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WHAT'S IN A NAME? INFORMAL JUSTICE FOR WOMEN VICTIMS OF DOMESTIC VIOLENCE AND THE CRIMINAL INJURIES COMPENSATION SCHEME OF WESTERN AUSTRALIA

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INTRODUCTION

I have been uncomfortable with the treatment of women victims of domestic violence since I began practising law in 1988. Initially, my discomfort was caused by my inability to obtain effective remedies for women victims, eg. protection orders which would actually protect. I then became increasingly frustrated by the judiciary’s inability, and at times refusal, to understand the circumstances of my clients. I believed that if the substantive law was changed, so would the treatment of victims. Judges would be required to apply the law regardless of any personal bias and victims would at least be able to find some solace in the fact that society no longer condoned their maltreatment. I discovered, however, that even when beneficial changes were made to the substantive law, the outcome for victims was not necessarily better.

In 1995, I investigated the treatment of women victims of domestic violence

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1 Throughout this article I will use the phrase ‘women victims of domestic violence’. By domestic violence I mean actual or threatened physical violence between married, de facto, or intimate partners in a heterosexual relationship. It is beyond the scope of this article to explore domestic violence which occurs in gay or lesbian relationships.
The purpose of this article is to explore how the 'process of assessment', rather than the substance of the legislation, affects the outcome of applications by women victims of domestic violence. In Part I, I briefly set out the findings of my previous research which prompted me to explore the procedure employed by the Assessor. In this section I describe the special needs and circumstances of victims of domestic violence. In Part II, I review the formation of the Office of the Assessor and look at potential political motivations behind its development. In Part III, I look at the specific statutory procedures and processes adopted by the Assessor and examine their potential effect on the outcome of applications by women victims. Finally in Part IV, I suggest alternatives to the present system, specifically what processes should be retained, rejected or introduced to accommodate the particular needs of women victims of domestic violence.

PART I: WOMEN VICTIMS OF DOMESTIC VIOLENCE

Women victims of domestic violence face considerable hurdles when they seek legal assistance. Often they are not believed or are accused of imagining or exaggerating their ordeals. If their accounts of abuse are accepted, the

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3 Fitzpatrick, C. 'Magistrate Barred For Bench Sexism', The West Australian 30 July 1996. The magistrate compared a stalker to "a little puppy dog wagging its tail."
legal system (Judges, lawyers, police) probes further to inquire whether they might have provoked their abusers into violence. Finally, the legal system may wonder, aloud or amongst itself, why the victim did not leave the abusive relationship if it was as bad as described. All of these reactions perpetuate the myth that women are somehow, or in someway, responsible for the violence they have suffered.

One avenue of legal redress which women victims of domestic violence have begun pursuing is criminal injuries compensation. As mentioned, I have previously examined how the Office of the Assessor for Criminal Injuries Compensation has applied the substantive requirements of the statutory scheme in applications from women victims. In my analysis of the Assessor’s treatment I employed a feminist perspective. Feminist analysis is of great assistance in explaining how the inherent bias of the legal system operates against women. Feminists “have shown how law and legal institutions silence women and fail to include or respond to their experiences.” In my analysis, I relied primarily on two feminist legal methods: ‘asking the woman question’ and ‘feminist practical reasoning’. These methods are best described by Katherine Bartlett, who notes that:

In law, asking the woman question means examining how the law fails to take into account the experience and value that seem more typical of women than of men, for whatever reason, or how

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4 Ibid
existing legal standards and concepts might disadvantage women. The question assumes that some features of the law may not only be non-neutral in a general sense, but also ‘male’ in a specific sense. The purpose of the woman question is to expose those features and how they operated, and to suggest how they might be corrected.\textsuperscript{9}

Feminist practical reasoning builds upon the traditional mode of practical reasoning by bringing to it the critical concerns and values reflected in other feminist methods, including the woman question. [It] challenges the legitimacy of the norms of those who claim to speak, through rules, for the community. [It] differs from other forms of legal reasoning, however, in the strength of its commitment to the notion that there is not one, but many overlapping communities to which one might look for 'reason.' \textsuperscript{10}

In my research, I identified three significant hurdles which women victims of domestic violence face when applying for criminal injuries compensation. Before making an award, the Assessor must be convinced that (i) the applicant did not contribute directly or indirectly to her injury; (ii) that she cooperated with authorities in bringing the offender before a court to face criminal charges; and (iii) that the award of compensation will not benefit the offender.\textsuperscript{11} In reviewing how the Assessor interpreted and applied these substantive requirements to the factual situations asserted by the victims, I was able to identify inaccurate stereotypes relied on by the Assessor and how the social and psychological context in which domestic violence occurs was ignored.

The Assessor’s belief system and reasoning process reflects the belief system of many members of society (I would say a significant majority). In the following paragraphs I will briefly describe several commonly held beliefs

\begin{itemize}
  \item \textsuperscript{9} Id, 837
  \item \textsuperscript{10} Id, 854 855
  \item \textsuperscript{11} Criminal Injuries Compensation Act 1985 (WA) ss 23, 24, 25
\end{itemize}
(myths) regarding domestic violence and explain how, if social and psychological factors were considered, these myths could not be used to further blame victims of domestic violence. This analysis will be useful in identifying the special needs and circumstances of victims, which need to be considered when evaluating the procedures and processes used by the Office of the Assessor.

