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Compensation for Criminal Injuries in Australia: A Proposal for Change in Queensland

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Abstract
It is widely recognised that state-funded compensation schemes are of vital importance to victims of criminal injuries. This is primarily because the two alternatives, the civil claim and the compensation order against the offender, are of little practical utility. The various governments of the Australian states and territories have each recognised the need for state-funded schemes. The scope of the state and territory compensation schemes has varied from jurisdiction to jurisdiction. An analysis of the various schemes presently in operation shows that none them are without shortcomings. The Queensland scheme, which has been described as a "bureaucratic farce', is the scheme most deserving of reform. Queensland is the only state or territory in Australia not to have enacted a specific statute relating to compensation. Queensland also holds the dubious honour of being the only state or territory in which provisions from its 1960's scheme continue to operate. The establishment of a tribunal system and the abolition of the ex gratia system would be moves in the right direction. Queensland is also placed in the enviable position of being able to learn from the experiences of the other Australian jurisdictions which have already introduced such systems.

Keywords
compensation, criminal injuries, Australia

Articles

COMPENSATION FOR CRIMINAL INJURIES IN AUSTRALIA: A PROPOSAL FOR CHANGE IN QUEENSLAND

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Introduction

The awarding of compensation for criminal injuries is not a creation of recent times. Compensation was recoverable under Roman, Jewish, Greek and Babylonian law, although certainty of recovery was dependant upon the strength of clan or kin to enforce compensation.[1]

A system of compensation also formed the basis of the law of early Anglo-Saxon societies. Any injury inflicted upon a victim, whether accidentally or intentionally, was a wrong and compensation and retribution were enforced at the instance of the victims' kin. This system often resulted in clan or blood feuds and was replaced in the eleventh century by monetary compensation. An offender who committed a minor wrong would pay a sum of money (known as a 'bot') to the victim. Upon the commission of a major wrong, the offender would usually have to pay a 'bot' to his victim and also a fine (known as a 'wite') to the king. Particular major wrongs (or 'Pleas of the Crown') were 'botless' and the penalty was forfeiture of all of the offender's property to the king combined with either death or mutilation.

Eventually, all major wrongs, or crimes and misdemeanours as they are now known, became 'botless' and the State became the sole recipient of all the monetary fines imposed upon offenders.[2]

Punishment and retribution, rather than compensation, became the important legal concepts. The development of the distinction between criminal law and civil law further eroded the role of the victim in the

1 Fry M *Arms of the Law* (1951) 29-30.

2 For a detailed discussion of the legal history of compensation see Baker JH *An Introduction to English Legal History* (1971) 273-89 and *Potter's Historical Introduction to English Law & Its Institutions* (4th ed by AKR Kiralfy) (1958) 353-5.

criminal justice process.[3] The victim's role has largely been limited to that of witness for the prosecution.

Victim compensation schemes had been proposed by a number of English and Italian philosophers during the eighteenth and nineteenth centuries.[4] The philosophers considered that a society should indemnify victims of crime to whom it owed a duty of protection from crime. The studies conducted, whilst of theoretical interest, did not lead to widespread debate or legislative change.

The modern day re-emergence of the idea of compensation for victims of crime was commenced in the 1950's by the British Magistrate and social reformer Margery Fry. In her writings, Fry advocated the incorporation of compensation as a feature of the criminal justice system.[5] The campaign and public debate which followed her writings subsequently led to the creation of the English Criminal Injuries Compensation Board in 1964.

It is interesting to note that the world's pioneering criminal injuries compensation scheme had in fact been enacted in New Zealand the year before. The first scheme in Australia was introduced in New South Wales in 1967 and, within a period of nine years, all of the Australian States and Territories had enacted compensation legislation.

One attempt has been made at the federal level to introduce an Australian scheme for the compensation of victims of crime. A national Compensation Bill was, in fact, passed by the House of Representatives in 1974. However, it 'foundered in the Senate' and was never passed.[6] A national no-fault accident compensation scheme was enacted in New Zealand in 1972.[7] In 1974 the scheme was amended to make provision for state-funded compensation of the victims of crime, who were deemed to be persons injured by accident for the purposes of the scheme.[8] It was thought that Australia seemed likely to follow the New Zealand example.[9] The subsequent failure to pass a national compensation bill in 1974 and the absence of any attempt during the fifteen year period since 1974, suggests that the introduction of such a scheme is far from likely. Whether or not such a scheme would withstand a constitutional challenge, is also open to question.[10] The answer to such a question seems of little practical relevance in circumstances where no proposed legislation has been placed before the Federal Parliament in over fifteen years.

Mention should also be made of the recent initiatives taken in this area at the international level. The Council of Europe has set minimum standards for

3 Mawby RJ & Gill ML *Crime Victims: needs services and the voluntary sector* (1987) 26.

4 Eg Jeremy Bentham and Enrico Ferri.

5 See above at 1, 124-6 and Fry M 'Justice for Victims' (1959) 8 Journal of Public Law 191.

6 Waller L 'Compensating the victims of crime in Australia and New Zealand' in *The Australian Criminal Justice System* (2nd ed 1977) 426, 442.

7 *Accident Compensation Act* 1972 (NZ).

8 Section 6 *Accident Compensation Act* 1972 (NZ).

9 See above 6 at 440.

10 McCaw K 'Compensation to Victims of Crimes of Violence' (1976) Australian Journal of Forensic Sciences 126, 134-135.

the compensation of victims of criminal injuries and these measures have been adopted by the Council's twenty-one member nations.[11] In 1985, the United Nations recognised the rights of victims of crime through the adoption of a declaration which specified basic standards of treatment for victims of crime.[12]

The international recognition of the right of crime victims to compensation evidences a growing global awareness of the plight of victims Victim's advocates consider that by securing United Nations support, a standard system of minimum requirements for the treatment of victims may be established.[13] The practical success of these international declarations will, of course, depend entirely upon the extent to which they are implemented by member nations.

Other Remedies

The infliction of criminal injuries will also constitute intentional torts to the person.[14] A victim is thereby generally able to institute civil proceedings for damages against an offender. It is considered[15] that the introduction of schemes for the compensation of criminal injuries has, when coupled with other compensation schemes,[16] made 'great inroads into the preserve once thought to be that of the law of torts'.[17] The inadequacy of the civil remedy is the main reason that this particular 'inroad' has been made. A civil right of action will be of no use in cases where an offender cannot be identified or found. The costs associated with bringing civil proceedings may be beyond a victim's means and, most importantly, the offender may be of insufficient means to meet any award of damages which may be made. It is not surprising, therefore, that civil proceedings for damages in respect of criminal injuries are rare.[18]

In circumstances where a victim dies as a result of criminally inflicted injuries, a statutory remedy exists in each Australian state and territory.[19] The statutes were enacted to provide a remedy for certain dependent relatives of a deceased victim whose death was caused by tort, notwithstanding that the death was caused in circumstances amounting to felony. This statutory right of action for damages against an offender is subject to the same limitations which apply to a civil action by a victim who suffers injury only.

