Submission to the CIC Review (WA)

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A. Introduction

Women's Law Centre of WA (WLCWA) welcomes the opportunity to make a submission to the Australian Law Reform Commission in response to the request for submissions for the Family Law Review Discussion Paper.

Who We Are

The WLCWA is a not-for-profit community legal centre funded by the Commonwealth Attorney General's Department (Legal Aid Commission) to provide quality legal services to disadvantaged women in Western Australia.

We are a member of Women's Legal Services Australia (WLSA) which is a national network of community legal centres specialising in women's legal issues, which work to support, represent and advocate for women to achieve justice in the legal system.

We seek to promote a legal system that is safe, supportive, non-discriminatory and responsive to the needs of women, particularly those who have lived with domestic and family violence.

What we do

We provide legal advice and assistance predominantly in the areas of:

- family law;
- family violence restraining orders;
- care and protection proceedings; and
- criminal injuries compensation for victims of family and domestic violence and/or sexual assault.

WLCWA also deliver training programs and educational workshops to share our expertise regarding effective responses to violence and relationship breakdown. WLCWA contributes to policy and law reform discussions, primarily focused on

family violence, to ensure that the law does not unfairly impact on women experiencing violence and relationship breakdowns. We are informed by a feminist framework that recognises the rights of women as central.

Who We Help

The WLCWA specialises in providing legal advice and assistance to women in need, particularly those who have experienced or who at risk of experiencing family violence.

Most of our clients are women who are unable to participate fully and effectively in the legal system without legal and non-legal advice and assistance and who cannot afford to finance private legal representation.

Why we are making this submission

As a legal service provider, WLCWA lawyers and staff are experienced in assisting women from all walks of life, all ages and from diverse cultural and linguistic communities from all areas of Western Australia. While based in Perth, WLCWA assists women from all over Western Australia including outreach services delivered in self-managed remote Aboriginal communities across the WA and Northern Territory borders.

In partnership with Relationships Australia WLCWA operate Djinda Services (the Perth Aboriginal Family Violence Prevention Legal Service) to provide legal assistance to Aboriginal and Torres Strait Islander women living in the Perth metropolitan area. In addition, the WLCWA hosts a coordinator for the Domestic Violence Legal Workers Network, the network being a collaboration of legal practitioners who work in the area of family and domestic violence.

We see firsthand how the criminal injury compensation makes it difficult for women who have experienced family violence and who continue to experience trauma, who have complex needs and those who can't afford legal representation to:

1. understand their options,

2. know what they need to do to pursue those options; and

3. have the time, resources, capacity and knowledge to pursue their options in a way that does not re-traumatise them or risk their (or their children's) safety.

Our submission focuses on the aspects of the current CIC system which we consider creates barriers to vulnerable women and which should be improved to ensure the CIC system, as part of a broader systemic response to family violence and criminal behaviour, is trauma informed and safe for vulnerable and disadvantaged women in WA to use.

Our submission reflects what we have observed in practice.

B. General Comments

Structure of this Submission

The questions posed in the Discussion Paper are comprehensive.

As a small community legal centre, WLCWA does not have the resources to engage a staff member to draft a submission which addresses each question and term of reference individually.

However, we consider it important that the voices of our clients who are the most vulnerable and the ones who currently face additional barriers to even participating in the system, let alone achieving just outcomes in the family law system are heard in this review, despite our limited resources and constraints.

For these reasons, our submission will not address each question specifically but will rather focus on what we consider to be the key challenges our clients experience from current CIC system and other supports we consider that our clients who have experienced family violence require so that the CIC scheme can be more readily accessed by those most vulnerable and in need of judicial intervention in our society.

Endorsement

WLCWA has endorsed the submission prepared by the Domestic Violence Legal Workers Network and also endorses the submission prepared by Djinda Services.

Terms and Language Used

For the purpose of this submission we have used the terms:

- CIC to refer to the current criminal injury compensation scheme in operation in Western Australia.
- the Act refers to the *Criminal Injuries Compensation Act 2003* (WA)
- Victim-survivor, instead of victim, to reflect the significant difficulties women who have experienced family violence have had to overcome and the strength and resilience that overcoming such an experience requires.

C. Addressing the Terms of Reference

Family Violence and CIC: General Comments

At the heart of the CIC system in WA (and as identified in the Executive Summary of the Discussion Paper) is the recognition that crime takes an enormous physical, financial and emotional toll on its victims and that victims should be provided with redress for the harm they have suffered.