First, it is not uncommon for society to wonder what the victim did to provoke her abuser, or to inquire whether the fighting was mutual (“mutual combat”). The mutual combat argument, however, fails to acknowledge that when women use violence, it is often in self-defense. Further, if a woman is in fact the initiator of the violence, it may be because “they sense impending violence from their partner and initiate the attack in order to stop the overwhelming build-up of tension.”12 Finally, given the disparate injuries which result from this mutual combat, this type of classification ignores the obvious difference in the physical capacities of the parties and the particular dynamics in male-female relationships.13

The search to find provocation by the victim by both abusers and the legal system is also symptomatic of social and psychological factors being ignored and political agendas being maintained by male power structures. The provocation assertion often equates verbal aggressiveness (‘nagging’, criticizing, saying no) with physical aggressiveness. This argument implies that there is a proper way for a woman to address her intimate, one which the male is empowered to maintain.14 As Ptacek explains:

‘loss of control’ and ‘provocation’ cannot explain violence; they merely serve as excuses, as rationalisations, and as ways of

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13 Id, 108
obscuring the benefits (however temporary or enduring) that the violence provides. At the individual level they obscure the batterers' self-interest in acting violent; at the society level they mask the male domination underlying violence against women.\textsuperscript{15}

Another way society seeks to blame the victim of domestic violence is by asking why she did not call the police or why she did not "insist" charges be laid against the abuser. First, these questions assume that the victim and the relevant authorities in fact recognise that the abuser’s behaviour is criminal. Police may view a report of abuse as just another "domestic", a waste of their time, and a situation best characterised as a private family matter.\textsuperscript{16} The courts and criminal justice system, by providing and relying on civil remedies (restraining orders, divorce) perpetuate the view that domestic violence is not criminal. The victim may herself believe the violence is not really a crime, or that all she is entitled to is a civil remedy. In my research of criminal injuries application by women victims, I discovered one case where a victim had not reported a serious injury to the police because she did not think they would "appreciate her bothering them" about her de facto pushing her down.\textsuperscript{17}

Even if the victim recognises that the abuser’s behaviour is criminal, she may have quite valid reasons for her reluctance to involve the police, courts, and other outsiders. Domestic violence is not easily dealt with by traditional police procedures and practices used to deal with crimes by strangers.\textsuperscript{18} A victim risks losing her relationship with the offender and all that it entails - love, economic support, and the relationship the offender may have with the victim’s children.\textsuperscript{19} She may want the violence to end, but not the relationship.

\textsuperscript{15} Id. 145
\textsuperscript{17} Jurevic, above, note 2
Unfortunately, a police response cannot guarantee an end to the violence.\textsuperscript{20} By calling the police she also risks retaliation and further intimidation by the abuser.\textsuperscript{21} If she does seek assistance, she then opens herself up to increased scrutiny by the courts, police, and other governmental agencies.\textsuperscript{22} The potential humiliation resulting from exposure to these institutions may be more than a victim is willing to suffer.

Finally, society often asks the victim why she stayed in the abusive relationship, if it was as bad as she describes. This question ignores the realities of many victims' lives. They may be financially unable to change households. They may be threatened by the abuser, eg. that he will fight for custody of their children. He may also threaten to inflict harm on himself, the victim, or other family members if she leaves the home. Victims who have suffered severe abuse may be so emotionally distraught that leaving the home is beyond their present capabilities. Even for those women who are not suffering from severe emotional trauma, societal pressures to keep the family together and make the marriage work can keep a victim from escaping an abusive relationship.\textsuperscript{23}

If women victims of domestic violence are to be accommodated within the legal system, the aforementioned myths must be dispelled. The psychological and social factors which operate in society to allow the perpetuation of domestic violence must be revealed so that the victim's physical, mental, and economic situation is presented from her perspective not the abuser's, and not the prevailing white, middle-class, male dominated legal system's.

As will be explored in Part III, procedures must be developed which will assist the victim to have her story heard and believed. The victim may require special procedural protection so that she feels safe in telling her story and assured that it will not be automatically discounted.

\textsuperscript{20} Wasik, M, above, note 16, 104
\textsuperscript{21} Id, 106
\textsuperscript{22} Id, 104
\textsuperscript{23} See generally, Seddon, Nicholas, \textit{Domestic Violence in Australia}, 2nd ed, (Sydney: Federation Press, 1993)
PART II: THE OFFICE OF THE WA ASSESSOR

Since the 1960s, Criminal Injuries Compensation schemes have been created in many common law jurisdictions. While essentially state financial schemes to compensate the victims of intentional torts, compensation is strictly limited for injuries caused by acts which are, or could be found, criminal. In Western Australia, compensation is limited for injuries to a person, not property.

In Western Australia, criminal injuries compensation legislation was first introduced in 1971 and was court based. As the Victim of Crimes Working Party noted, "[i]t was intended that at the conclusion of a criminal trial the victim could make an immediate claim for injury or loss suffered as a consequence of the offence." In 1982, the criminal injuries compensation scheme was substantially changed to require that applications for compensation be made to a new office, the Office of the Assessor for Criminal Injuries Compensation, where applications would be heard by an independent assessor required to hold a private hearing on all applications. The impetus for these changes is reflected in the legislative history. The Western Australia Parliament believed that the court system was too formal, victims were reluctant to appear in court to talk about the incident, and that the cost and inconvenience of appearing in court often outweighed the potential award. The new procedures were intended to be informal, allow the applicant to proceed without representation, and require the assessor to “act speedily and informally on applications made to him,

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26 Criminal Injuries Compensation Act 1985 (WA) s 3
28 Western Australia Parliament, Parliamentary Debates (Hansard), Volume 241, 1982, 4848 (9 November 1982)
29 Ibid
having regard to the requirements of justice and unfettered by legal rules relating to evidence and procedure." 30

In 1985, the *Criminal Injuries Compensation Act 1985* (WA) was amended to allow the Assessor discretion as to whether a notice of application would be sent to the offender and whether to conduct a hearing. These changes were promoted to “simplify matters” and “further reduce stress in the victim.” 31

To accomplish the goals of these reforms (informality, cost reductions, ease of access, no need for legal representation and flexibility), specific statutory provision, regulations, and informal guidelines were developed. These will be analysed in detail in Part III. It is important now, however, to consider why the legislature sought to adopt these goals in the first instance. What were the motivations? What political implications are involved in these choices?

