reasonable living costs of the respondent and any of his or her dependants;
- the reasonable business expenses of the respondent;
- the payment of any specified debt incurred by the respondent in good faith;
- any other expenses allowed by the court.

4.38 In considering whether to impose conditions on the restraining order, the Court must consider the ability of the respondent to meet living costs, expenses or debt out of property that is not restrained property.[101] The Court cannot allow the restrained property to be used to meet the legal expenses of the respondent.[102]

95 Criminal Proceeds (Recovery) Act, s 24. "Tainted property" is property that has been wholly or in part acquired as a result of significant criminal activity, or directly or indirectly derived from significant criminal activity – Criminal Proceeds (Recovery) Act, s 4.

96 Criminal Proceeds (Recovery) Act, s 25.

97 A qualifying instrument forfeiture offence is an offence that is punishable by a term of imprisonment of five years or more: Criminal Proceeds (Recovery) Act 2009, s 5.

98 Criminal Proceeds (Recovery) Act 2009, s 26.

99 Criminal Proceeds (Recovery) Act 2009, s 27.

100 Criminal Proceeds (Recovery) Act 2009, s 28(1).

101 Criminal Proceeds (Recovery) Act 2009, s 28(3).

102 Criminal Proceeds (Recovery) Act 2009, s 28(2).

4.39 A person who has a severable interest in property that is subject to a proposed restraining order or a restraining order may apply to the court that is to consider, or has considered, the application to have the severable interest excluded from the restraining order.[103] If the severable interest is that of a mortgagee and the mortgagee exercises its power of sale, any proceeds payable to the mortgagor are restrained property, despite not being property subject to the original order.[104]

4.40 Once an assets forfeiture order or an instrument forfeiture order is made, it has the effect that the property vests in the Crown and is in the custody and control of the Official Assignee.[105] In the case of a profit forfeiture order, if the amount realised from the disposal of the property is less than the maximum recoverable amount specified in the order, the Official Assignee is empowered to recover the remainder as a debt due to the Crown and to bring civil proceedings for that purpose.[106]

4.41 After the making of a forfeiture order the Official Assignee must, as soon as practicable, after the expiry of the appeal period, dispose of the property and allocate the funds in the following way:[107]

- first, by paying the costs recoverable by the Official Assignee;
- secondly, by paying to the Legal Services Agency the amount (if any) payable by way of legal aid granted to the former interest holder (less any contributions paid by the former interest holder);
- thirdly, by paying any outstanding fines and sentences of reparation imposed on the former interest holder;
- fourthly, by paying any remaining money to the Crown.

4.42 Under section 87 of the Criminal Proceeds (Recovery) Act, the Official Assignee may recover costs if the Official Assignee takes custody and control of the property under a restraining order or forfeiture order or deals with or disposes of the property under a forfeiture order. Regulations prescribe that the Official Assignee can recover all costs and charges incurred by or on behalf of the Official Assignee, or the cost of work undertaken by the Official Assignee or a Deputy Official Assignee, in connection with the exercise or performance of functions under the Act.[108]

A proposed process for restraining property for the purposes of reparation

4.43 Reparation can be imposed for loss of or damage to property, emotional harm and loss or damage consequential on any emotional or physical harm or loss of or damage to property.[109]

103 Criminal Proceeds (Recovery) Act 2009, s 30.

104 Criminal Proceeds (Recovery) Act 2009, s 31.

105 Criminal Proceeds (Recovery) Act 2009, ss 50 and 70.

106 Criminal Proceeds (Recovery) Act 2009, s 55(4).

107 Criminal Proceeds (Recovery) Act 2009, ss 82, 83 and 85.

108 Criminal Proceeds (Recovery) Regulations 2009, reg 13.

109 Sentencing Act 2002, s 32.

4.44 In 2008 and 2009 a total number of 42,281 reparation orders were made. Of these, just 298 involved reparation in excess of $20,000. Roughly half of the orders for reparation in excess of $20,000 were imposed in relation to fraud and deception offences.

4.45 We now turn to consider how our proposed process for the restraint of property for the purposes of reparation might work. We note that the following part of this report considers a number of specific issues arising in relation to this process; we consider the other procedural provisions relating to restraining orders in the Criminal Proceeds (Recovery) Act not covered in the discussion below should apply to our proposed process.

Limiting criterion to ensure cost-effectiveness

4.46 There is little to be gained by restraining property that is of insufficient value both to meet the costs of restraint, and to make a meaningful contribution to the offender's reparation obligations. Accordingly, we consider that setting appropriate criteria for making a restraining order would help to ensure that orders are only made in situations where there is sufficient property to enable the Official Assignee to recover the costs of restraint and to make a significant contribution towards the payment of reparation.