In recent years, there has been increasing recognition of the toll which family violence takes on not just the individual family members who are affected but more broadly on our communities.

Increasingly, family violence is being taken out of the private dimension and is being seen (as it rightly should) as a criminal justice issue and one which affects the community outside of those individuals who are directly affected.

Ultimately, family violence is about power, coercion and control stemming from rigid gender stereotypes in our society which have culminated in some members of our society (predominantly, as supported by statistics men) feeling they are entitled to others, predominately women.

These gender stereotypes and social norms which studies indicate leads to family violence is an issue for our society as a whole. The prevention of family violence is not something which an individual or even a cohort within a community can do on their own. It is something which needs to encompass and involve all of society as ultimately it is about our society sending a consistent message that no one in our society is entitled to use and abuse others.

More than criminal acts between strangers, family violence is pervasive and increasingly reports and submissions coming from peak family violence advocacy bodies in inquiries such as the Victorian Royal Commission into Family Violence, the current ALRC Family Law Review and the Queensland No to Violence have highlighted that the best practice professional response to family violence is the provision of holistic trauma-informed (or trauma based) service delivery.

Noting the significant overlap between family violence and criminal law, the CIC system is inevitably part of a much broader system response to family violence. It is rare for our Centre's CIC clients to only have one legal issue and many present to our Centre with complex multiple legal needs many of which ultimately stem from trauma and/or family violence they have experienced in their lives. These other related needs include care and protection (where the trauma has resulted in them not being able to care for their children without further intensive parenting support which is often not able for them), criminal law assistance (particularly where they have been misidentified as a perpetrator themselves and are the respondent in criminal proceedings against the primary perpetrator and family law assistance (it is unfortunately common that the family law system is used by perpetrators as a means of inflicting further control over the respondent post-separation).

A lot has changed in the past 15 years since the Act commenced in relation to how we are and how we should be responding to family violence.

The CIC system would now benefit from reform to make it more consistent with other aspects of the family violence system to lessen the risk that:

1. Vulnerable women who have experienced family violence know and can access assistance,
2. Those accessing the system will be further traumatised from the experience;
3. The experience will cause vulnerable women who have already experienced trauma to disengage from seeking assistance in relation to other aspects of their life (e.g. it can take many years and on average 7 attempts before a family violence victim-survivor finally leaves a violent relationship and every time she attempts she is increasing the risk that the perpetrator may harm or kill her. To achieve final separation only to be told by an authority that they do not believe the family violence occurred may lead to that victim-survivor returning to the violent relationship and never attempting to leave again).

The way in which the CIC system responds to family violence is important as the consequences for the victim-survivors are far more reaching that just the assessment of merits of a particular application for compensation.

They have the potential to make the difference between someone breaking free from a violent relationship and trying to break the cycle of violence for the next generation or receiving confirmation of the perpetrators' message that they will not be believed even if they did speak out against the violence.

A more holistic approach is needed.

Specifics Areas where the Act can be improved

Alleged Offences

WLCWA considers that the current scope of the *Criminal Injuries Compensation Act 2003* (WA) (the "Act") is limiting and, in many cases, excludes family violence victims from receiving compensation.

For a victim to claim compensation under the Act, there must be an alleged or proved offence consisting of a "crime, misdemeanour or simply offence".[1] This is an issue for family violence victims, as they will often suffer from continuous patterns of control and coercion and these offences do not easily fit into individual transactions of behaviour. As such, it is difficult to satisfy the discrete requirements as required under the Act.

WLCWA notes that, for many of these family violence victims, their experience will fall under the definition of family violence in other Western Australian legislation, including:

- *Restraining Orders Act 1997* (WA); and
- *Children and Community Services Act* 2004.

Furthermore, the Australian Law Reform Commission's 'Family Violence – A National Legal Response' recommended that victims' compensation legislation should include family violence and ensure that evidence of a pattern of family violence may be considered.[2]

In WA, the Restraining Orders Act definition was itself updated as of 1 July 2017 to bring the WA legislation more into line with how family violence is defined in family law – both in the Family Court Act 1997 (WA) and Family Law Act 1975 (Cth).

[1] *Criminal Injuries Compensation Act 2003* (WA) s3, Pt 2 Div 1.

[2] Australian Law Reform Commission, 'Family Violence – A National Legal Response', 2010, Recommendation 29-5(a).

