

GOVERNMENT RESPONSE TO

LAW COMMISSION REPORT

ON

COMPENSATING CRIME VICTIMS

Presented to the House of Representatives

GOVERNMENT RESPONSE TO LAW COMMISSION REPORT ON *COMPENSATING CRIME VICTIMS*

Introduction

1. The Government has considered the Law Commission's report *Compensating Crime Victims* (NZLC R121) tabled in Parliament on 22 December 2010, and responds to the report in accordance with Cabinet Office Circular CO (09) 1.
2. The Law Commission recommends amending the Criminal Proceeds (Recovery) Act 2009 (the CPR Act) to allow property to be restrained in anticipation of a reparation order being made. The Law Commission also recommends amending the CPR Act to reprioritise payment of reparations over legal aid contributions.
3. The Government respectfully declines the Law Commission's proposed restraining order regime and proposal to reprioritise the order of payments in the CPR Act.

Law Commission Report and Government Response

BACKGROUND

4. In May 2008, the then Government asked the Commission to examine the mechanisms for compensating victims of crime for harm, loss or damage suffered as the result of crime. The 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'.¹

5. In October 2008, the Law Commission released the issues paper *Compensating Crime Victims*.² The issues paper considered options in relation to:
 - extending entitlements for personal injury and 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.
6. The Commission received 25 submissions on the issues paper from victims of crime, individuals and organisations who work with victims of crime, as well as other stakeholders in the criminal justice system.

¹ Justice and Electoral Committee, *Inquiry into Victim's Rights: Report of the Justice and Electoral Committee* (2007).

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

7. On 22 December 2010, the Commission tabled in Parliament its final report on the project, *Compensating Crime Victims*.

GOVERNMENT WORK PROGRAMME ON VICTIMS

8. The Law Commission's report acknowledges the Government's significant work programme for victims of crime. It notes that these developments address many of the broader concerns about the position of victims raised by submissions on the Commission's issues paper. In view of the Government's work programme, the Commission confines their report to the core issues raised by their terms of reference.

Response

9. The Government appreciates the Commission's acknowledgement of its victims of crime work programme. Since the Commission's issues paper was released in 2008, this Government has aimed to improve the way the criminal justice system interacts with those who find themselves in it through no fault of their own. The Government's work programme on victims includes:
 - the review of the Victims' Rights Act 2002. In March, Cabinet approved a reform package of 20 proposals that will enhance victims' rights and role in criminal justice processes, and ensure that agencies delivering services to victims are more accountable;
 - a \$50 offender levy which is being used to fund eight entitlements and services for victims of serious crime that were implemented from November 2009 to July 2010;
 - greater protections for victims of domestic violence. Improvements include the introduction of Police Safety Orders and allowing District Court judges to issue protection orders for victims when sentencing for domestic violence-related offences;
 - the recently announced five further initiatives for victims of serious crime (commencing 1 July 2011), which are able to be funded due to the offender levy being collected more quickly than anticipated; and
 - a project on alternative pre-trial and trial processes for child witnesses in the criminal justice system, with a focus on the feasibility of pre-recording a child's entire evidence and using trained experts to undertake the cross-examination of children.

INCREASING VICTIMS' ENTITLEMENTS TO COMPENSATION

10. The Law Commission's report considers the adequacy of existing arrangements for compensating victims of crime and ways to improve mechanisms for recovering reparation from offenders. The Commission explored:
 - whether crime victims should receive greater entitlements to compensation for personal injury than other accident victims through the accident compensation system;

- extending eligibility for compensation for mental injury;
- reparation under the Sentencing Act; and
- a State-funded reparation system, which could either be fully or partially funded via:
 - a State-advances reparation scheme;
 - a full State-funded reparation scheme; or
 - compulsory insurance.

11. For various principle, practical and affordability reasons, the Commission concluded that the status quo is preferable in each case above.

Response

12. The Government agrees with the Law Commission's conclusions on compensation for victims. The options explored to increase victims' entitlements would have issues of affordability, would reintroduce fault in determining eligibility for compensation, and would be difficult to administer.

RESTRAINING PROPERTY FOR THE PURPOSES OF REPARATION

13. The Law Commission considers there is room to improve the current mechanisms for enforcing orders for reparation and makes 14 recommendations to that end. These recommendations can be considered in three groups:

- proposed amendments to the CPR Act to restrain property for victim reparation;
- a proposed administrative process; and
- the disposition of restrained property.

Recommendations 1, 3 and 10 – Proposed amendments to the CPR Act to restrain property for victim reparation

14. The Law Commission recommends establishing a regime within the CPR Act for restraining the property of an accused person in anticipation of a reparation order being made. An application could be made if the accused person has been charged or will be charged with an offence within 48 hours. The Law Commission recommends that the restraining order should be made subject to conditions, including allowing the respondent to pay legal expenses out of the restrained property.

15. The Law Commission notes that under the proposed restraining order regime property held by the accused that would be available for restraint may not have any connection to the loss or damage to the victim.

Recommendations 2, 4 - 9, 11, 13 – Proposed administrative process

16. The Law Commission recommends access to a CPR Act restraining order for the new regime should be restricted to cases where the victim has suffered loss or damage of at least \$20,000, and where a court is satisfied the usual cost of restraining the type of property is less than the value of the property itself.

17. The Law Commission makes a number of further recommendations regarding the process of applying for restraining orders, including consultation on whether the application is financially justified, required notice of the application to affected parties, and conditions of the restraining order.
18. The Law Commission also recommends that 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 when 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.