4.47 We acknowledge that there is no such threshold under the Criminal Proceeds (Recovery) Act in relation to other types of restraining orders. Moreover, the costs of restraining property vary according to the nature of the property being restrained and the duration of the restraining order, so that any threshold is bound to be somewhat arbitrary.

4.48 However, because the Crown is the beneficiary of orders made under the Criminal Proceeds (Recovery) Act and is able to determine when it is worth applying for a restraining order to protect its interests, the process is in effect self-regulating. That is demonstrated by the advice we have received from the Official Assignee that property worth less than $20,000 is seldom restrained because the costs of restraint usually make it uneconomic to do so.

4.49 In contrast, if restraining orders were used to protect the interests of victims, there would be considerable pressure upon prosecutors to apply for such orders. It would therefore be a potential source of inconsistency and conflict, and a cause for victim dissatisfaction, if it were left to prosecutorial discretion.

4.50 Some would argue that the costs incurred in restraining the property pending the making of a reparation order should not take a higher priority than the interests of the victim in receiving the reparation; in other words, that the State should bear the cost of protecting the interests of the victim.

4.51 This would be consistent with the fact that the State already bears the cost of enforcing reparation. However, reparation is enforced through the utilisation of mechanisms established for fines enforcement and does not involve a stand-alone system. A restraining order regime would be likely to incur more significant costs for each dollar recovered by way of reparation. Therefore, we doubt that it is a cost that should be borne by the taxpayer in order to advance the interests

of a single victim or a group of victims. For these reasons, we favour limiting the availability of a restraining order to cases where the value of the property available for restraint is sufficient to cover the costs of restraint and to benefit the victim.

4.52 In particular, we consider that before making a restraining order for the purposes of reparation, a court should be satisfied of two matters. Firstly, it should be satisfied that the victim has suffered loss or damage of at least $20,000. This criterion will limit the number of cases to ensure that proportionality exists between the costs of restraint and the liability of the defendant. For example, it would be unjust to restrain property worth $25,000 for the purposes of ensuring payment of $5,000 in reparation if the cost of its administration by the Official Assignee amounted to $20,000; that would essentially involve payment by the offender of $25,000 in order to meet a $5,000 obligation.

4.53 Secondly, we consider the Court should be satisfied that the usual costs of restraining property of the type that is the subject of the application are less than the value of the property itself. We expect that as a matter of practice this will require a prosecutor making an application to consult with and adduce evidence from the Official Assignee, who will be best placed to provide information about the costs of restraint.

4.54 When these criteria are applied we expect there will be small numbers of cases. As we have noted above, only 289 cases in 2008 and 2009 involved an order for reparation of $20,000 or more. Of this relatively small number, only a fraction will involve an offender with property available for restraint that is worth more than the costs of restraint. We note that in cases where the offender's property is well concealed or where his or her control of the property is not obvious, the costs of tracing that property, which would need to be included in the costs of restraint, will be considerable, meaning that the property would need to be worth substantially more than $20,000 to make restraint worthwhile. We would therefore expect the number of applications to be no more than 20 to 40 per year.

Timing of application

4.55 We have considered whether restraining orders for the purposes of reparation should be available in relation to cases involving emotional harm. However, because we do not think that it would be feasible for a prosecutor or a court to make a judgment as to the quantum of emotional harm suffered by the victim or victims at that point in the process, we recommend limiting restraining orders to cases involving loss or damage to property.

4.56 The question arises as to when an application for a restraining order for the purposes of reparation might be made. An application for a restraining order in relation to an instrument of crime may be made prior to a criminal charge being laid. The Court may make such an order where it is satisfied that it has reasonable grounds to believe that the respondent has been or will be charged with a qualifying instrument forfeiture offence within 48 hours. There does not appear to be any reason to adopt a different position than that applying to restraint of instruments of crime in terms of the timing of the application. Accordingly, the

court should be able to make an order either where the person has been charged with the offence or where the court has reasonable grounds to believe that the person will be charged with an offence within 48 hours and the other criteria are met.

Who should make the application?

4.57 As noted above, an application for a restraining order relating to an instrument of crime is made by the prosecutor. However, a question arises as to whether a victim should be able to make an application for a restraining order in relation to reparation, given that it is his or her interests that are at stake. We consider that, despite the victim's clear interest in the process, it would be consistent with the conduct of the rest of the criminal process for the prosecutor to make the application. Given that victims do not actively participate in the substantive criminal proceeding, it would be anomalous for them to be able to make applications for restraining orders. Further, it would be necessary for the prosecutor to make the application, if, as discussed above, the order were to be made up to 48 hours before the person is charged with the offence.