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11 Council of Europe *Convention on The Compensation of Victims of Violent Crime* (1983) and *Position of the Victim in the Framework of Criminal Law and Procedure* (1985).

12 General Assembly of the United Nations *Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985).

13 Whitrod R 'Victim participation in Criminal Proceedings - A Progress Report' (1986) 10 Crim LJ 76.

14 Flemming J, *The Law of Torts* (5th ed, 1977) 34-36.

15 Veitch E and Miers D 'Assault on the Law of Tort' (1975) 38 Mod LR 139.

16 Eg workers compensation schemes and compensation schemes for road accident victims.

17 Ibid 140.

18 Bates A, Buddin J and Meure D *The System of Criminal Law: Cases and Materials* (1st ed, 1979) 640-2.

19 Qld: *Common Law Practice Act* 1867; NSW *Compensation to Relatives Act* 1897; Tas *Fatal Accidents Act* 1934; SA *Wrongs Act* 1936; ACT *Compensation (Fatal Injuries) Ordinance* 1938; Vic *Wrongs Act* 1958; WA *Fatal Accidents Act* 1959; NT *Compensation (Fatal Injuries) Ordinance* 1974.

Consequently, such an action will often be of little practical assistance in cases involving the infliction of criminal injuries.

Justifications for Criminal Injuries Compensation Schemes

A significant amount of writing in the area of compensation for criminal injuries has been devoted to the theoretical justifications underlying the introduction of compensation schemes.

One philosophy is that the State has a 'legal duty' to protect its citizens and therefore should assume the burden of compensating victims of criminal violence. This 'legal duty' philosophy is based upon the fiction of a contract between the state and the citizen, a breach of which occurs when the state fails to protect the citizen from criminal injury. The philosophy has been almost universally denigrated.[20]

On the other hand the 'social duty' justification appears to have received widespread support. It is said to be socially and morally desirable to compensate the victims of crimes of violence.[21] Compensation is seen as 'a tangible expression of the state's sympathy and concern for those who, through no fault of their own, suffer unjustifiable invasions of their personal integrity'.[22] This humanitarian argument is also relied upon as the primary justification for the introduction of compensation schemes. The 'social duty' justification is not without its critics, one of whom argues that it results in the preferential treatment of only one group of victims.[23]

It is submitted that this argument does not warrant the exclusion of victims of crime from compensation schemes. It would, if accepted, naturally follow that compensation for road accident victims should also be abandoned upon the basis of preferential treatment. The proponents of the theoretical 'preferential treatment' argument would make a more positive contribution by using their argument as a basis for the implementation of a comprehensive accident scheme which includes *all* victims.

Compensation schemes may also be justified upon the basis that a fundamental obligation of any criminal justice system must be the provision of justice for all members of a society.[24] Emphasis in the past has centred upon justice for offenders only. The provision of an adequate compensation system for victims is an attempt to redress this imbalance in a criminal justice system. This 'fundamental obligation' theory is relied upon by the writer in the formulation of the proposed reforms to victim compensation in Queensland, although the writer acknowledges that the 'social duty' philosophy is also a valid justification.

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20 See eg Burns P *Criminal Injuries Compensation* (1980) 116 and Atiyah P *Accidents, Compensation and the Law* (3rd ed, 1980) 321.

21 Shapland J, Willmore J and Duff P *Victims of the Criminal Justice System* (1985) 118.

22 Veitch and Miers 38 Mod LR 150.

23 Atiyah see above 20 at 339.

24 Bates 633 (referred to this justification as the State 'obligation' argument) and Ashworth A 'Punishment and compensation: Victims, Offenders and the State' (1986) 6 Oxford Journal of Legal Studies 86, 121 (referred to it as the 'duty of the State in criminal cases').

An Analysis of the Present Australian Schemes

Jurisdiction

Tribunals have been established in New South Wales and Victoria for the determination of applications for compensation for criminal injuries. In New South Wales the tribunal is known as the 'Victims Compensation Tribunal'[25] and has been in operation since 1988. The Victorian tribunal was established pursuant to the provisions of the *Criminal Injuries Compensation Act* 1972 (Vic.) and continues to operate under the present scheme.[26] The tribunal, known as the 'Crimes Compensation Tribunal',[27] is constituted by a barrister or solicitor of not less than seven years standing.[28] The Victims Compensation Tribunal in New South Wales is constituted by a Magistrate.[29]

Compensation proceedings before each Tribunal are required to be both expeditious and informal, having regard to the requirements of justice,[30] and the Tribunals are not bound by legal rules relating to evidence and procedure.[31] The provisions relating to procedures evidence a clear intention, by both state legislatures, that the Tribunals are to play a very different role to that of the court schemes operating elsewhere in Australia.

Awards of compensation made by both Tribunals are paid from a Consolidated Fund and are not subject to any additional administrative discretion.[32] The Crown's right of subrogation against convicted offenders is retained in each State.[33]

In Tasmania, compensation proceedings are conducted by the Master of the Supreme Court[34] and the Master is able to delegate this function to either the Registrar or Deputy Registrar of the Supreme Court.[35] The *Criminal Injuries Compensation Act* 1976 (Tas), which created the scheme, consists of only thirteen provisions and does not make specific provision for the evidential and procedural requirements of compensation proceedings. The Act does provide however, that proceedings must be held in private and the publication or reporting of proceedings is prohibited.[36] Compensation schemes elsewhere in Australia make provision for closed proceedings in particular cases,[37] but the total restriction upon public hearings and

25 Section 4 *Victims Compensation Act* 1987 (NSW) (hereafter referred to as the *VCA* 1987 (NSW).
26 Part II *Criminal Injuries Compensation Act* 1983 (Vic) (hereafter referred to as the *CICA* 1983 (Vic)).
27 Section 4 *CICA* 1983 (Vic).
28 Schedule 1 *CICA* 1983 (Vic).
29 Section 4 *VCA* 19878 (NSW).
30 Section 13 *CICA* 1983 (Vic) and ss 5 and 30 *VCA* 1987 (NSW).
31 Section 13(1) *CICA* 1983 (Vic) and s 30 *VCA* 1987 (NSW).
32 Section 30 *CICA* 1983 (Vic) and s 27 *VCA* 1987 (NSW).
33 Section 27 *CICA* 1983 (Vic) and ss 42 and 43 *VCA* 1987 (NSW).
34 Section 5 *Criminal Injuries Compensation Act* 1976 (Tas) (hereafter referred to as the *CICA* 1976 (Tas)).
35 Section 3 *CICA* 1976 (Tas).
36 Section 8 *CICA* 1976 (Tas).
37 For eg s 31 *VCA* 1987 (NSW).

publication in Tasmania is unique in Australia. It is difficult to understand the need for a blanket prohibition in all compensation proceedings, and the writer is not aware of any characteristic, peculiar to compensation proceedings, which would necessitate such a prohibition.