For the purposes of this article I consider the Office of the Assessor to be an example of a tribunal created to embody the characteristics of informal justice. Neither the term ‘tribunal’ nor ‘informal justice’ are amenable to simple definition. In classifying the Office of the Assessor as a tribunal, I rely on Hazel Genn’s definition: “The label is given to many different kinds of bodies with widely differing functions, and covering a vast range of subject areas including private as well as public law issues.” 32 Her study of UK tribunals concerned those institutions that functioned as court substitutes. She notes that these ‘court-substitutes’ “… do not have responsibility for making regulations or policy decisions, but are required to act as informal courts, reviewing administrative decisions or adjudicating between disputing parties.” 33

30 Ibid
33 Id. See also Douglas, Roger & Jones, Melinda, *Administrative Law* 2nd ed (Sydney, NSW: Federation Press, 1996) 174 who note that:

“[t]he genus, tribunal, includes a disparate group of bodies. Some are de facto courts, established in order to dispense cheap justice in situations which would otherwise be handled by ordinary courts, but a considerably greater expense… the decision to create them, and the use of the label “tribunal,” both reflect a belief that it is possible to create bodies which will behave more or less like courts, but more cheaply, more
Informal justice is an even more difficult term to define. Matthews suggests the term is "widely employed as a shorthand for a variety of practices, both public and private, for dispute processing. At the most general level it encompassed all forms of dispute processing which were seen as departing from the image of the formal legal process based on adversarial alternatives."  

Abel elaborates that,

[although it is clearly necessary to have some working concept of informal justice, its boundaries must remain quite fluid. Such institutions are informal to the extent that they are non bureaucratic in structure and relatively undifferentiated from the larger society, minimize the use of professionals, and eschew official law in favour of substantive and procedural norms that are vague, unwritten, common common-sensical, flexible, ad hoc, and particularistic. Every instance of informal justice will exhibit some of these characteristics to some degree, though in none will all of them be fully developed.]

The Office of the Assessor in Western Australia is a court-substitute that acts as an informal court to determine whether the applicant has made out a meritorious claim for compensation. The parties to this "dispute" include the applicant herself and depending on one's characterisation the offender (whom the applicant must prove was at fault) or the State (who will investigate the applicant's behaviour.) The Office of the Assessor is an informal alternative to the formal judicial system because of the following key characteristics the intention that the use of a professional advocate be unnecessary; the preclusion of an award of costs if one is employed; and the Assessor's broad discretion to apply flexible substantive and procedural norms to fit the particular needs of the dispute before him or her. This informality is not without its potential ramifications or implicit perceptions of justice.
What does this movement to informal justice say about our perception of formal justice? Abel asks, "[a]re we saying that legal procedures never produces formal justice? Why do we think that informal institutions can achieve formal justice in an unjust society when formal institutions can't? In what cases is it appropriate to abandon substantive law for other normative guidelines? Are the latter preferable because they are imbued with common sense, or are more popular, or less technical?"  

These questions were not addressed in the parliamentary debates preceding the adoption of the criminal injuries compensation tribunal in Western Australia. If they had been, one could argue that, at the very least, the provisions giving the Assessor broad discretion in determining the rules of evidence and procedure and for probing into the conduct of the applicants would have been given a minimum of attention.

What is the effect of informal justice on the formal justice system? Matthews believes the operation of informal courts relegitimise the ailing legal system by distracting attention away from the failures of the legal process and by implication, reaffirm its credibility by indicating that its failures are due to overload. It reinforces the claim that authorities really are concerned with the grievances no matter how apparently trivial their subject; and, it reaffirms the fundamental individualised and professionalised principles of the formal system. Abel comments that "[t]he object [of informal justice] is not to reduce litigation in general but to rid the courts of certain kinds of cases so that judges can handle more cases of the other kind or handle them better." Informalists "therefore speak of cases being 'appropriate' for the courts glossing over the implicit decision to move certain matters to alternative institutions rather than adapt existing courts to handle them." In the legislative history surrounding the adoption of the criminal injuries tribunal, while there was mention of the supposed benefits to the applicants, there was no discussion on the effect on the formal courts. Interestingly, the potential

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37 Above n 34, 13
38 Above n 36, 234
39 Above n 35, 7
effect of unburdening the district court was not offered in support of the amendments. If the debate took place today, given the burgeoning case loads of all courts, and the need for case management techniques, it would not be surprising if this argument were put forward without reflection on its effect on the applicants.

Finally, what does the choice of informalism mean to the citizenry of the State? Abel suggests that,

[I]nformal institutions control by disorganizing grievants, trivializing grievances, frustrating collective responses. Their very creation proclaims the message that social problems can be resolved by fiddling with the control apparatus once more, that it is unnecessary to question basic social structures. Informalism represents an attempt by the dominant classes to impute wishes to the dominated so that the former can enjoy speedy, inexpensive access to authoritative courts from which the later have been excluded.  

Matthews' analysis supports this view. He argues that,

[I]n the States' purpose in encouraging informalism is to appease the poor and disaffected and to diffuse the possibility of coordinated resistance through a mixture of offensives which combine subtle manipulation with more intensive forms of control.  