4.58 There is a further argument against victims making applications that arises from the need for evidence to support an application for a restraining order. As we have discussed above, the criteria we have recommended will likely necessitate input from the Official Assignee. In particular, the identification of property within the effective control of the offender and the likely costs of restraining such property are not matters that most victims will have the expertise to address.

4.59 We note in this context that, while we recommend retaining the status quo in terms of the role of victims in criminal proceedings, the Commission has a reference to consider whether the present adversarial criminal trial process should be modified or replaced with an alternative model. Victims' interests and their role in the process will form a key component of this project.[110] The extent to which victims should have status to seek reparation (and to obtain restraining orders as a corollary) is best left to be considered fully in that context, along with the related issues.

Notice

4.60 Under the Criminal Proceeds (Recovery) Act, the applicant must serve notice on any person who has an interest in the property (including the respondent), and the Official Assignee.[111] However, section 22(1) of the Criminal Proceeds (Recovery) Act provides that the Court may consider an ex parte application for a restraining order if it is satisfied that there is a risk of the proposed restrained property being destroyed, disposed of, altered, or concealed if notice were given to the person or those persons. Three issues arise here.

110 This project has arisen from the Commission's recommendation in their 2008 report, Disclosure to Court of Defendants' Previous Convictions, Similar Offending, and Bad Character (NZLC R103) 2008. The project is being undertaken collaboratively with Elisabeth McDonald and Yvette Tinsley from Victoria University of Wellington and Jeremy Finn from the University of Canterbury, who have a Law Foundation grant for research on similar issues. Preparatory work has commenced.

111 Criminal Proceeds (Recovery) Act 2009, s 21(1).

4.61 Firstly, should applications for a restraining order in relation to reparation be heard ex parte? There does not seem to be any reason to depart from the procedure adopted in the Criminal Proceeds (Recovery) Act. As with other types of restraining orders, applications should generally be made with notice; however, there should be provision to make an application ex parte where a risk to the property that is sought to be restrained exists.

4.62 Secondly, should there be a requirement to notify victims of applications for restraining orders that relate to reparation? We note that the Victims' Rights Act 2002 provides for investigating authorities, members of the court staff and the prosecutor to provide a victim with information about the conduct of the criminal process.[112] The matters of which a victim is to be kept appraised include the charges laid; reasons for not laying charges; the victim's role as a witness; the date and place of the accused's first appearance in court in relation to the matter, any preliminary hearings, any defended hearing or trial, sentencing hearings, and the hearing of appeals; and the final disposition of proceedings.

4.63 We consider that if a restraining order is granted in relation to an accused's property for the purpose of preserving the property to meet any possible reparation order, the victim ought to be informed of that given their interest in seeing any reparation order enforced. Accordingly, we recommend that section 12(1) of the Victims' Rights Act be amended to add the following:

- where the total loss or damage arising from the offence and any other offences with which the accused is jointly charged is not less than $20,000, whether or not the prosecutor intends to apply for a restraining order in relation to reparation; and
- where an application for a restraining order in relation to reparation is made, the outcome of that application.

4.64 Finally, as we have recommended the adoption of a criterion relating to the costs of restraint of property of the type that is the subject of the application, we consider that it is necessary to go further than simply requiring the prosecutor to notify the Official Assignee of an application for a restraining order. As we noted above, the Official Assignee is likely to be best placed to estimate the likely costs of restraint and make a judgment as to whether it is worthwhile applying for a restraining order. Accordingly, we recommend that a prosecutor be obliged to consult with the Official Assignee prior to making an application for a restraining order in relation to reparation. In practice we do not consider it likely that an application for a restraining order could proceed without the full support of the Official Assignee, given the specialised nature of the evidence that will be required to establish our recommended criteria.

112 Victims' Rights Act 2002, s 12.

What property may be restrained?

4.65 There is a key difference drawn in the Act between restraint of property in relation to assets forfeiture and instrument forfeiture, and restraint for the purposes of profit forfeiture orders. In the case of the latter, rather than simply being made in relation to the specific property identified in the restraining order application (as will be the case with restraint for assets forfeiture and instrument forfeiture orders), the restraining order may relate to:[113]

- all of the respondent's property (including property acquired after the making of the restraining order);
- specified parts of the respondent's property; or
- all of the respondent's property (including property acquired after the making of the restraining order) other than specified property.