The Master's award of compensation is paid automatically by the Treasurer out of moneys provided by Parliament,[38] and consequently, the award ordered is not the subject of a further administrative discretion. In circumstances where an award is made and an offender is convicted, a 1984 amendment to the Act provides that the Master must order the offender to pay to the crown the whole of the compensation and costs awarded.[39] This provision ensures that, in cases where offenders are convicted, any money paid by the Treasurer to victims is recoverable from offenders and is to be paid into the Consolidated Revenue Fund.

In Western Australia, compensation orders were first made by the 'Office of Assessor' in 1982.[40] The Office has continued to operate even though the 1982 Act was repealed in 1985 and replaced by a new scheme.[41] The Assessor is a legal practitioner, appointed by the Governor, and is required to be of not less than eight years' standing and practice.[42] Like the New South Wales and Victorian Tribunals, the Assessor is required to determine applications expeditiously and informally, having regard to the requirements of justice.[43] Also like the Tribunal awards, an Assessor's award of compensation is automatically paid by the State's Consolidated Revenue Fund[44] and the scheme ensures that the Crown's right of subrogation against an offender is retained.[45]

In South Australia, the Northern Territory, the Australian Capital Territory and Queensland, jurisdiction over compensation proceedings has remained with the criminal trial courts. In South Australia compensation orders are made by the District Court,[46] although ex gratia payments of compensation may be made by the Attorney-General in cases where an offender is acquitted of an offence.[47] In the Northern Territory any 'Local Court of Full Jurisdiction' is empowered to make awards.[48] The *Local Courts Act* (NT) provides that such courts may be constituted by a Stipendiary Magistrate or a Judge of the Supreme Court.[49]

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38 Section 10 *CICA* 1976 (Tas).

39 Section 7(a) *CICA* 1976 (Tas).

40 Part II *Criminal Injuries Compensation Act* 1982 (WA) (hereafter referred to as the *CICA* 1982 (WA)).

41 Section 5 *Criminal Injuries Compensation Act* 1985 (WA) (hereafter referred to as the *CICA* 1985 (WA).

42 Section 5 *CICA* 1985 (WA).

43 Section 28 *CICA* 1985 (WA).

44 Section 37 *CICA* 1985 (WA).

45 Section 39 CICA 1985 (WA).

46 Section 4 and 7 *Criminal Injuries Compensation Act* 1978 (SA) (hereafter referred to as the *CICA* 1978 (SA)).

47 Section 11(3)(b) *CICA* 1978 (SA).

48 Section 4 and 5 *Crimes Compensation Act* 1982 (NT) (hereafter referred to as the *CCA* 1982 (NT)).

49 Section 18 *Local Courts Act* (NT).

In the Australian Capital Territory the determination of applications for compensation is made by the Supreme Court, the Court of Petty Sessions and the Registrar of the Supreme Court.[50] If proceedings have been instituted in a particular court, then that court has jurisdiction to determine a compensation application arising from the offence charged.[51] The Registrar of the Supreme Court has the power to determine applications for compensation in circumstances where criminal proceedings have not been instituted in respect of an offence.[52]

In Queensland, the District Court and Supreme Court are empowered to make awards of state-funded compensation in cases where offenders are convicted.[53] Ex gratia payments by the State are available in other specific circumstances but may be made only by the relevant Minister.[54]

The significant differences between the court-based schemes become more evident when one examines the procedures relating to the payment of the awards made by the courts. In South Australia the Attorney-General must, within twenty-eight days of an order, pay the amount of compensation from the Criminal Injuries Compensation Fund.[55] The Attorney-General may only decline to satisfy the order or reduce the payment on the basis of other compensation being payable to the victim.[56]

In the Australian Capital Territory, the Judge, Magistrate or Registrar hearing the application is obliged to forward a certified copy of the order to the Secretary of the Attorney-General's Department.[57] The Secretary is then required to pay an amount equal to the sum awarded from Commonwealth revenue.[58] The Secretary has no discretion in relation to the payment of the sum already awarded.

The situation relating to the payment of compensation orders in the other two Australian court-based systems is very different. In the Northern Territory, where a compensation certificate is awarded by a court the Minister *may* pay the whole or part of the amount specified, or decline to make any payment at all.[59] Whether or not any compensation is payable rests ultimately with the Minister who has an unfettered discretion in such matters.

In Queensland, where a compensation order is made by a court or an application has been made for an ex gratia payment, the Minister charged

50 Section 11 *Criminal Injuries Compensation Ordinance* 1983 (ACT) (hereafter referred to as the *CICO* 1983 (ACT)).
51 Section 11(1) & (2) *CICO* 1983 (ACT).
52 Section 11(3) *CICO* 1983 (ACT).
53 Section 663 *Criminal Code* (Qld).
54 Minister for Justice and Attorney-General or other Minister of the Crown: s 663C *Criminal Code* (Qld).
55 Section 11(1) *CICA* 1978 (SA).
56 Section 11(2) *CICA* 1978 (SA).
57 Section 30 *CICO* 1983 (ACT) (although the Magistrate's order is in fact forwarded by the Clerk of the Court of Petty Sessions and the Judge's order is forwarded by the Registrar).
58 Section 30(3) & s 27 *CICO* 1983 (ACT).
59 Section 20 *CCA* 1982 (NT).

with the administration of the *Criminal Code* must seek the approval of the Governor in Council.[60] The nature of the payment from the state is 'ex gratia', and accordingly, the Governor in Council is under no legal obligation to consider or approve the application. The Queensland scheme also allows for an indefinite deferment of the consideration by the Minister before submission of a report to the Governor in Council.[61]

This particular inadequacy of the Queensland compensation system was strenuously criticised by Denmack J in *R v Sainty*.[62] His Honour, after noting that the deferment power had been used in the past, concluded that :

> until the deferment power is repealed and replaced by a requirement that a payment be made within a specified time - say three months of the order being made, chapter LXVA of *The Criminal Code* remains a hollow farce.[63]

The Northern Territory and Queensland schemes are the only compensation schemes in Australia to have retained absolute administrative discretions in relation to the payment of compensation awards. Such a discretion creates an additional unjustifiable bureaucratic hurdle for the victims of crime.

The provisions relating to informal and expeditious proceedings in the tribunal-based schemes are not present in the court-based schemes. The very nature of court proceedings, and the necessary compliance with the rules of evidence and procedure, prohibit court proceedings from being conducted in such a fashion. Accordingly, the benefits associated with the adoption of informal and expeditious procedures are only compatible with non-court-based compensation schemes.

Claimants

Possible criminal injuries compensation claimants may be broadly divided into two categories.

a: Where the Victim Dies

The Queensland compensation scheme is the only scheme in Australia which makes no provision for the compensation of the dependants or relatives of a deceased victim. The only avenue open to the close relatives of a deceased victim in Queensland is to maintain an action for damages for death caused by a wrongful act under the *Common Law Practice Act* 1967 (Qld). This Act enables certain relatives to recover damages from the offender notwithstanding the fact that the death has been caused under such circumstances as amount in law to felony.[64] This right of action is of no use to a victim's relatives in cases involving impecunious offenders or in situations where the offender is never apprehended.

