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Pro Bono

INFORMATION ABOUT NAMIBIA'S LAW ON ...

COMPENSATION FOR CRIMES

ProBono is a monthly column by the Legal Assistance Centre designed to inform the public about Namibian law on various topics. You can request information on a specific legal topic by sending an SMS to 081-600-0098. Note that we will not be able to give advice on specific cases in this column, only general legal information.

If a person commits a crime in Namibia and is convicted, they might be sentenced to time in jail or to the payment of a fine to the State. But what about the victim? Can we say that justice has been done if the convicted person is sent to prison but the victim still suffers a loss without compensation?

Victims of crime in Namibia generally have two options to pursue compensation for damages stemming from crimes committed against them. They can bring civil proceedings for damages or they can seek compensation as an adjunct to the criminal trial under the Criminal Procedure Act 51 of 1977. (Civil cases involve private individuals on both sides. In criminal cases a state prosecutor tries to prove that an accused person is guilty of a crime.)

Unfortunately, the victim compensation provisions of the current Criminal Procedure Act are much too narrow. The current law provides for compensation only for “damage to or loss of property (including money)”. This section does not authorize compensation for physical and psychological harm to a person. The seriousness of this omission is obvious when we consider crimes such as rape.

Last year, there was a public outcry following press reports about a father who refused to report the man who had raped and impregnated his 14-year-old daughter because he was concerned that if the perpetrator went to jail, he would not contribute maintenance to the child born of the rape – reasoning that having the perpetrator in prison would not benefit his daughter. The victim, a primary school student, had to leave school to care for the baby. The family made an arrangement that the perpetrator would pay for her school when she went back in addition to monthly maintenance for the child.

Members of the public were outraged that the perpetrator was taking advantage of the poverty of the girl's family and using money to silence them. If the Criminal Procedure Act

allowed for compensation for physical and psychological injury, there would be less financial incentive in cases such as this to shield perpetrators from criminal sanctions.

When the new law on rape was being drafted, the Law Reform and Development Commission proposed a provision on compensation for rape victims. The proposed provision would have made it mandatory for a court that convicts an accused to also order that the accused pay a fixed amount to the complainant as compensation for the crime. This proposal was ultimately rejected on the grounds that improved compensation arrangements for rape victims alone would probably increase suspicions that women are prone to lay false charges of rape.

In part to address these concerns, the Criminal Procedure Act 25 of 2004 includes a broader provision on victim compensation in respect of all crimes. This provision covers “injury, damage or loss, whether patrimonial or otherwise resulting from a criminal offence”. It also includes several elements to promote access to justice.

For example, the provision ensures that all victims are informed of the right to apply for compensation by the presiding officer. Where there is a criminal conviction, victim compensation may be requested by the victim, the victim’s legal practitioner or the prosecutor acting on the instructions of the victim. The award of compensation can include the costs of legal representation for the victim if appropriate.

Under section 326 of the 2004 Criminal Procedure Act, the amount of an award for injury, damage or loss must be proved on a balance of probabilities. If compensation for an injury has already been paid to the victim by a community court in terms of customary law, then no further compensation for that injury would be made in the criminal trial.

The 2004 Criminal Procedure Act is not in force and is unlikely to ever be brought into force for various technical reasons. [It has been repealed since this article was written.] But there is nothing to prevent the victim compensation provisions in that law from being incorporated into the existing Criminal Procedure Act.

A universal approach to victim compensation that would cover bodily injury and emotional and psychological damage, as well as property damage, would be a welcome development in Namibian law. Such an approach would promote efficiency in legal proceedings. Addressing victim compensation in the criminal case would allow evidence which has already been heard at the trial to be considered in determining the amount of compensation that is appropriate. This would make it unnecessary for a victim to pursue separate civil proceedings in order to receive compensation.

Furthermore, civil proceedings can be complicated and costly, making them impractical for most crime victims. Victim compensation made in the course of a criminal trial would be a more streamlined process, and would have the same effect as a civil judgment of the same court – meaning that all the same procedures for enforcement of the order would be available, including attachment of property.

Even more importantly, this approach would remove at least one powerful disincentive to reporting serious crimes such as rape. This is something that would benefit all Namibians.