Recommendation 1. – The Act should be amended so that the definition of family violence is consistent with the definition in s5A of the *Restraining Orders Act 1997* (WA), being violence, threats of violence and 'any other behaviour by the person that coerces or controls the family member or causes the member to be fearful'.[3]

Definition of 'injury'

The definition of 'injury' in the Act is defined as 'bodily harm, mental and nervous shock, or pregnancy'.[4] This injury suffered by family violence victims is cumulative and is often a combination of physical, psychological, cognitive, social and economic harm.

The current definition is quite 'transactional' and tends to focus on isolated acts of criminal life behaviour rather than on the pattern of behaviour over the life of the relationship between the perpetrator and the victim-survivor.

While violence as between strangers may suit this approach, a different approach is needed for family violence where behaviour is subjective, techniques and methods of control and intimidation tend to change over time and the trauma and harm caused by victim-survivors is the result of a wider pattern of behaviour which needs to be assessed as a whole.

WLCWA considers that the psychological injury suffered by family violence victims is broader than 'mental or nervous shock'.

WLCWA notes that other jurisdictions, including Queensland and the ACT recognise, further injuries for family violence and sexual offences (including reduced sense of self-worth, increase fear or security and adverse impact on feelings).[5]

Recommendation 2. – The Act should be amended so that the definition of 'injury' is expanded to incorporate the broader harms experienced by family violence victims.

[3] *Restraining Orders Act 1997* (WA) s5A(1).
[4] *Criminal Injuries Compensation Act 2003* (WA) s3.
[5] *Victims of Crime Assistance Act 2009* (QLD) s27(1)(f) and *Victims of Crime (Financial Assistance) Act 2016* (ACT) s9(1)(c).

Definition of "close relative" in the Act

WLCWA agrees with the concerns raised in the DVLWN submission about the current definition of close relative being culturally exclusive to families outside of an Anglo-Western context and therefore inadequate in today's multicultural society. In particular, the definition is not consistent with the kinship and care relationships of Aboriginal and Torres Strait Islander people in WA and should be amended to better reflect the types of relationships in other cultures.

Recommendation 3. – The definition of 'close relative' in section 4 of the Act should be expanded to include people who, for all intents and purposes, act as such close relative to the victim.

Recommendation 4. – There be further detailed consultation with Aboriginal and Torres Strait Islander led organisations and communities about how the definition of close relative should be amended to better reflect their communities.

Time limitations under the Act

Currently, applications for criminal injuries compensation must be made within three years after the date on which the offence was committed or if there was more than one offence, the date of the last offence.

There is discretion for assessors to accept applications made after the time limit if they think it is just to do so.[6]

The 3-year time limit is inconsistent with the dynamics of family violence. WLCWA agrees with the comments in the DVLWN submission about the widely accepted research that shows that it may take family violence victims several years to reach

[6] *Criminal Injuries Compensation Act 2003* (WA), s9(2)

out for assistance.[7] Separation is often the time when the victim-survivor is the most at risk and their priority in the years following separation, particularly where there are children of the relationship or of either party from other relationships is the safety of family members. It might simply be too unsafe for a victim-survivor (especially one who has experienced and endured horrific acts of violence) to apply for compensation to redress their harm until their children are older or the perpetrator has refocused his attention elsewhere.

The process of applying for compensation requires an understanding and acceptance that the violence did happen. For many family violence victim-survivors, minimising the violence or denying it happened is a coping mechanism that assists them to get through day to day life for the duration of their relationship or until they build up the courage or have the means to leave. In our experience, it can take some victim-survivors many years to even come to terms with what happened and then be in a position where they can tell someone else, including a lawyer for the purpose of receiving advice about, and then applying for, compensation.

WLCWA considers that the Act be amended so the 3-year time limit does not automatically apply when the applicant has experienced family violence (this should include when the application itself may not relate to the acts of family violence but when the individual applicant is someone who otherwise was not able to meet the timeframe because they were subjected to family violence).

WLCWA considers it is not sufficient to rely on the discretion of Assessors to grant an exemption under the discretion they already enjoy in the current Act. This is not intended as a criticism of the current Assessors (who we consider are doing a great job with the constrained resources they have) but is moreso to safeguard against a system where the way in which family violence is responded to relies on the expertise, experience and views of individual persons in the role of Assessor.

[7] Australian Law Reform Commission, 'Family Violence - A National Legal Response', 2010, Chap 18 Evidence of Family Violence, Difficulties in Giving Evidence

Recommendation 5. – The Act be amended so that no time limit applies when the applicant was subjected to family violence.