The New South Wales scheme contains the most comprehensive provisions

60 Section 663D & C *Criminal Code* (Qld).
61 Section 663C(3) and 663D(3) *Criminal Code* (Qld).
62 [1979] Qd R 19, 20.
63 Ibid 21.
64 Section 12 & 13 *Common Law Practice Act* 1867 (Qld).

relating to situations where a victim of criminal injuries dies as a result of the injuries. The scheme permits claims by a 'close relative' of a deceased victim.[65] Close relatives of a victim are defined as a victim's spouse or a person living with the victim as the victim's spouse; a parent, guardian, step-parent or grandparent of the victim; or a child, step-child or grand child of the victim or any other child of whom the victim is a guardian.[66] This category is wide enough to include the de facto spouse of a victim and the children of such a spouse, who may not necessarily be children of the victim. Any other relatives of a deceased victim (for example, siblings of the victim), may also be able to claim compensation if they fall within the category of 'secondary victim of an act of violence'.[67] A 'secondary victim' is defined as 'a person who has sustained injury as a direct result of witnessing, or otherwise becoming aware of, injury sustained by a primary victim, or injury or death sustained by a deceased victim, of that act'.[68] Any sibling of a deceased victim who directly suffered consequential injury would clearly fall within the wide ambit of the definition of a secondary victim.

In Victoria, the dependants of a deceased victim are able to claim compensation for expenses incurred and loss suffered as a result of a victim's death.[69] A 'dependant' is defined as a person who was 'wholly or mainly dependent' upon the victim's income at the time of the victim's death or who would have been so dependent but for incapacity due to the injury from which the victim died.[70] A victim's child, born after the victim's death, who would have been dependant upon the victim is also deemed to be a dependant of a deceased victim.[71] Two other categories of persons are able to make claims in circumstances where a victim has died. A person who has incurred expenses as a result of a victim's death[72] is able to claim compensation and a person who was responsible for the maintenance of a victim who has died is also permitted to claim compensation.[73] Each of the categories of claimant must in some way have been financially associated with a deceased victim. There is no equivalent in Victoria to the 'secondary victim' category in New South Wales. Persons who may have suffered injury by witnessing, or learning of, the infliction of the fatal injuries but who were not financially associated with the deceased victim would not fall within any of the categories in the Victorian scheme. Such persons may be able to claim compensation by falling within the wide ambit of the term 'victim' as it was interpreted by the High Court in *Fagan's* case.[74] Accordingly, such persons may be able to make claims on their own behalf in Victoria.

The Tasmanian provisions relating to circumstances where a victim dies are

65 Section 13 *VCA* 1987 (NSW).
66 Section 3 *VCA* 1987 (NSW).
67 Section 10 & 12 *VCA* 1987 (NSW).
68 Section 10 *VCA* 1987 (NSW) (a person may also be a 'secondary victim' in a situation where a primary victim survives).
69 Section 17 *CICA* 1983 (Vic).
70 Section 3 *CICA* 1983 (Vic).
71 Section 3 *CICA* 1983 (Vic).
72 Section 22 *CICA* 1983 (Vic).
73 Section 22 *CICA* 1983 (Vic).
74 *Fagan v Crimes Compensation Tribunal* (1982) 56 ALJR 781 (HCt).

almost identical to the Victorian provisions. Persons who suffer expenses, are responsible for the maintenance of, or are dependants of, a deceased victim, are all covered by the Tasmanian scheme. The one limitation placed upon claims in such cases is that a person who has incurred expenses as a result of a victim's death is only entitled to make a claim in circumstances where there are no dependants of the deceased victim.[75] This particular limitation did form part of the Victorian scheme[76] but was not retained when the new compensation scheme was introduced in 1983.[77] The Tasmanian scheme, like the Victorian scheme, has no equivalent to the New South Wales category of 'secondary victim'. It is impossible to say whether such persons may impliedly fall within the general provisions[78] which create the basis of an award in the manner in which the Victorian provisions have been interpreted.[79] This is primarily because of the express prohibition upon the reporting of compensation proceedings in Tasmania.[80]

The Australian Capital Territory provisions relating to deceased victims closely resemble the Tasmanian provisions. For example the definition of 'dependants' is the same and persons who were responsible for the maintenance of a deceased victim are also able to claim compensation.[81] It is also likely that the provisions would impliedly cover 'secondary victims'[82] as the definitions of the terms 'injury' and 'criminal conduct' are extremely broad.[83]

In South Australia, Western Australia and the Northern Territory a person claiming to be a dependant of a deceased victim must have been a 'relative' of the victim in order to claim compensation.[84] In South Australia and the Northern Territory the relative must also have been financially dependant upon the deceased victim to be entitled to make a claim.[85]

The Western Australian scheme does not require any financial dependency[86] and a 'close relative' of a deceased victim needs only to have suffered loss in order to make a claim. An extensive definition of the term 'close relative' includes a de facto spouse who is left with a child of that union or who has resided with the victim for not less than three years.[87] The South Australian definition of 'dependants' is not as extensive as the Western Australian definition, for example, grandparents and stepchildren are not included. The definition does, however, include a putative spouse of the deceased victim. One category overlooked by the legislators in South Australia and Western

75 Section 4(5)(c) *CICA* 1976 (Tas).
76 Section 3(1)(c) *CICA* 1972 (Vic).
77 Section 3 *CICA* 1983 (Vic).
78 Section 4(1) *CICA* 1976 (Tas).
79 *Fagan v Crimes Compensation Tribunal* (1982) 56 ALJR 78 (HCt).
80 Section 8 *CICA* 1976 (Tas).
81 Section 2 and 5(2) *CICO* 1983 (ACT).
82 As they are known in New South Wales.
83 Section 2 *CICO* 1983 (ACT).
84 Section 4 and 7 *CICA* 1978 (SA) ss 3 and 11 *CICA* 1985 (WA) and ss 4(1) and 5(2) *CCA* 1982 (NT).
85 Section 4 *CICA* 1978 (SA) and s 4 *CCA* 1982 (NT).
86 Section 14(2) *CICA* 1985 (WA).
87 Section 3 *CICA* 1985 (WA).

Australia is the children of a de facto spouse, who are not children of the union, but may nevertheless be financially dependent upon a victim. This category of claimant was not overlooked by the Northern Territory legislators. The range of possible dependants is extended by the wide definition given to the word 'relative'. A relative includes for example, de facto widows or widowers *and* their children.[88] Special provision is also made for the recognition of traditional Aboriginal marriages and the determination of relationships according to such marriages.[89] The combined effect of the definitions creates an extremely wide category of possible dependants of a deceased victim.