Maureen Cain's work in this area elaborates on the last question and offers an alternative to the conventional efforts of evaluating alternatives to formal justice. Instead of using formal justice (or as she prefers, professionalised justice) as the standard by which alternative are compared to (and by which “one can come up with only negative characteristics for informal justices, or inversions of the professionalised version” 42), she offers new provisional

40 Id, 67
41 Above, note 34, 14
criteria. Using ten characteristics found in her ideal of "collective" justice, she measures professionalised justice, populist justice, and incorporated justice regimes against these characteristics. In evaluating forums for dispute processing, these characteristics can be used "as a temporary yardstick by which progress can be measured. If one or more of these characteristics is missing, an agency can ask itself why this is so" 43 or what the significance of this characteristic has in the particular dispute context.

Cain uses a working-class standpoint and class categories are integral to her model. There is no reason, however, why her analysis can not be useful if other standpoints are adopted. She explains that, "a theory emphasizing qualitative rather than purely quantitative distinctions is prima facie - but still only potentially - better able to take account of complexities such as those introduced by racism and sexism." 44

It is beyond the scope of this article to examine Cain's theories in detail, but it is interesting to see how applying some of her criteria to the Office of the Assessor model can illuminate potential problems. Four characteristics are particularly relevant: (i) how the client is constituted as a subject of the dispute; (ii) how the "other side" is seen; (iii) how the incident at issue is defined; and (iv) what kind of evidence is deemed relevant.

In collective justice, the client is constituted as a collective subject,45 that is a member of a defined class which will be protected and empowered by this constitution. This means that "the 'other side' in matters dealt with by the agency ... must necessarily be seen in class terms also." 46 In professionalised justice, both the client and the opponent are individualized: "[b]oth parties are subjects at law in this conception, hence justice has no object other than self." 47

In incorporated justice,48 clients are constituted as individuals, but the other
side "is frequently denied, for the opponent is usually the agency itself, and to recognize it as an opponent would be to recognize, willy nilly, the clients of the agency as a single category of people, a collectivity, if not a class." 49

When these criteria are used to analyse the party formation in criminal injuries compensation, the problem becomes clear. The applicants, women victims of domestic violence, are individualised. They are not seen as a member of any class, eg. poor, women, victims of male violence, citizens failed by the police, etc; instead, they are individual victims. The opponent is figuratively the offender, but the true opponent is the State (the statute itself classifies the offender as an interested person, and not as a party). The State is the holder of the funds, the State assesses eligibility, the State created the scheme, and the State is in many respects responsible for the victim's injury, by reinforcing patriarchal structures which result in judicial and institutional (police and other agencies) non-feasance. If a collective form of party configuration was employed, the true parties would be abused women versus a patriarchal state.

This configuration would then have ramifications for how the dispute is defined. The collective justice model would aggregate all incidents of abuse to identify a class basis.50 The problems would be broadly and generally defined which would identify the underlying problems, not an individualised, decontextualised criminal offence. In contrast, "professionalised justice insists on the incident being dealt with in isolation ... as an occasion complete in itself".51 Incorporated justice similarly limits the definition of the dispute. By denying the existence of an opponent, the agency must view the incident as a "well intentioned mistake", an "atypical mistake" or allege that "the client did not put the initial case well enough, clearly enough (blaming the victim)".52

Applied to the Office of the Assessor, it can be argued that when the victim of domestic violence makes an application for compensation, the issue is whether or not she is "deserving" of compensation from the State for an isolated

49 Id, 73  
50 Id, 61  
51 Id, 67  
52 Id, 73
criminal act. The dispute becomes focused on the behaviour of the applicant (not the offender because even if the act was criminal, the State can escape liability if the victim is in some way to blame for her misfortune). The action, in essence, becomes State versus applicant, not applicant versus State, or applicant versus offender. If the victim had the benefit of being collectively constituted, and the State was identified as the 'other side', the definition of the dispute would be widened. This would require the decision maker to look at additional issues, such as whether the State is implicated in the injury suffered by the applicant by, for example, failing to provided refuge shelters, failing to adequately train police officers, or failing to pursue criminal sanction against the offender.

Finally, the type of evidence that is relevant in the dispute is affected by all three characteristics just mentioned. In collective justice, "the kind of evidence required for either negative or positive prevention, and for identifying the class character of the issues and the opponent, are different from the kinds of evidence required for adjudication in a narrower, individualised sense." 53 Professionalised justice utilises the rules of evidence which are "strict and circumscribed" and "guarantee the ostensibly apolitical and asocial character of professionalised justice." 54 Incorporated justice uses two types of evidence:

[A]s regards the incident, rather strict rules may well be applied .... evidence is customarily admitted only about the single incident under discussion. As regards the characteristics of the client ... different evidential practices are involved. Here it becomes possible for the agency to examine abroad range of background characteristics in order to determine whether or not the claim is likely to be deserved. 55

This definition of the incorporated justice method and its use of evidence could have been written with the Office of the Assessor in mind. The

53 Id, 61
54 Id, 67
55 Id, 74
Assessor, when determining whether an offence has occurred looks only at the particular incident at issue. However, to determine whether the applicant is deserving of compensation, the Assessor is given broad discretion to consider any factor that may be relevant. This results in strict rules of evidence for evaluating the incident, and middle-class values based on stereotypes and myths for determining worthiness.\textsuperscript{56}

This part of the article has described the formation of the Office of the Assessor, and raised questions regarding its effect on formal courts and on the relationship between citizen and State. Maureen Cain's analysis was offered to demonstrate how a more political analysis/focus can be used to critique the informal methods used by tribunals. In the following part, I analyse the potential effect of specific provision of the\textit{Criminal Injuries Compensation Act 1985 (WA)} on women victims of domestic violence, how those provisions may contravene the intention of the legislation, and how they certainly work against women victims achieving justice.