Relationship with, and benefit to the offender

In the current Act, an award must not be given if the assessor is of the opinion there is a relationship or connection between the perpetrator and victim, and by reason of that relationship or connection the money paid under the award is likely to benefit the perpetrator.

The question of whether the offender may benefit is separate to the question of whether or not (and if so what type) of relationship the offender has with the victim-survivor and should be treated separately.

WLCWA agrees with the concerns raised in the DVLWN submission on this point.

In the family violence context, there is usually an ongoing relationship of sorts between the offender and the victim-survivors. For some, they may even still live together for reasons which can include to avoid homelessness and the removal of their children from the victim-survivor by the State as a result of that homelessness. For others, maintaining a relationship of sorts might be the safest option for them at that stage whether it be to keep an eye on the perpetrator's moods to able to assess for risk and safety plan accordingly or to appease the perpetrator's desire for control by at least pretending as though they still want a relationship.

In other cases, the ongoing relationship might be the direct consequence of a State or Commonwealth response to the family violence. Sadly, it is not uncommon for our clients who have managed to flee a violent home and relationship with children to be dragged back and forced to live in the same community as the perpetrator by orders made ex-parte in the Family Court.

WLCWA agrees in theory that the award for compensation should not benefit the offender.

However, noting the complexities of family violence WLCWA considers this should not be a ground on which to refuse an award but rather should be a reason why the

payment of the award be monitored by someone to lessen the risk that the offender benefits.

There are many options to achieve this and consideration should be given to what has worked in other jurisdictions (it is noted that the Victorian review of the Victim Compensation scheme is waiting its final report which would be useful to consider in terms of its recommendations and what measures it suggests which might work in WA).

Recommendation 6. – The Act be amended so that an ongoing relationship between the offender and victim-survivor does not exclude them from receiving an award of compensation.

Recommendation 7. –The measures by which an award may be protected be the subject of further consultation with stakeholders including directly with victim-survivors of family violence.

Victim fails to assist investigators and the commission of an offense at the time of injury

These two sections are prime examples of where the CIC Act is not responsive to the needs of family violence victim-survivors.

WLCWA agrees with the concerns articulated in the DVLWN submission on these points.

It is the experience of WLCWA that these are the grounds on which applications for compensation from family violence victims tend to be refused or create enough uncertainty for the victim-survivor that they decide not to proceed with the application even when the harm they experienced was horrific and in our experience would otherwise result in a high award.

WLCWA supports reform so that when Assessors are considering these two sections, there be an exemption to each of these when the applicant was subjected to family violence.

Family violence is about ultimately about power and control.

The CIC Act and the way it is interpreted and applied needs to be informed about the dynamics. It should be the 'end of the story' for an application for compensation that if the victim-survivor applicant was committing an offence. This flies in the face of the complexities of family violence and the subjective means of control used by perpetrators.

Rather more investigation should be undertaken in relation to why and how the victim-survivor applicant was committing an offence so that where the offence was ultimately because of the power and control of the perpetrator that this be used a further evidence of the family violence and not as a reason to refuse an award.

Changes to Jurisdiction, Practice and Procedure of Chief Assessor and the office that would better serve the needs of the community

Administrative decision making

WLCWA considers it that one of the key features of the current CIC scheme is that applications are dealt with administratively and not by a court.

This is a distinguishing feature which sets the WA scheme apart from other jurisdictions and is an important positive aspect of the current CIC scheme which increases access to justice for victims of crime and family violence.

WLWCA strongly supports WA maintaining an administrative decision making system for CIC application.

In our opinion, if the model were to become judicial, this would create an additional barrier to disadvantaged women, especially those who have (and may continue to be) experiencing trauma as a result of family violence or the consequences of the family violence.

We consider that many victim-survivors who otherwise are in need of redress for harm and trauma would disengage from pursuing claims if they were determined in a court setting which many consider to be daunting, overwhelming, intimidating and unfamiliar. Many of our clients have had negative experiences in relation to how their

allegations of family violence have been responded to. Their experiences in other court settings including family law courts, has not contributed to a sense of confidence in how courts deal with family violence. To have family violence claims determined in a court setting would be a step away from a trauma informed response.

We need a more trauma informed and trauma based response – not less.

WLCWA agrees with the submission of DVLWN and its recommendations that the appeal process from decisions lie to the State Administrative Tribunal and not the District Court for the same reasons outlined above.