However, even such an extensive definition will not overcome the fundamental flaw associated with attempting to categorise dependants as relatives. The two categories are not mutually exclusive. Not all relatives are dependent upon other relatives and not all dependants are relatives. The use of the word 'relative' does not assist in formulating a general and comprehensive definition of a 'dependant' as a category of claimant. The writer submits that the more appropriate definition of a 'dependant' is one which includes any person who is financially dependant upon a deceased victim and suffers loss as a result of the victim's death. Whilst some of the Australian schemes may be deficient as a result of the definitions of dependants used, one must not lose sight of the fact that even these schemes are a significant improvement upon the Queensland scheme which makes *no* provision for state-funded compensation awards in such cases.

b: Where the Victim suffers injury only

All of the Australian compensation schemes allow victims, who have suffered injury as a consequence of criminal conduct, to claim compensation. The terminology used in each scheme varies, but a number of phrases and terms are commonly used.

'Injury'

The term 'injury' is present in all of the schemes and is described, in all but one scheme, in terms similar to the following: 'injury is bodily harm and includes pregnancy, mental shock and nervous shock'.[90]

The Australian Capital Territory definition of injury is more detailed and the term is defined as:

any physical or mental injury, and includes:

a. mental shock and nervous shock;
b. pregnancy;
c. the aggravation, acceleration or recurrence of any physical or

88 Section 4(1) *CCA* 1982 (NT).
89 Section 4(2) *CCA* 1982 (NT).
90 Section 663A *Criminal Code* (Qld), s 4(1) *CCA* 1982 (NT), s 4 *CICA* 1978 (SA), s 3 *CICA* 1987 (NSW), s 3 *CICA* 1985 (WA), s 3 *CICA* 1983 (Vic) and s 2 (2)*CICA* 1976 (Tas).

mental injury;

d. the contraction, aggravation, acceleration of recurrence of a disease; and

e. damage to spectacles, a contact lens, a hearing aid, artificial teeth, and artificial limb or other artificial substitute, or a medical, surgical or other similar aid or appliance.[91]

This extensive definition includes a number of injuries which are not defined as such anywhere else in Australia. Indirectly the definition results in a widening of the category of possible claimants by deeming that damage to certain personal property is also injury. The inclusion of the provision relating to disease in paragraph (d) also artificially extends the category.

The extensive definition of 'injury' in the Australian Capital Territory scheme logically expands the operation of the scheme and thereby improves the scheme.

'Victim'

All of the Australian schemes either use the words 'victim', 'aggrieved person' or 'person aggrieved' to describe the person who has suffered injury. The New South Wales scheme, which came into operation in 1988, introduced different terminology to describe victims of crime.[92] The new scheme retained the term 'aggrieved person' but specified that it only applies in relation to compensation awards by a court against convicted offenders.[93] The term is not used throughout the rest of the Act and claims may be made to the Tribunal by a 'primary victim', 'secondary victim' or 'law enforcement victim'. 'Primary victims' are persons who sustain injury as a direct result of an act of violence.[94] This category of victim is recognised by all of the Australian schemes and is generally referred to as the 'aggrieved person' or the 'victim'. The use of the new term really only evidences a change in terminology.

On the other hand, the use of the term 'secondary victim' evidences a radical change to the category of possible claimants. A 'secondary victim' is defined as 'a person who has sustained injury as a direct result of witnessing, or otherwise becoming aware of, injury sustained by a primary victim, or injury or death sustained by a deceased victim, of the act'.[95] It was not entirely clear, prior to the introduction of the new scheme, whether the scheme applied only to immediate victims of criminal conduct or to a wider class of persons who may have suffered injury. [96] The inclusion of the category of 'secondary victim' provides specific statutory recognition of the wider category of victim. In South Australia, it had been held that the scheme included, as claimants, persons who had witnessed the infliction of injuries.[97]

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91 Section 2 *CICO* 1983 (ACT).
92 *FCA* 1987 (NSW).
93 Section 52 *VCA* 1987 (NSW).
94 Section 10 *VCA* 1987 (NSW).
95 Section 10 *VCA* 1987 (NSW).
96 *McCafferty* (No2) [1974] 1 NSWLR 475.
97 *Battista v Cooper* (1976) 14 SASR 225.

Clearly, such an interpretation is open upon all of the Australian schemes.

However, the Queensland judiciary have not so interpreted the Queensland scheme. In *R v Callaghan & Fleming ex parte Power*, Connolly J held that the 'person aggrieved' was a 'person or one of the persons to whose person the violence was offered'.[99] In that case the applicant was a bank teller in a bank at the time when an armed robbery with violence took place and although he was threatened with a pistol, the money was actually taken from another teller. Connolly J, accepting that the compensation provisions were remedial legislation and should be given a benign construction, concluded that the applicant was a 'person aggrieved' by the offence and ordered a payment by way of criminal compensation. In dicta, his Honour opined that the term 'person aggrieved' would not extend to include a bystander who had suffered a nervous disorder as a result of having witnessed the offence, but to whose person no violence was offered.

It is submitted that this interpretation of the term 'person aggrieved' unduly limits the category of possible applicants, particularly having regard to his Honour's earlier statement that the legislation was to be given a benign construction. The wide definition of the term 'injury' as 'bodily harm and includes pregnancy, mental shock and nervous shock'[100] is similar to the definition in the South Australian legislation[101] which, when coupled with a wide definition of a 'person aggrieved', was interpreted there as entitling bystanders to make an application in circumstances where they suffer nervous shock.

The alternative avenue of compensation made available pursuant to s 685A of the *Criminal Code* (Qld) may be the subject of a similarly narrow interpretation. There is scope however for a wider interpretation to be made of s 685A of the *Criminal Code* due to the inclusion of the words in brackets. The provision specifies that the court of justices may order that the offender - 'pay compensation for injury suffered by any person (whether the victim against whose person the offence was committed or another) by reason of the commission of the offence'.[102] The use of the words in brackets evidences an intention of the legislators to extend the compensation payments to persons other than the immediate victims of the offence. However, even if a more liberal approach is taken by the judiciary to possible victims under s 685A, the three major limitations to the operation of the provision would make this approach purely academic.

The first limitation relates to the application of the provision only to cases where the offender is convicted. The provision will not operate in cases where an offender is never found, not charged with the offence or acquitted of the offence. The second limitation is that the only source of compensation payments is the offender, with no provision for state compensation payments in cases where the offender is impecunious. The third limitation is the most

98 [1986] 1 QdR 457.
99 Ibid 458.
100 Section 663A *Criminal Code* (Qld).
101 Section 3 *Criminal Injuries Compensation Act* 1969 (SA).
102 Section 685A (1)(c) *Criminal Code* (Qld).

serious restriction upon this avenue of compensation. The section provides no right of application for a victim. The victim seeking compensation under s 663B is able to make a formal application for compensation, whereas a victim seeking compensation pursuant to s 685A is unable to make any application for compensation. It has been held that the victim must rely upon the court of justices before whom the offender is tried to make an order for compensation at the time of sentencing the offender. [103]

As a result of these limitations, in particular the third limitation, it is improbable that a person, other than the immediate victim, would ever be awarded compensation for injuries received from witnessing the commission of the offence. Even if a liberal interpretation of s 685A was accepted by the judiciary, it is highly unlikely that the court would be made aware of a bystander's injuries without the possibility of an application being made on the bystander's behalf.