4.66 As there will not necessarily be any relationship between property that is sought to be restrained for the purposes of reparation and the alleged offending giving rise to the reparation, we recommend that similar discretion be included so that the court making the restraining order can restrain any property that is appropriate in the circumstances.

Going behind the "corporate veil"

4.67 As noted above, the Act enables the High Court to "go behind the corporate veil" and order that property is to be treated as if the respondent had an interest in it. We recommend that this provision also apply in the context of our proposed regime for restraint of property in relation to reparation.

Conditions of order

4.68 Under section 28 of the Criminal Proceeds (Recovery) Act, a restraining order can be made subject to conditions, for example, that the living costs of the respondent be met out of the restrained property. This should also be the case with the proposed new type of restraining order. This will enable the court to consider any hardship to the defendant or their dependants in making the order, for example, where the defendant's livelihood is dependent on the use of a particular asset.

4.69 However, we consider that one aspect of this provision ought not to apply to restraining orders made for the purpose of ensuring property remains available to meet reparation obligations. Section 28(2) provides that, in making conditions on a restraining order to meet a respondent's expenses, a court may not allow the person's legal expenses to be met from the restrained property. This was intended to prevent assets being dissipated through payment of unreasonable legal fees, as has been the experience in some other jurisdictions.[114] A particular concern was that without such a limitation there would be incentives to enter into negotiated settlements that included provision for payment of unreasonable legal expenses in order to prevent the State obtaining the forfeited property.

113 Criminal Proceeds (Recovery) Act 2009, s 25.

114 See for example, Australian Law Reform Commission *Confiscation that counts: A review of the Proceeds of Crime Act 1987 (ALRC R87, 1999), chapter 15.*

However, we consider that the risk of such negotiated settlements is minimal where there is an identifiable victim whose loss or damage is quantifiable and there is a statutory presumption in favour of reparation.

4.70 We also think that the use of the defendant's property rather than legal aid to fund his or her legal representation will reduce the risk of prolonged or unmeritorious appeals against restraining orders. Accordingly, we consider that the exclusion of legal expenses from the expenses that may be met from restrained property is not necessary in relation to reparation. This will also reduce the number of cases where legal aid will be granted for the purposes of representation in restraining order proceedings and the criminal proceedings to which they relate.

4.71 The possibility of the State incurring significant legal expenses in relation to restraining order proceedings was raised with us in the course of consultation on this proposal. We understand that this concern was largely based on experience with the civil forfeiture regime under the Act. However, as reparation orders arise in the context of criminal proceedings, there are different incentives at play. In particular, there are sentence discounts for guilty pleas in this context. While some additional Crown legal costs will be incurred, they are a necessary incident of a process that is designed to ensure that sentences of reparation can be effectively enforced. The prosecutor and the Official Assignee will need to assess the likely costs of litigation when deciding whether it is worth making an application for a restraining order.

Custody and control of the Official Assignee

4.72 A key difference between the Criminal Proceeds (Recovery) Act and its predecessor, the Proceeds of Crime Act 1992, is that under the earlier Act the Official Assignee took custody and control of the property only where the court was satisfied that it was desirable to do so,[115] whereas custody and control of the restrained property is automatically vested in the Official Assignee when a restraining order is made under the new Act[116]. We see no reason to distinguish between restraining orders in relation to reparation and other forms of restraining order under the Criminal Proceeds (Recovery) Act in this regard and recommend that the custody and control of the Official Assignee be mandatory.

Excluding severable interests from the restraining order

4.73 There are two types of severance order under the Criminal Proceeds (Recovery) Act 2009. Firstly, under section 30(2)(a)-(c) the court must exclude a severable interest if the applicant proves on the balance of probabilities that he or she has that interest in the property, and has not benefited unlawfully from the "significant criminal activity", or was not involved in the "qualifying instrument forfeiture offence" to which the restraining order relates. In these situations, the court has no discretion in the matter.

115 Proceeds of Crime Act 1991, s 42(1)(b).

116 Criminal Proceeds (Recovery) Act 2009, ss 24(1)(b), 25(1)(b), and 26(1)(b).

4.74 In cases where the applicant is not able to satisfy the court of the matters set out in section 30(2)(a)-(c), the Court may nevertheless exclude a severable interest if it considers that it is in the public interest. The factors that the Court may take into account when determining the public interest include but are not limited to:[117]

- any undue hardship that is likely to be caused to any person by the severable interest being subject to a restraining order;
- the gravity of the significant criminal activity or the qualifying instrument forfeiture offence with which the property is associated;
- the likelihood that the interest will become subject to a forfeiture order.