Recommendation 7. – The WA CIC scheme should continue to operate as a legal process exercised administratively by the Office of the Criminal Injuries Compensation.

Notifying the Perpetrator

WLCWA appreciates the public policy interest to attempt to recoup from the perpetrators money to finance the payments being made to victims as a result of the perpetrator's criminal behaviour. However, there is also a public policy interest to ensure that a system which is intended to provide redress to victims of criminal behaviour does not itself become a means by which that victim suffers further harm and trauma.

It is common for our service to hear women speak about the many years, sometimes, decades, it has taken for them to start the healing process after they been harmed by a member of their family. Learning that the CIC process may involve notifying the perpetrator is enough for many of them to walk away from pursuing any claim – despite the horrific abuse and harm they have experienced.

Some talk about the psychological and emotional harm they wish to avoid as a result of the perpetrator learning they have applied to the government for compensation (i.e. including that the perpetrator may think the harm was justified as the victim 'got something out of it'. Others speak of fear about being directly physically harmed from

an angry perpetrator who then blames the victim for them being chased by the government to repay.

In the context of harm from family violence, where the perpetrator and the victim intimately know each other and may be required to have an ongoing relationship of sorts with each other now or in the future (e.g. if they may have children together) the notification to the perpetrator could significantly damage such necessary ongoing relationship and even expose the victim to further danger.

Alternatively, we consider that such notification can provide perpetrators with an opportunity re-enter the victim's life and manipulate the victim in an attempt to access funds, if awarded.

The need to protect the victim applicant from further trauma and harm should outweigh any financial benefit that could be gained from the perpetrator being notified of the claim.

Recommendation 8 – The Act be amended so that in cases of family violence, offenders are NOT notified of the applicant's CIC claim unless the applicant consents.

CIC Act and system should be more culturally safe

WLCWA agrees with the comments in the DVLWN submission and notes it is also the experience of our clients that the current Act and way in which it is applied, including where the Public Trustee is administering payments of the final award on behalf of vulnerable women, is not culturally safe for many of the victim-survivors seeking to apply.

As part of a broader system response to family violence (including where those actions become criminal and when they do not) WLCWA strongly considers that all those in working in the system receive regular ongoing (and where possible accredited) training in the dynamics of family violence, cultural competency and trauma informed and trauma based responses.

WLCWA has advocated for and will continue to advocate for such training to be undertaken by all those who work with persons experiencing family violence

(perpetrators, victim-survivors and those indirectly impacted by it) to ensure that across the wider family violence system the response as experienced by that person is consistent.

Only then will be break down the silos that otherwise exist and which cause some vulnerable members of our society to fall through the gaps.

Recommendation 9 – All professionals in the CIC system especially those at the Office of Public Trustee who administer payments, receive ongoing and regular training in family violence dynamics, trauma informed responses and cultural competency and disability awareness. Those bodies be properly funded to provide such training.

Recommendation 10 – Consultation be had with Aboriginal and Torres Strait Islander led organisation and communities and with peak bodies for people from cultural and linguistically diverse backgrounds and experience from working with people affected by family violence to develop the modules for such training to ensure it meets the needs as experienced by members of those communities.

D. Closing Comments

At the end of the day, the CIC scheme is intended to redress harm that is caused by someone that ought to have been prevented by the State. It should not of itself by a cause of further harm or trauma for service users.

It is the responsibility of the State as well as society as a whole to do what they can to prevent it and where it occurs to respond to it in a way that:

- is trauma informed,
- seeks to hold perpetrators accountable; and
- is aiming at addressing the systemic gender inequality which results in family violence (use the response as a prevention tool).

Family violence should be everyone's responsibility to prevent.

Reform to the CIC system to make it more responsive to family violence and trauma based would be a powerful tool the State Government could use to send a public message that family violence is not acceptable and is a priority for government.

WLCWA supports this message.

E. Acknowledgments

The WLCWA wishes to thank Sarah Bright, Principal Legal Officer of WLCWA, for drafting the submission on behalf of WLCWA.

F. Further Information

WLCWA has prepared this submission on the basis that will be made public (i.e. it is not confidential) and we have no objections to our submission being uploaded on the website.

If you have any queries in relation to this submission please contact Sarah Bright, Principal Legal Officer of WLCWA at sarahb@wlcwa.org.au or Carrie Hannington, Senior Executive Officer of WLCWA at carrie@wlcwa.org.au or our office generally on (08) 9272 8800.