The writer submits that no illogical distinction should be drawn between the direct and indirect infliction of criminal injuries. It appears however, in Queensland, that a specific statutory provision would be required, as the judiciary are loath to give a wide interpretation to the existing provisions.

Burden of Proof

A victim is required to prove that the injury suffered was a consequence of (or a result of) criminal conduct (or an offence) pursuant to every scheme in Australia. The schemes operating in each state and territory, except Queensland, specifically provide that this matter will be sufficiently proved if it is proved on the balance of probabilities.[104] The standard of proof required, namely proof on the balance of probabilities, is the same as that required in a civil action and is not onerous. The claimant need only prove that it was more likely than not that they were so injured.

Generally, the criminal law requires proof of guilt beyond reasonable doubt.[105] The Queensland scheme is contained in the *Criminal Code* and thereby forms part of the criminal law of the State. It could be argued, therefore, that by implication the quantum of proof is beyond reasonable doubt and the burden of proof is upon the claimant.[106] Such an onerous burden does not sit well with the philosophy underlying the schemes as the schemes were introduced for the benefit of victims.

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103 *R v Civoniceva ex parte Attorney General* [1983] 2 QdR 633 and *R v Stieler* [1983] 2 QdR 573.

104 Section 8(1) *CICA* 1978 (SA), s 7(3) *CICA* 1985 (WA), s 2 0 *VCA* 1987 (NSW), s 20(2)(a) *CICA* 1983 (Vic) s 5(1)&(2) *CICA* 1976 (Tas), s 5(1) and 17 1982 (NT) and s 8 *CICO* 1983 (ACT).

105 *Woolmington v DPP* [1935] AC 462.

106 It may be that the courts determine the quantum of proof to be on the balance of probabilities in accordance with the view taken by Connolly J in *R v Callaghan and Flaming* [1986] 1 Qd R 475, 476 namely that the compensation provisions are remedial legislation which suggests that a lesser standard is applicable.

Amount of Compensation Payable

a: Minimum Amount Specified

Six of the Australian state-funded schemes prescribe minimum payments of compensation. In New South Wales and Victoria the minimum sum stipulated is $200.[107] However, in South Australia, Northern Territory, Australian Capital Territory and Queensland the minimum amount payable is $100.[108] The Western Australian and Tasmanian schemes make no provision for a prescribed minimum amount payable.

The imposition of a prescribed minimum has three major repercussions upon the operation of the schemes. The first is a reduction in the total amount of compensation payable by the state, thereby resulting in a cost-saving benefit to a state compensation fund. The second repercussion is a limitation of the total number of claims that need to be dealt with by the courts or the tribunals. This repercussion, by reducing the administrative burden, must indirectly reduce the delays involved in the processing or hearing of claims. The third repercussion is a restriction in the category of possible claimants under the scheme, because relatively small monetary claims cannot be made where a minimum amount is prescribed.

It is impossible to estimate the number of claims that would involve awards of less than the statutory limits set by the six Australian state-funded schemes. It is interesting to note however, that in Queensland alone pursuant to the crime statistical data for the year ended 30 June, 1989, a total of 4,903 minor assaults were reported to police.[109] Minor assaults consist of assaults less than assaults occasioning bodily harm and constituted the largest category of offence involving injury to the person in the 1989 Major Crime Index.[110] Such statistics indicate that the possible category of minor claims may be significant.

The setting of a lower limit upon compensation payments can be seen pragmatically as a cost and time saving exercise. The specification of a minimum amount recoverable is not unique to the Australian schemes. In fact, the English Criminal Injuries Compensation Scheme currently specifies a minimum loss requirement of £550 (or approximately $1,100 Aust).[111] The high minimum amount was designed to reduce the overall costs of the Scheme,[112] and has been strongly condemned.[113] The minimum amount has been described as one of the serious difficulties of the English scheme.[114] It is considered that it is not fair or reasonable to achieve economy in

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107 Section 9 *VCA* 1987 (NSW) and s 20(2)(e) *CICA* 1983 (Vic).

108 Section 7(10) *CICA* 1978 (SA), s 13 *CCA* 1982 (NT), s 9 *CICO* 1983 (ACT) and ss 663C and 663D *Criminal Code* (Qld).

109 Queensland Police Department *Annual Report* (1989), 63.

110 Ibid 63-64.

111 Section 114 *Criminal Justice Act* 1988.

112 Bailey S and Tucker D *Remedies for Victims of Crime*, (1984) 9-10.

113 Report by a Working Party appointed by the Scottish Association of Victim Support Schemes *Compensation for Victims of Crime* (1988).

114 Miers D 'The Compensation Provisions' [1989] Crim LR 32, 42.

government expenditure at the expense of certain victims of crime.[115]

The criticisms of the English lower limit are also applicable to the Australian jurisdictions which specify lower limits. The category of excluded claimants will, of course, be significantly less because of the considerably lower minimum amounts prescribed here. Nevertheless, such an arbitrary restriction is inconsistent with the Australian criminal justice system. The criminal law in Australia has never distinguished between minor and major crimes in relation to prosecutions or punishment. For example, the law has never specified a minimum sum capable of constituting the subject of a prosecution for stealing. In such a context it is difficult to justify the introduction of a threshold amount in relation to compensation.

The situation currently existing in Western Australia and Tasmania, where no minimum amount is prescribed, avoids the inequity evident in the other Australian jurisdictions.

Accordingly, the abolition of the prescribed lower limit of $100 in Queensland is recommended.

b: Maximum Amount Specified

Each of the Australian compensation schemes prescribe maximum amounts of compensation payable from the state funds. In New South Wales and Victoria the prescribed maximum payment is $50,000.[116] In South Australia and the Australian Capital Territory the sum of $20,000 is specified[117] whilst in Western Australia and the Northern Territory $15,000 is the maximum sum recoverable.[118] A maximum amount of $10,000 is prescribed in Tasmania.[119]

In Queensland the maximum amount depends entirely upon the particular injury received and consists of an amount as specified, and varied from time to time, by s14(1)(C)(a) of the *Workers' Compensation Act* 1916-1988 (Qld).[120] One 'particular prescribed amount' is specified as a maximum relating solely to criminal compensation, being the sum of $20,000 in the case of mental or nervous shock.[121] In cases where the injury suffered by a claimant is not an injury specified in the *Workers' Compensation Act* table, the court must consider the injury suffered in relation to and by comparison with the injuries which are specified in the scale.[122] The task of comparison will not always be an easy one due to the limited number of injuries

115 Report by a Working Party appointed by the Scottish Association of Victim Support Schemes, above 12.

116 Section 16 *VCA* 1987 (NSW) ss 15,16,17 and 18 *CICA* 1983 (Vic) and the *Criminal Injuries Compensation Regulations* (Vic).