4.75 We consider that this provision for the exclusion of severable interests from a restraining order should apply in the same way to our proposed regime for restraining orders in relation to reparation.

Duration of the restraining order

4.76 The Criminal Proceeds (Recovery) Act provides that a restraining order relating to an instrument of crime expires on the earliest of the following dates (unless it is extended under section 41 of the Act):[118]

- after 48 hours, if the order is made before a charge has been laid, unless the person is charged with the qualifying instrument forfeiture offence contemplated by the restraining order or a related qualifying instrument forfeiture offence within that time;
- the withdrawal of all charges relating to the qualifying instrument forfeiture offence upon which the restraining order is based or to the related instrument forfeiture offence;
- the acquittal of the person on all charges, or the quashing of all convictions relating to the qualifying instrument forfeiture offence upon which the restraining order is based or to the related qualifying instrument forfeiture offence;
- the making or declining of a qualifying instrument forfeiture order; or
- one year.

4.77 We recommend that there be equivalent provision made in relation to restraining orders made for the purposes of reparation.

4.78 In the event that a restraining order is made and charges are either not laid or do not result in the imposition of a sentence of reparation, the Official Assignee will bear the costs of restraining the property. Therefore, there needs to be budgetary provision for the small number of cases where this will arise.

117 Criminal Proceeds (Recovery) Act 2009, s 30(3).

118 Criminal Proceeds (Recovery) Act 2009, ss 37(1) and 40.

Disposition of restrained property and application of the proceeds

4.79 Where property of the offender had been the subject of a restraining order and the relevant appeal period had expired, then following the imposition of a sentence of reparation the property would need to be disposed of and applied to meet the costs of restraint and the offender's obligations under the reparation order. Under the Criminal Proceeds (Recovery) Act, when an instrument forfeiture order is made, the order must specify that the property vests in the Crown and is in the custody and control of the Official Assignee.[119] The property subject to the instrument forfeiture order must be disposed of as soon as possible after the expiry of the appeal period by the Official Assignee in accordance with the priorities set out in the Act.[120]

4.80 We recommend that the Criminal Proceeds (Recovery) Act similarly provide that property restrained under the Act for the purposes of reparation should vest in the Crown and be in the custody and control of the Official Assignee. The Official Assignee would then (subject to any applications for relief by third parties, which we discuss below) dispose of the property and apply the proceeds in the following order of priority:

- to pay the Official Assignee's costs that would be recoverable under section 87 of the Act;
- to pay any sentence of reparation (including any amounts outstanding under previous sentences of reparation) or, where there are insufficient funds to meet the amounts payable under more than one sentence of reparation, to make part payment towards each sentence on a pro rata basis;
- to pay to the Legal Services Agency, any amount payable by way of legal aid granted to the offender;
- to pay any outstanding fines;
- to meet any other outstanding forfeiture orders;
- to pay any remaining money to the offender.

4.81 We note that when a forfeiture order is enforced under the Criminal Proceeds (Recovery) Act, the second call on the money obtained from disposal of the property after payment of the Official Assignee's costs is payment to the Legal Services Agency of any amounts still payable by the former owner of the property in respect of legal aid granted to him or her. However, in this situation, where the purpose of the restraining order is to improve recovery of reparation, we consider that the interests of the victim in recovering reparation should precede the interests of the state in recovering legal aid. Accordingly, payment of the reparation should take a higher priority than recovery of outstanding contributions of legal aid.

119 Criminal Proceeds (Recovery) Act 2009, s 70(1).

120 Criminal Proceeds Act 2009, s 85.

4.82 We note that legal expenses are excluded from the types of expenses incurred by a respondent that may be met from the restrained property.[121] Therefore, assigning repayment of contributions of legal aid a lower priority when it comes to applying the proceeds of the restrained property effectively operates as a state subsidisation of legal representation in the narrow class of cases in which restraining orders will be obtained for the purposes of reparation.

4.83 Reparation should also be put before recovery of fines. Once any remaining property has been paid to the Legal Services Agency and applied to cover outstanding fines, what is left over (if anything) should not vest in the Crown, but rather should be returned to the offender.

Third party relief

4.84 Finally, we consider that it would also be appropriate to provide a mechanism by which third parties who have not had their interest in the property excluded from the restraining order can apply for relief from the effects of applying the property to the sentence of reparation, as is the case with forfeiture orders under the Criminal Proceeds (Recovery) Act.