Recommendations 12 and 14 – Disposition of restrained property

19. The Law Commission recommends the proceeds from property restrained under the CPR Act for the purposes of reparation should be applied in the following order of priority:
 - a. to pay the Official Assignee's costs that would be recoverable under section 87 of the CPR Act;
 - 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.
20. To avoid an anomaly with the existing order of priority of sections 82, 83 and 85 of the CPR Act, the Law Commission recommends that these sections 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.³

Response

21. The Government supports measures to improve the enforcement of reparations and is committed to continuously improving legal mechanisms available to better enforce reparation for the benefit of victims.
22. Currently, the Government is making improvements to how reparation is collected from offenders by reforming the collections operating model and bringing in new enforcement powers through the Courts and Criminal Matters Bill. The Bill includes provisions to better determine how an offender is to pay reparation and to streamline the sale or disposal process for confiscated vehicles for the purposes of

³ Payment of fines and reparation currently have the same priority under the CPR Act. However, the Courts and Criminal Matters Bill is amending the CPR Act to reflect current practice that payments received from an offender will be applied to pay reparation to victims before any outstanding fines.

reparation. These improvements will better hold offenders to account and should mean that more reparation is collected for victims. The Bill is currently awaiting the Committee of the Whole stage in Parliament.

23. The Government respectfully declines the Law Commission's recommendations to establish a statutory regime for restraining property in anticipation of a reparation order being made.
24. The Government has the following concerns about the proposal:
 - there is no demonstrated need for a new restraining regime to be established. Based on the information available, there is no evidence to suggest that defendants are dissipating their assets prior to a court making an order of reparation.
 - the use of the CPR Act mechanisms to restrain property is outside the scope and intent of the CPR Act:
 - the CPR Act is concerned with disrupting and preventing significant criminal activity (e.g. organised crime), and is based on the principle that crime must not be allowed to pay;
 - there are already limited legal mechanisms⁴ for restraining property pending the outcome of legal proceedings. This includes:
 - the current mechanisms in the CPR Act that allow the Crown to seek forfeiture of restrained property of an offender who has profited from significant criminal activity;
 - property is able to be restrained through Freezing Orders in Part 32 of the High Court Rules, which protects the applicant's interest against dissipation of the property prior to the outcome of those proceedings; and
 - the Securities Act 1978 can be used to 'freeze' a person's assets when he or she is suspected of financial wrongdoing. This prevents assets from being sold or transferred and enables any civil claims that might be brought by investors to be met;
 - the proposal would be complex to implement and difficult for agencies to manage. The administrative processes for the new restraining regime have a number of practical difficulties and efficacy issues. For example, setting a monetary threshold of \$20,000 for restraining orders would be complicated to administer. The extent of loss or damage in a specific case will be unknown until the criminal proceedings are conducted and the extent of offences and liability of the offender is decided upon. Until the court has decided these issues, the amount of reparation ordered will be unknown.

⁴ The mechanisms depend on civil and criminal proceedings occurring at the same time, so that the property is able to be restrained and, following a conviction in the criminal court, can be forfeited in the civil court. The use of these mechanisms to recover reparation depends on the type of property seized being able to be dissipated.

25. The costs of establishing such a regime would be considerable, and based on the limited data available, the number of victims who would benefit would be very small (less than 40 per year). Approximately half are likely to be organisations, such as banks or insurances companies, rather than individuals. There is a significant risk that costs to Government could exceed the amount recovered for victims. In addition, there is little evidence to suggest that a new regime would result in these victims receiving more reparation than they would under the current collection system.
26. In the current economic environment the Government must prioritise spending carefully. We consider there is insufficient data to proceed with the Law Commission's recommendations.
27. The Government also disagrees with the Law Commission's proposal to reprioritise the order in which proceeds are discharged to prioritise payment of reparation over repayments of legal aid.
28. The legal aid system requires people to repay some or all of their legal aid. The majority of legal aid debt is recovered where a charge has been placed over a property and the charge is recovered when the property is disposed of. In the case of people applying for legal aid to defend civil proceedings under the CPR Act, the CPR Act ensures that their legal aid can be secured against the property in question.
29. When the CPR Act was being developed, it was decided that the Act should prevent an accused person using up their seized assets to pay for their legal expenses. As such, in some cases, an accused will require legal aid in order to pay for their defence costs. The repayment priority for legal aid was intentionally set above fines and reparation so that an accused's legal aid debt can be recovered from their seized assets. The Law Commission's proposal would undermine the original policy intent of the Act.
30. Any change to the priority that legal aid receives when the Crown disposes of property would impact on the level of repayments that are recovered, and thus impact on the overall affordability of the legal aid scheme. There is already a significant gap between baseline and forecast expenditure on legal aid that the Government is working to address.
31. The effect of amending these sections to reprioritise reparation over legal aid repayments would be to reduce the likelihood of legal aid repayments from applicants defending civil proceedings under the CPR Act. Ultimately, this would require further savings to be found elsewhere in the legal aid scheme.

Conclusion

32. The Government agrees with the Law Commission's conclusion that the current arrangements for providing compensation to crime victims are appropriate and should not be changed.

33. The Government respectfully declines the Law Commission's recommendation to establish within the CPR Act a regime for restraining the property of an accused person in anticipation of a reparation order. Based on the data available, the Government considers the benefit for victims would not justify establishing and resourcing a new restraining regime in legislation.
34. The Government is implementing other measures to improve the enforcement of reparations. These improvements are being progressed through the Courts and Criminal Matters Bill currently awaiting the Committee of the Whole stage in Parliament.