117 Section 7 *CICA* 1978 (SA) as amended by s 4 *Criminal Injuries Compensation Act Amendment Act* 1987 (SA) and s 9 *CICO* 1983 (ACT).

118 Section 20 *CICA* 1985 (WA) and s 13 *CCA* 1982 (NT).

119 Section 6(1) *CICA* 1976 (Tas) (the maximum sum applies to cases where no maximum is prescribed in relation to the particular criminal conduct involved).

120 Section 663A *Criminal Code Amendment Act* 1984 (Qld).

121 Section 663AA(1) *Criminal Code* (Qld).

122 Section 663BA *Criminal Code* (Qld).

specified in the workers' compensation table and the difficulty of equating these injuries with the very large number of possible criminal injuries which may be inflicted.[123]

Recently, in *Castle and Hughes; ex parte Hansen*,[124] Connolly J held that no amount specified in s 14 of the *Workers' Compensation Act* applied in respect of the injury suffered by the applicant. The female applicant had been the victim of an armed robbery and had suffered amongst other injuries, a stab wound to the left breast. His Honour held that, as there was no prescribed amount in relation to the injury suffered, there was no limitation on the amount of compensation which may be awarded. This interpretation abolishes any maximum amount payable, but is only effective in relation to injuries which are not analogous with any of the injuries specified in the *Workers' Compensation Act.*

Another problem which arises as a result of the use of the table relates to a fundamental difference between workers' compensation and criminal injuries compensation. An injured employee has two avenues of redress open to him only one of which is in the form of workers' compensation payments. The second avenue, namely a civil claim against his employer, is also readily available. Accordingly, in most cases the workers' compensation payments are only of secondary importance and are seen as a means of financial support whilst lengthy personal injuries proceedings are taking place. Invariably, the civil award of damages will be significantly larger than the workers' compensation payments which are subsequently deducted from the award. This situation can be contrasted with the situation facing the victim of criminal injuries. Unlike employers, offenders are often not identified or found, and if located are often 'men of straw'. Civil proceedings therefore are not a practical alternative for victims of criminal injuries.

The workers' compensation scheme, which was established as a secondary avenue of redress for employees, is being superimposed upon a criminal injuries compensation scheme which is the primary, and almost always the only, form of redress open to victims of crime. Consequently the amounts payable, pursuant to the workers' compensation table, are not adequate or just compensation for victims of crime in Queensland.

The specification of a maximum amount of $20,000 in cases of mental or nervous shock will also be inadequate in a number of cases involving minor physical injuries but substantial psychological harm. For example, a rape victim may suffer only minor physical injuries coupled with substantial, long-term psychological harm. The sum of $20,000 may be a manifestly inadequate award in such cases.

Attempts have been made by the Queensland judiciary to circumvent the problem of inadequate prescribed maximum amounts of compensation. In *R v Wraight and Dakin, ex parte Fullerton* [125] Campbell J concluded that, in

123 See eg *R v Paki-Titi ex parte Alexander* Unreported (No 179 of 1989) (7 June 1989) Ambrose J.

124 [1990] 1 Qd R 560.

125 [1980] Qd R 582.

cases involving multiple offences, the prescribed maximum amount of compensation could be awarded in respect of each offence committed by each offender. The two respondents in the case had each been convicted of two counts of rape of the applicant and one count of attempted murder of her. The sum of $5,000 was awarded to the applicant to be paid by each respondent in respect of the counts of rape and the sum of $1,907.20 was awarded against each respondent in respect of the offences of attempted murder. Accordingly, a total sum of $13,814.40 was awarded to the applicant even though the maximum amount of compensation prescribed at the time was $5,000. [126]

Campbell J held that 'a literal reading of the section' led to the conclusion that the prescribed maximum amount related to each offence by each offender and that the prescribed maximum amount thereby became the sum of $30,000.[127] It is difficult to understand the reason why his Honour did not award the entire maximum in relation to the offences committed in this case, particularly in the light of his Honour's comments upon the respondents' conduct and the applicant's suffering. His Honour, in sentencing the respondents, made reference to the 'animal savagery and brutality of their crimes being almost beyond belief'.[128] Reference was also made to the fact that the applicant had suffered a great deal and that the horror of the offences would 'undoubtedly remain with her for the rest of her life'.[129] The assessment of compensation ultimately made in the case becomes even more difficult to understand in light of his Honour's assumption that the 'ordinary principles of assessment of damages in civil cases apply to an assessment under this section of the *Code'*. [130]

Although the amount actually awarded in the case appears inadequate, sight must not be lost of his Honour's attempt to circumvent the grossly inadequate statutory maximum of $5,000. In fact, sight of this matter was not lost to the Queensland Legislature and in 1984 the *Criminal Code* was amended to prevent such a circumvention of the statutory maximum.[131] The prescribed maximum now applies to situations where more than one offence arises out of the one course of conduct, or closely related courses of conduct, of an offender.[132] Compensation for the three offences committed by each offender in *Wraight's* case[133] would be limited by this provision to the one prescribed maximum amount. However, it has been recognised that in cases involving multiple offenders the provision does not prevent the prescribed amount being awarded against each offender. In *R v Bridge and Madams; ex parte Larkin*[134] the two respondents had each been convicted of rape, detention of the applicant with intent to carnally know her and indecent assault. The prescribed maximum of $20,000[135] applied as the only injury suffered by the

126 Section 663B *Criminal Code* (Qld).
127 *R v Wraight and Dakin ex parte Fullerton* [1980] Qd R 582, 582.
128 Ibid 583.
129 Ibid.
130 Ibid.
131 Section 5 *The Criminal Code Amendment Act* 1984.
132 Section 663B *Criminal Code* (Qld).
133 *R v Wraight and Dakin ex parte Fullerton* [1980] Qd R 582.
134 [1989] 1 Qd R 554.
135 Section 663AA(1) *Criminal Code*.

applicant was of the nature of mental or nervous shock. McPherson J concluded that the 1984 amendment to the *Criminal Code* prevented the awarding of the prescribed maximum in respect of each of the six convictions.[136] On the other hand, his Honour found no difficulty with each of the offenders being held liable for the maximum amount and stated:

> Section 663B(1) speaks of conviction of the 'person' on indictment, and enables the court to order 'him' to pay a sum not exceeding the prescribed amount. Where, as in a case like this, each has under s 7 of the *Code* incurred criminal responsibility and suffered conviction for an offence in which both have participated, each of them can be ordered to pay a sum not exceeding the prescribed amount of $20,000 by way of compensation for ensuing injury of mental or nervous shock. [137]

The applicant was thereby awarded the sum of $40,000 by way of compensation for the injury suffered by her. His Honour's interpretation of the compensation provisions ensured that the applicant received twice the amount prescribed for such injury.