\textbf{PART III: THE CRIMINAL INJURIES COMPENSATION ACT 1985 (WA) PROVISIONS}

In this part of the article, I have chosen to focus on seven key areas. The areas of cost, accessibility, speed, and representation were chosen because they are issues which informal justice has specifically addressed and asserts are advantages of ‘informalism’. I will also look at the areas of hearing, evidence, and the publication of decisions. I chose these areas because they are problematic in the Office of the Assessor, and present significant impediments to applicants seeking justice.

\textsuperscript{56} As Richard Abel remarks on informal institutions: “their competence is defined by the nature of their relationship between the parties and the type of accusation or claim. If they stigmatise one party less by redesignating the accused as “respondent,” they render the other more vulnerable to criticism by recharacterising the victim as a “complainant.” This allows, indeed encourages, informal institutions to ask whether, perhaps, the complainant provoked the conflict, or perhaps is being hypersensitive.” Abel, R, 'Contradictions of Informal Justice' in Abel, Richard (ed),\textit{The Politics of Informal Justice} (New York: Academic Press,1982), 272
COST

One of the reasons the Office of the Assessor was created was that the costs to the applicant involved in conventional litigation were considered too high. By making the procedure simpler the legislature assumed there would be no need for legal representation. Thus Section 44 of the Act precludes the award of costs for such representation.

Abel raises several important questions about the cost and expense in alternative forums versus formal institutions. Are they less expensive for the claimant, or do savings accrue to the State? Would the applicant have ever used the more expensive formal courts? If informal alternatives are less expensive, is this because they are worth less or are they inferior to formal courts? 57

While there are no answers to these questions in the WA Act’s legislative history, in fact the questions were not asked. They deserve reflection by reformers before an alternative is proposed for cost saving benefits.

The most recent report by the Office of the Assessor, required to be made by the Act,58 requests the appointment of an additional assessor (half time), additional support staff, and new office space.59 The report states that over 1400 new applications were received in 1995. Of all claims lodged in this period, 59.5% were lodged by a solicitor. Are there real savings if a new venue is required? Are Assessors cheaper than judges (the same report suggests they should have the same status)? Is the District Court made less expensive (via time savings) to litigants by having 1400 applications dealt with by the Assessor? Are there real savings for the almost 60% of applicants who required a solicitor’s assistance?

57 Above, note 36, 232
58 Criminal Injuries Compensation Act 1985 (WA) s 48
ACCESS

Access is another quality attributed to informal alternatives. While reducing the “entry fee” to the alternative is one way of encouraging access, others such as knowledge of the remedy, location of the venue, and ease of application process are also relevant. As described previously, the Office of the Assessor provides information for potential applicants on how to bring claims for criminal injuries. There are no filing fees. The venue is located in a commercial office building accessible by public transportation. Knowledge of the scheme has only recently been a factor warranting attention and has resulted in community agencies drawing attention to potential clients via pamphlets and help-lines.

Abel asks other questions regarding access. The most interesting one involves quality of access:

Proponents certainly want legal institutions to be equally available to the entire population, for this is an axiom of liberalism, but they tend to be vague about what such equality means and how it is to be attained within an unequal society. Would equality be satisfied if some disputants had access to courts but others only to informal alternatives? 60

He also queries whether the push for access to informal alternatives is in reality “an attempt by the dominant classes to impute wishes to the dominated so that the former can enjoy speedy, inexpensive access to authoritative courts from which the latter have been excluded.” 61

One way of improving access for women victims of domestic violence is to require police to advise them of the scheme when the incident of abuse is first reported, or called to the attention of relevant authorities. Of course this would require the police to recognise that the incident is in fact criminal. A more

60 Above, note 36, 233
61 Above, note 35, 8
important question is why women victims of domestic violence should be
denied access to the District Court when they might believe it has greater
power over abusive men and where these same men might be disinclined to
allege provocation?

**SPEED**

One of the reasons the Office of the Assessor was formed was to provide a
quick process for the resolution of claims. It was felt that the process in the
District Court was prolonged and caused unnecessary anxiety to claimants.62
As a result of this concern, the Assessor is required by statute to act expedi­
tiously.63

It is common knowledge that all formal courts have experienced an increase in
case loads resulting in significant time delays for civil trials, and as a result
new case management policies have been introduced in most jurisdictions.
The Office of the Assessor is also experiencing this problem. The 1995 report
states that in 1995, 1448 applications were received, and the Office has a
backlog of 2554 cases. In 1994, the backlog was 1873 cases. The Assessor
states that it will now take approximately two years for new applications to be
processed. Is this quicker than the District Court? Before this argument of
speed can be used, a comparison must be evaluated.

The Assessor’s report states: “When I stepped into office in January the
backlog of applications meant that for many victims, instead of “closure” there
was the potential for the victim to continue to feel neglect and brood over such
a grievance for a considerable unhealthy period of time.” 64 In the context of
domestic violence, I would suggest that speed is in fact valuable for the
victims. If one of the reasons that some women remain in abusive relationship
is one of financial need, an award of compensation might assist a woman in
having the resources to leave a violent household.

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62 Western Australia Parliament, *Parliamentary Debates (Hansard)*, Volume 241, 1982,
5345 (16 November 1982)
63 *Criminal Injuries Compensation Act* 1985 (WA) s 28
64 Report of the Assessor, above, note 59, 7
HEARINGS/PRIVACY

The Assessor may make a determination on an application without conducting a hearing.\textsuperscript{65} If the Assessor decides to hold a hearing it will be in private and the Assessor will determine who will be heard.\textsuperscript{66} In 1995, out of the 720 applications which were finalised, only 38 hearings were conducted.