4.85 In relation to an instrument forfeiture order, people may apply for relief on either of two grounds: that they have an interest in the property as shown in a notice issued under section 142B of the Sentencing Act 2002 (which requires the prosecutor to give notice of any person who to the knowledge of the prosecutor has an interest in the property); or that, having regard to all of the circumstances, undue hardship is reasonably likely to be caused to the person making the application or another person by the operation of an instrument forfeiture order.[122]

4.86 The Court may similarly grant relief on one of two bases. First if the Court is satisfied on the balance of probabilities that the applicant has an interest in the property and was not involved in the instrument forfeiture offence, it must declare the nature, extent and value of the interest and provide relief in respect of that interest by not making an order, excluding the interest from the order or requiring the payment to the applicant by the Crown of a sum of money equivalent to value of the interest.[123] Secondly, if the Court is satisfied that undue hardship is likely to be caused to the applicant or another person (other than the offender) by an instrument forfeiture order, it may order than the person be paid an amount from the proceeds of sale of the property.[124]

4.87 We consider that equivalent provision should be made in relation to restrained property that is to be disposed of to meet reparation obligations.

121 Criminal Proceeds (Recovery) Act 2009, s 28(2).

122 Ciminal Proceeds (Recovery) Act 2009, s 77.

123 Sentencing Act 2002, s 142L.

124 Sentencing Act 2002, s 142M.

RECOMMENDATIONS

R1 The Criminal Proceeds (Recovery) Act 2009 should be amended to provide for the making of restraining orders pending determination of criminal proceedings to prevent an accused person's assets being dissipated prior to the making of a reparation order.

R2 Before making a restraining order for the purposes of reparation, a court should be satisfied that the victim has suffered loss or damage of $20,000 or more, and that the usual costs of restraining property of the type that is the subject of the application are less than the value of the property itself.

R3 A court should be able to make a restraining order in relation to reparation where it is satisfied that the respondent has been or will be charged with an offence within 48 hours and the other criteria are met.

R4 An application for a restraining order in relation to reparation should be made by the prosecutor.

R5 Before making an application for a restraining order in relation to reparation, the prosecutor should be required to consult with the Official Assignee as to whether grounds for making such an application exist.

R6 Applications for restraining orders in relation to reparation should generally be made on notice, with provision for ex parte applications where a risk to the property sought to be restrained exists.

R7 Section 12(1) of the Victims' Rights Act 2002 should be amended to require a victim to be notified of whether the prosecutor intends to apply for a restraining order in cases where the total loss or damage arising from the offence and any other offences with which the offender is jointly charged is not less than $20,000; and where an application for a restraining order is made, the outcome of that application.

R8 The restraining order should be able to relate to all or any part of the respondent's property, as is the case with restraining orders in relation to profit forfeiture orders.

R9 In making a restraining order in relation to reparation, the court should be able to go behind the "corporate veil" and order the restraint of property that it determines is in the effective control of the respondent.

R10 A restraining order in relation to reparation should be able to be made subject to conditions, including the payment of legal expenses from restrained property. The custody and control of the Official Assignee should be automatic upon the making of a restraining order in relation to reparation.

R11 The provision for the exclusion of severable interests from a restraining order in section 30 of the Criminal Proceeds (Recovery) Act 2009 should be applied to restraining orders in relation to reparation.

RECOMMENDATIONS

R12 Upon the making of a reparation order, the restrained property should vest in the Crown and be in the custody and control of the Official Assignee, who would then dispose of the property and apply the proceeds in the following order of priority:

(a) To pay the Official Assignee's costs that would be recoverable under section 87 of the Criminal Proceeds (Recovery) Act 2009;

(b) To pay any sentence of reparation (including any amounts outstanding under previous sentences of reparation) or, where there are insufficient funds to meet the amounts payable under more than one sentence of reparation, to make part payment towards each sentence on a pro rata basis;

(c) To pay to the Legal Services Agency, any amount payable by way of legal aid granted to the offender;

(d) To pay any outstanding fines,

(e) To meet any other outstanding forfeiture orders;

(f) To pay any remaining money to the offender.

R13 There should be provision for third parties who have not had their interest in the property excluded from the restraining order to apply for relief from the effects of applying the property to the sentence of reparation, as is the case with forfeiture orders under the Criminal Proceeds (Recovery) Act 2009.

Related amendments to the Criminal Proceeds (Recovery) Act regime

4.88 In our discussion of the disposition of restrained property and application of the proceeds, we concluded that where property has been restrained specifically for the purpose of meeting reparation orders, payment of reparation should take a higher priority than the interests of the State in recovering outstanding contributions of legal aid. However, this would create an anomaly in that it would prioritise the interests of the victim over those of the State in recovering legal aid where the property has been restrained for one purpose as opposed to another.

4.89 Accordingly, we recommend that sections 82(1) (discharge of assets forfeiture order), 83(1) (discharge of profit forfeiture order), and 85 (discharge of instrument forfeiture order) be amended so that payment of any outstanding sentences of reparation is included as paragraph (b) in each list of priorities and comes before payment to the Legal Services Agency of any outstanding contributions of legal aid and payment of any outstanding fines.

RECOMMENDATIONS

R14 Sections 82(1), 83(1) and 85 of the Criminal Proceeds (Recovery) Act 2009 should be amended to provide that payment of any outstanding sentences of reparation takes a higher priority than payment to the Legal Services Agency of any outstanding contributions of legal aid and payment of any outstanding fines.

CRIMINAL BANKRUPTCY

4.90 The other possible mechanism to improve the recovery of reparation that we have considered is the introduction of criminal bankruptcy. Currently penalties, fines and reparation are excluded from the application of the Insolvency Act 2006. The Insolvency Act 2006 provides that penalties, fines and reparation are not a "provable debt" and are not discharged at the end of the insolvency.[125]

4.91 The Insolvency Act 2006 provides that a debtor may be adjudicated bankrupt either by a creditor applying for the court to adjudicate the debtor bankrupt or by the debtor applying to the Official Assignee.[126] A creditor may apply if:[127]

- the debtor owes the creditor $1,000 or more or, if 2 or more creditors join in the application, the debtor owes a total of $1,000 or more to those creditors between them; and
- the debtor has committed an act of bankruptcy within the period of 3 months before the filing of the application; and
- the debt is a certain amount; and
- the debt is payable either immediately or at a date in the future that is certain.

4.92 Acts of bankruptcy are set out in sections 17 to 28 of the Insolvency Act and include, for example, failure to comply with bankruptcy notice, departure from New Zealand, and avoidance of creditors. On adjudication the Assignee must advertise the adjudication. The bankrupt must file with the Assignee a statement of his or her affairs, and if the bankrupt has not already done so, the Assignee may call a meeting of the bankrupt's creditors. Proceedings to recover certain debts must be halted, and the property of the bankrupt vests in the Assignee.[128]

4.93 We have considered whether it would be possible and desirable to incorporate penalties, fines and reparation into the bankruptcy scheme by making them provable debts, with the effect that the State could apply for bankruptcy in the event that they remained unpaid.

4.94 The idea of the State acting to recover money through insolvency is not in itself problematic as, for example, the Inland Revenue Department is a preferential creditor under the Insolvency Act.[129]

4.95 One reason for excluding fines and reparation from the bankruptcy is that in the normal course of bankruptcy provable debts are discharged at the end of the bankruptcy.[130] Discharging reparation and fines when they have not been paid in full is undesirable, and, in the case of reparation, would undermine the importance of reparation to the victim. It may also provide an incentive for offenders to enter into the bankruptcy process in order to avoid paying fines and reparation by having them discharged.

125 Insolvency Act, s 232.

126 Insolvency Act 2006, s 10.

127 Insolvency Act 2006, s 13.

128 Insolvency Act, s 64.

129 Insolvency Act 2006, s 274.

130 Insolvency Act 2006, s 304.

4.96 However, there are some provable debts which do survive bankruptcy. Section 304 of the Insolvency Act provides that a bankrupt is not released from the following on the discharge of the bankruptcy:

- any debt or liability incurred by fraud or fraudulent breach of trust to which the bankrupt was a party;
- any debt or liability for which the bankrupt has obtained forbearance through fraud to which the bankrupt was a party;
- any judgment debt or amount payable under any order for which the bankrupt is liable under section 147 (which relates to the bankrupt being required to contribute to payment of debts during the bankruptcy) or section 298 (which allows the court to discharge the bankrupt subject to any judgement or order for the payment of a sum of money);
- any amount payable under a maintenance order under the Family Proceedings Act 1980;
- any amount payable under the Child Support Act 1991.

4.97 If fines and other monetary penalties were made provable debts, it is perhaps debatable whether they should be an exception to the general rule that provable debts do not survive the discharge of bankruptcy. We note in this regard that profit forfeiture orders under the Criminal Proceeds (Recovery) Act are provable debts that do not survive discharge. However, reparation is clearly in a different category that is more analogous to a debt or liability incurred through fraud. Accordingly, we do not see an objection in principle to making reparation a provable debt that survives bankruptcy.