The discretion on whether to hold a hearing is problematic. If the Assessor has questions regarding the credibility of the applicant (Section 25 of the Act allows for the Assessor to have regard to any behaviour, condition, attitude or disposition of the applicant), or has general reservations about the claim, the applicant has no other opportunity to present additional evidence in support of her application. The statute gives the Assessor the ability to “seek and receive such evidence or information and make such enquiries and investigations as he thinks fit.”\textsuperscript{67} However, the Act provides no opportunity for the applicant to review this information before a decision is made, and does not require the Assessor to give any notice that such information has been sought or received.

In Victoria, it has been asserted that, “[a]t minimum, natural justice is denied if prejudicial material upon which the CCT [Criminal Compensation Tribunal] seeks to rely is not made available to the applicant for perusal... Rules of natural justice also require that an applicant has a right to respond to any matters raised in material which is part of the CCT file.”\textsuperscript{68}

It is beyond the scope of this article to evaluate the natural justice implications of the Office of the Assessor, but at a minimum it would seem that an applicant has a right to be heard, and a right to know what information the Assessor will rely on in making a decision. Without such protections, this scheme, while deserving the label informal, cannot be deemed to be an example of informal justice.

\textsuperscript{65} Criminal Injuries Compensation Act 1985 (WA) s 33
\textsuperscript{66} Id, ss 34, 36
\textsuperscript{67} Id, s 30
\textsuperscript{68} Ambikapathy, P & Scutt, J, ‘Victim Compensation or Trial’ [1996] Law Institute of Victoria 44, 45
One option would be to allow the Assessor the discretion to hold a hearing unless she intended to reject the application or reduce compensation for contributory conduct. In one file reviewed in my research, the Assessor reduced compensation for contributory conduct based on the comments of an officer in a police report. The applicant had no opportunity to refute the officer's conclusions and the only recourse for her would be to appeal the Assessor's decision in District Court (where she would be liable for costs if she lost). 69

Another consideration is the requirement that hearings be in private. At first blush, this provision appears sensitive and benevolent: victims will be protected from having to publicly recount their experience and further trauma will be minimised. In the context of victims of domestic violence this protection is valuable. However, it is not without problems. As Abel suggests,

> [a]lthough the guarantee of confidentiality is justified in the name of process, its effect is to isolate grievants from one another and from the community, inhibiting the perception of common grievance. Without the possibility of aggregation, of some greater impact, even the most committed grievant will burnout and "lump the complaint". 70

The “possibility of aggregation” could be of significant value to women victims of domestic violence. Part of the problem surrounding domestic violence is that it occurs in private and is hidden. Women victims feel isolated and believe that they are alone and singular in their experience. The legal system individualises their experiences. Aggregating claims and experiences would assist in establishing a pattern or practice (eg. police inaction which would collaborate women’s failure to report incidents to police) and indicate to society that the causes of domestic violence are systemic, not atypical or “personal.”

69 Jurevic, above, note 2
70 Above n 56, 289
DECI SIONS

The problems described in the previous section are compounded by the fact that the Assessor’s decisions (and reasons) are not public or published. While the Act\(^\text{71}\) requires the Assessor to provide the applicant reasons when an application is refused, any other person interested in the application (defined as a person who may be liable to the Crown for refund, or any other person who has a substantial interest) may also request the reasons for a determination. However, these reasons are not normally available to general members of the public.

The Assessor hints at the problems with this policy, though I doubt the Assessor would argue that reasons for decisions should necessarily be made public. The Assessor’s report notes:

> In the disposal of large sums from the public purse, it is important that there is parity in making quantum damages. All legal decisions, although firmly premised in the Law have inherent therein the element of personal judgment.

> In the area of the assessment of damages for injury such assessment withstands public scrutiny when it is based upon knowledge of law, sound knowledge of precedent and is tempered with a human understanding of contextual issues. There must be some consistency in the assessment and measure of damages awarded.

> The addition of another Assessor, albeit part time, would not only alleviate the pressure on capacity to perform effectively, but would also allow for comparisons of judgment and an inbuilt process of moderation ... it is now unreasonable that any incumbent should have to shoulder the workload as a professional isolate. Such isolation not only takes its personal toll but in my

\(^{71}\) *Criminal Injuries Compensation Act 1985 (WA)* s 21.
opinion holds the inherent danger of the incumbent beginning to make judgments based on personal precedent rather than objective reflection, other precedent and moderation.72

These concerns, albeit self interested, have legitimacy. They are more appropriately directed, however, not at the Assessor but at the applicants, and society in general. As the distinguished scholar Richard Ingleby notes:

But the decisions and the agreements derived through "alternative" bodies are not always publicised. Publicity of norms and their scrutiny through the appellate process enable challenge and clarification ... [T]he benefits of litigation are not just for the parties to the dispute. The adjudication decision has two aspects, the resolution of the dispute between the parties, and the provision of norms, by the doctrine of precedent, for the rest of the community. The latter should not be underestimated, because the precedential impact of a decision means that the rule will eventually apply to a much wider range of situations than that from which the rule was constructed.73

In the context of domestic violence, the creation of norms is imperative. Without them, the individual decision maker is allowed to rely on "personal precedent" and beliefs which can be dangerous if they are ill informed or biased. Furthermore, society at large will not benefit from the educative function that the law, through precedent, can have in changing behaviour. A specific example of how the creation of norms would be of assistance is in the definition of provocation. If it was accepted by the Tribunal that a victim cannot be said to have provoked her abuse by words alone, men (and society) would not be able to continue blaming the victim for the abuse she suffers.

72 Above, note 59, 8
73 Ingleby, R, In the Ball Park: Alternative Dispute Resolution And The Courts (Carlton, Victoria: Australian Institute of Judicial Administration, 1991) 1
EVIDENCE AND DISCRETION

The Assessor is given significant discretion under the Act to determine what evidence is relevant. Section 27 allows the Assessor to “have regard to such factors and circumstances as he thinks relevant.” Section 28 allows the Assessor “to act without regard to, or to observe, legal rules relating to evidence or procedure.” Section 30 allows the Assessor to “seek and receive such evidence or information and make such other inquiries and investigations as he thinks fit.” These provisions have resulted in the Assessor adopting a policy whereby the Office sends a notice to offenders to advise them of the application made against them and inviting “their comments or submission with respect to issues concerning provocation and contributory conduct.” 74

While it could be argued that this discretion allows the Assessor to be flexible in determining the necessary evidence in each case and allows for a more inquisitorial versus adversarial approach in making a determination, it easily lends itself to abuse. Without established precedent to follow, the Assessor can rely on ill conceived stereotypes and personal biases in determining what is at issue and what evidence is persuasive. As Wiegers notes,

... challenging dominant ideologies requires more than simply changing the gender or for that matter, the class origin and race of potential decision makers. Formal rules constraining the exercise of discretion may be helpful even if the rules are thereby considered over or under inclusive (for example, a rule that the victim’s conduct will never provide a defence to intentional harm nor operate to reduce damages). However, discretion can never be completely avoided and is often necessary precisely in order to capture differences in the constrained circumstance of people’s lives. The publicity generated by litigation may be an effective strategy in influencing the exercise of discretion by judicial and administrative bodies to some degree. 75

74 “Guidelines and Procedures In Preparing & Lodging A Claim”, Office of the Assessor, 2.08
75 Above, note 6, 304-305
However, Ingleby warns that,

[...]he more discretion which applies to any particular decision, then the wider the bracket, the larger the ballpark, the greater the
elasticity in the rubber band. Whatever image is used, more
discretion means a greater range of possible orders which a trial
dudge might make. This means that practitioners' and third party neutrals' capacity to predict the outcome of any particular dispute
is inversely proportionate to the amount of judicial discretion...
Far from maximising the possibility of doing justice in every case,
it could be argued that the impact of broad judicial discretion is precisely the opposite, if "every case" includes the decisions
which never fail to be made by trial judges.76

Given the history of judicial incompetence in dealing with issues of domestic
violence, the broad discretion given the Assessor is inappropriate and can only
serve to deny victims justice. This discretion, coupled with the lack of
opportunity for hearing and review of evidence, and the fact that the decision
of the Assessor are not published is clearly a recipe for disaster. Not only will
individual victims be denied the full benefit of the law, the larger community
will be unable to challenge the reasoning and decision making process of the
individual Assessor whose discretion is virtually unlimited.

REPRESENTATION

As previously mentioned, when introducing the Office of the Assessor, the
legislature envisioned that applicants would no longer require the assistance of
legal representation when pursing claims for criminal injuries compensation.
Its reasoning went something like, "if the process is informal and accessible,
lawyers will not be required, costs to the applicant will be minimal, and
everything will be quick." As indicated, however, many applicants still feel the need for legal representation (59.5% used a solicitor to file their claims),

76 Above, note 73, 67
even though costs are not available (Criminal Injuries Compensation Act 1985 (WA) s44).

Genn, in her article “Tribunals and Informal Justice,” makes a thorough and exhaustive analysis of the role of legal representation in tribunal proceedings. She notes that, the “absence of representation ... may be a deliberate choice,” justified for the reasons asserted above. She adds that,

[i]nformality is therefore necessary only when a prior decision has been taken that representation will not be subsidised. The resource issue that underpins decisions to opt for ‘informal’, ‘non-technical’ proceedings should not therefore be obscured in debates about the drawbacks of conventional courts. The two issues are separate.

In Genn’s study of tribunals she found that, “the presence of a skilled representative significantly increased the probability that a case would succeed.” This finding refutes the usual assertions that because the size of the claims is small, the tribunal decision-makers are skilled and helpful, and the legal issues are simple, that representation is unnecessary. She points out that,

[Although most tribunal hearings are more informal and procedurally more flexible than Courts, such informality has been wrongly assumed to extend to all aspects of tribunal processes. However, none of the procedural informality of tribunals can overcome or alter the need for applicants to bring their cases within the regulations or statute, and prove their factual situation with evidence.

77 Above, note 32
78 Id, 398
79 Ibid
80 Id, 400
81 Id, 401
From my analysis in the previous sections, one might wonder how an applicant would, without legal representation, be able to raise the issue of natural justice to obtain access to all materials in the possession of the Assessor relevant to the dispute. Would an unrepresented applicant be able to put forward arguments to persuade the Assessor to waive the limitation period, especially when the office guidelines are silent on this possibility? Genn argues that,

> informality can constitute a trap for those bringing or defending their cases by conveying the false impression that the tribunal’s decision-making processes can be carried out with the same lack of formality and relaxation of rules as the hearing... Decision making in tribunals is accomplished within the context of rules and case law which determine the existence of entitlements or the limits of ‘reasonableness’... [Applicants] must assert and establish a legal right, entitlement, or defence: ‘the assertion of a right is a form of moral criticism: besides the expression of a demand, it involves an appeal to the authority of principle in support of one’s claim’.\(^\text{82}\)

The Office of the Assessor sends out helpful brochures and detailed guidelines. One brochure stresses that,

> in the majority of cases, applications are dealt with by the Assessor from the information provided by you ... Only in some cases will you have to attend a hearing ... most hearings are held in the offices of the Assessor and are conducted in private and as informally as possible.\(^\text{83}\)

It sounds as easy as applying for a credit card. What unrepresented applicants are in the dark about is that the Assessor is not there to help them put forward

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\(^{82}\) Id, 401 402

\(^{83}\) "Compensation for Victims of Crime" by the Assessor of Criminal Injuries Compensation, Perth, WA
their case, collect evidence, select the most persuasive evidence, or alert them to any unfavourable information she may have in her possession. The unrepresented applicant is incapable of anticipating potential difficulties in the substantive law.