4.98 However, another possible rationale for excluding penalties, fines and reparation is that there are existing mechanisms to recover them. As we discussed above, fines and reparation are enforced either under Part 3 of the Summary Proceedings Act 1957, in relation to fines imposed by a District Court, or under sections 19–19F of the Crimes Act 1961, in relation to fines imposed by the High Court. These enforcement regimes allow access to the property of a person owing money without the need to go through the process of bankruptcy. The mechanisms under them are in effect just as wide-ranging as those available to the Official Assignee. There is therefore no obvious benefit to the State in providing bankruptcy as an alternative mechanism.

4.99 There are also some obvious disadvantages. First, the costs incurred by the State in the bankruptcy process would substantially exceed those incurred through the utilisation of the enforcement mechanisms in the Crimes Act 1961 and the Summary Proceedings Act 1957.

4.100 Secondly, and more importantly, while the State (and through it the victim) has access to all of the offender's property through existing enforcement mechanisms, it would under bankruptcy have to share that property with all other creditors; the amount recovered would depend in each case on the number of creditors, the amount of debt, and the preferential ranking provided for under the Insolvency Act (e.g. debts owed to secured creditors and unpaid wages are both given preference over other types of debts).

4.101 If penalties, fines and reparation were made provable debts, therefore, it is unlikely that the State would ever avail itself of the bankruptcy option as a method of enforcing that debt.

4.102 However, this does not dispose of the matter. The fact that reparation is not included in the list of provable debts means that, if the offender is adjudicated bankrupt by another creditor, the victim who is owed reparation receives nothing from the bankruptcy process, while other creditors are paid out on the distribution of the bankrupt's assets prior to his or her discharge from bankruptcy (to the extent that this is possible given the circumstances of the bankrupt). On the face of it, this seems unfair. Why should the victim not be able to share in a slice of the cake alongside all other creditors?

4.103 The answer is to be found in the current practice of the Insolvency Service and the financial situation of most bankrupts. We understand that the Service's long-standing practice has been that, where reparation payments are being paid by instalments, it permits those payments to continue to be made from income or other assets notwithstanding the adjudication in bankruptcy. If reparation were to be made a provable debt that would no longer be possible. Reparation would rank equally with all other provable debts owed to unsecured creditors; it would be frozen at the date of adjudication; and no further payments would occur until the pro rata distribution of assets to creditors prior to the discharge of bankruptcy. Given that unsecured creditors generally get only a small proportion of what is owed to them, victims would almost certainly be worse off than under current arrangements. Even if provision were made to enable reparation to survive the discharge of bankruptcy, its payment would be substantially delayed. We do not think that this would be a desirable outcome. For public interest reasons, including community confidence in the criminal justice system, payment of reparation should have priority over an offender's obligations to other creditors (which substantially comprise the Inland Revenue Department and financial institutions), and should therefore be enforceable notwithstanding an adjudication of bankruptcy to protect those obligations. Notwithstanding the appearance of unfairness, therefore, we have concluded that the maintenance of the status quo best protects the interests of victims.

4.104 We note in passing that the legislative authority for the current practice is somewhat uncertain. We have been advised that the Insolvency Service interprets section 147 of the Insolvency Act as providing authority for its practice of permitting reparation payments to be continued after bankruptcy. However, we have some reservations about whether this provision does provide clear authority for the continuation of reparation payments for two reasons.

4.105 Firstly, we note that the common law rule was that bankrupts could retain such income as was necessary to maintain themselves and their dependants. Payment of outstanding fines and reparation would seem to fall outside of the definition of "maintenance". Secondly, while section 232(2) of the Insolvency Act 2006 excludes fines, penalties and reparation from provable debts, there is no provision enabling the bankrupt's property to be applied towards them. This may be contrasted with rates obligations, the enforcement of which is specifically preserved by section 4 of the Act. Therefore, it is arguable that notwithstanding the existence of section 232(2), the continued payment of reparation is not permitted by the Act and has the effect of unlawfully defeating the claims of other creditors. Accordingly, we suggest that consideration be given to amending the Insolvency Act at an appropriate time to make clear that an adjudication in bankruptcy does not affect a court's right to recover a fine, penalty, reparation or other compensation ordered following a conviction or a discharge without conviction under section 106 of the Sentencing Act, and does not prevent the Official Assignee or the bankrupt from making payment towards any such fine, penalty, reparation or compensation.

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