I would assert that women victims are particularly vulnerable without representation. A victim may blame herself for her abuse, and if the Assessor gives any indication that she is responsible in some way for the incident, she may accept at face value the Assessor's judgment. Alternatively, the victim may be unable to fathom that she is in anyway responsible for her abuse, and as such be totally unprepared to counter any evidence or allegation that could be interpreted as "contributory."

If the Assessor does decide to hold a hearing, an unrepresented applicant will be at a distinct disadvantage. As Genn warns,

> [t]he relative simplicity with which proceedings can be initiated, the literature from tribunals stressing this informality, the physical appearance of hearings and the approach of the tribunal to the conduct of hearings can convey the impression that decision-making processes are carried out in a rather relaxed and informal manner ... Thus, although unrepresented appellants are free to 'speak for themselves' before tribunals, and many value this freedom, it has hidden dangers. [D]ecision making processes in tribunals require legally relevant and sufficient accounts.84

For victims of domestic violence, the possibility of an applicant being unable to tell her story in a persuasive manner is even greater. The victim may be embarrassed and humiliated by making public the abuse she has suffered in private. As a result, she may minimise the extent and seriousness of the abuse; she may leave out particularly painful or humiliating circumstances. If her abuser attends the hearing, she may be intimidated or hesitant to talk openly about the abuse.

84 Above, note 32, 403
An unrepresented client will be unable to appreciate the significance of questions asked by the Assessor or may unknowingly affect her case by offering irrelevant but prejudicial information. For women victims, because of the broad discretion given to the Assessor for determining procedure and rule of evidence, it is imperative that representation is available.

PART IV: RECOMMENDATIONS AND CONCLUSION

The recommendations I suggest are pragmatic. I am not optimistic that significant change can be accomplished in the legal system without concurrent political alteration (upheaval?) of the "corporatist form" of government. The recommendations I make may alleviate some of the difficulties faced by applicants who have suffered domestic violence, but I doubt the victims will find justice. I am mindful, however, of Sarat's warning that "it may not be wise to approach the study of disputing and dispute processing as the search for an ideal fit between a fixed dispute and a fixed array of dispute processing techniques."  

Procedures or features that should be retained are: the accessibility of the claim's procedure; the requirement that the Assessor act expeditiously; and the privacy of the hearing. Though admittedly there are legal traps awaiting applicants, the initial application process is straightforward. Community

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85 See Abel, R, 'Critique of Torts' (1990) 37 UCLA Law Review 785 for an interesting analysis of the tort systems. In this article he explores the effects of tort damages on reproducing material inequalities. Not only is the measure of damages inequitable, but they "deliberately reproduce the existing distribution of wealth and income." He continues, "by excluding some people and injuries from the system or discouraging victims from claiming, tort law suggests that they are valued less highly...[it] proclaims the class structure of capitalist society: you are what you own, what you wear, and what you do." (at 803)

86 See Wiegars, above, note 6, 307: "compensatory schemes are admittedly not designed to address the deeper causes of wife abuse. They can, however, at least in the short run improve the material circumstances of women's lives. Ultimately we need community-based action that allows and encourages men to redefine their relationships with women and social and legal change that empowers and enables women to live independently of abusive men."

87 Sarat, A. 'The New In formalism in Disputing and Dispute Processing' (1988) 21 Law and Society Review 695, 709
agencies are offering more services to assist victims in completing the application material. The more applications that are filed, the more the Government is forced to acknowledge the effects and costs of crimes, especially to women victims of domestic violence.

The goal of expeditious determinations should be retained and additional staff for the Office of Assessor appointed to handle the backlog of cases. It is unfair to make victims wait for two years before having their applications processed.

On balance, I believe hearings should be conducted in private. The possibility that public hearings could mobilize collective actions is too remote; the potential that a public hearing would further traumatise applicants is too real.

The sections of the Act which give the Assessor broad discretion to probe the victim’s character, to determine what factors are relevant to the dispute, and to disregard rules of evidence and procedure must be substantially reformed. It is beyond the scope of this article to fully analyse the Tribunal’s discretion, but it is not beyond the scope of this article to suggest that these provisions must be reviewed with a view to limiting the Assessor’s discretion.

The Assessor should be required to give notice to the applicant when information is received which may be prejudicial to the application. The applicant should be afforded the opportunity to review and respond to all information which is in the possession of the Assessor.

Before the Assessor rejects an application, or reduces compensation for contributory conduct, a hearing should be held and the applicant entitled to be heard and call witnesses. At a minimum, those rights constitute “natural justice.”

Finally, the personnel employed in the Office of the Assessor should undergo relevant training in domestic violence, sexual assault, and other appropriate topics. While not a panacea for overcoming deeply ingrained prejudices or biases, appropriate education may be of use in at least tempering a predisposition to blame the victim. 88
In this article I have reviewed the processes and procedures used by the Office of the Assessor for Criminal Injuries Compensation in Western Australia. I have examined these processes and their effect on women victims of domestic violence. In this review, I have sought to analyse whether these procedures, which are offered as ‘informal’ alternatives, affect the delivery of justice to applicants. This article should, if anything, alert those who support informalsim without question, that one must look beneath the surface of any proposed reform.

88 See above, note 6, 303. Wiegers acknowledges that, "whether specialized training or new legislative initiatives are beneficial in challenging the underlying assumptions relied on by decision makers and the public generally depends on the substance of the training or legislation; among other factors."