Such a finding is to be commended as an attempt to more adequately compensate victims of crime. However, if this is a correct interpretation of the compensation provisions, difficulties arise with respect to the rationale behind the provisions. For example, what if Miss Larkin has suffered exactly the same degree of mental or nervous shock, but the offences had been committed by Mr. Bridge alone? The answer according to his Honour's interpretation, would be that she would only be entitled to one-half of the amount that she would have received if Mr Madams had also been involved. It is submitted that the rationale of awards should be compensatory for injuries actually received and that the quantum of the award should not depend upon the number of offenders involved in the infliction of the injuries. The fact that McPherson J had to resort to such an interpretation, in order to appropriately compensate a victim, is evidence of the inadequacy of the maximum amounts prescribed by the Queensland legislature.

If a maximum limit must be set, the larger maximum amounts set in New South Wales and Victoria are to be preferred. However, it is the writer's submission that, as compensation awards are generally the only practical avenue of redress available to victims of crime, no maximum limit should be imposed.

The English Criminal Injuries Compensation Scheme does not prescribe a maximum limit[138] and the absence of a prescribed maximum limit is not seen as a difficulty with, or inadequacy, of the Scheme.[139] In fact, this feature of the Scheme was retained when the Scheme was placed upon a statutory footing in 1988.

One fear consequent upon suggestions relating to the abolition of a

136 *R v Bridge and Madams ex parte Larkin* [1989] 1 Qd R 554, 557.
137 Ibid 556-7.
138 Section 108-117 *Criminal Justice Act* 1988.
139 See generally Miers [1989] Crim L R 32.

maximum limit may be the 'blow out' effect caused to the state compensation funds. This fear has proved not to be realistic in England.[140] In addition, the number of serious injuries requiring large monetary payments will constitute only a small proportion of all criminal injury claims made. For example, the total number of criminal offences reported to police in Queensland in the year ended 30 June, 1989 numbered 167, 382 whilst the category of crimes resulting in serious injuries (including murder, attempted murder, serious assaults, rape, attempted rape and robbery) number only 5,404.[141] Accordingly, the percentage of more serious crimes, warranting larger monetary payments than the current maximum, should in practice be limited.

Appeal Procedures

The New South Wales and Western Australian compensation schemes provide for appeals against compensation orders to a District Court Judge.[142] A similar right of appeal exists to a County Court Judge in Victoria.[143] In South Australia and the Australian Capital Territory, statutory rights of appeal lie to the Supreme Court.[144]

No appeal lies from a compensation order in Tasmania or the Northern Territory.[145] In the Northern Territory the original compensation order, known as a 'compensation certificate', may be granted only by a 'local court of full jurisdiction'.[146] As discussed previously, such courts may be constituted by either a Stipendiary Magistrate or a Judge of the Supreme Court. In circumstances where a certificate is issued by a Local Court constituted by a magistrate, the magistrate is able to reserve a question of law arising out of an application for the decision of the Supreme Court.[147] In Tasmania, on the other hand, the *Criminal Injuries Compensation Act* specifically provides that no appeal lies from an award made by the Master of the Supreme Court.[148] Such a limitation, when coupled with the restriction upon the publication or reporting of the proceedings before the Master, leaves a victim's claim completely within the unrecorded discretion of one person. In circumstances where awards may appear to be inadequate or excessive, the victim and the offender are left with no avenue to have the decision reviewed. The absence of review in this area is made even more disturbing by the Master's power to delegate any of the functions under the scheme to the Registrar or Deputy Registrar of the Supreme Court.[149]

In Queensland, neither of the avenues through which a victim may seek compensation provide a right of appeal for a victim. In fact, s 663B *Criminal Code* makes no provision for an appeal by any party to

140 Zdenkowski G, Ronalds C and Richardson M (eds) *The Criminal Injustice System: Volume 2* (1st ed 1987) 149.

141 Queensland Police Department *Annual Report 1989* 63-64.

142 Section 29 *VCA* 1987 (NSW) and ss 41-43 *CICA* 1985 (WA).

143 Section 26 and 27(6) *CICA* 1983 (Vic).

144 Section 9a(2)(a) *CICA* 1978 (SA) and s 28 *CICA* 1983 (ACT).

145 Section 10 *CICA* 1976 (Tas) and *CCA* 1982 (NT).

146 Section 4 & 5 *CCA* 1982 (NT).

147 Section 19 *CCA* 1982 (NT) and *Brown v Baxter* (1987) 87 FLR 449.

148 Section 10 *CICA* 1976 (Tas).

149 Section 3 *CICA* 1976 (Tas).

compensation proceedings. A general right of appeal exists for a convicted offender to the Court of Criminal Appeal, in that, with the leave of the court, the offender is able to appeal against the sentence passed upon his conviction. The Queensland Court of Criminal Appeal held in *R v Muchan*,[151] that a compensation order made pursuant to s 663B was appealable as a sentence having regard to the provisions of s 668 of the *Criminal Code*. Less than four months after the decision in *R v Muckan*, s 663B was amended to provide that a compensation order made pursuant to the section 'shall not, for any purpose, be taken to be part of a sentence'.[152] This amendment also bars the Attorney-General's general avenue of appeal pursuant to s 669A. The *Criminal Code* does not provide any general right of appeal for a victim (or claimant). Consequently, no appeal lies for any party from compensation proceedings commenced pursuant to s 663B.

The second avenue of compensation, s 685A *Criminal Code*, also does not contain a specific provision relating to appeals from a compensation order of the court of justices. In *R v Civonceva ex parte Attorney-General*[153] it was held that, pursuant to the general appeal provisions,[154] an appeal will lie to the Court of Criminal Appeal for both the convicted offender and the Attorney-General. This is because a s 685A order was found to form part of the 'sentence' imposed by the court of justices. Accordingly, the victim is the only party affected by the order who is unable to appeal. Indeed, it does not come as a surprise that no appeal lies for a victim, as the section does not make provision for an application for compensation by a victim in the first place.[155]

The lack of a suitable appeal structure means that victims must be content with the order at first instance, which may be an order refusing compensation or an order granting an inadequate quantum of compensation.

The absence of a right of appeal in New South Wales, prior to the 1987 Act, has been strongly criticised[156] and described by Hutley J as 'thoroughly unsatisfactory'.[157]

The same criticisms can still be directed at the Queensland situation which continues to deprive victims of a right of appeal.

Proposed Reforms

The following set of proposed changes to the Queensland criminal injuries compensation scheme are formulated upon the basis of the preceding discussion.

1. A separate statute providing specifically for the compensation of criminal injuries must be introduced.

151 [1975] Qd R 393.
152 *Criminal Code and Justices Act Amendment Act* 1975.
153 [1983] 2 Qd R 633.
154 Section 668D and 669A *Criminal Code* (Qld).
155 The victim may ask the prosecutor to make such an application on his or her behalf.
156 Fairall 9 Crim L J 108.
157 *Grzybowaz v Smilianic* [1980] 1 NSWLR 627 at 633.

The present scheme is merely an amalgamation of piecemeal amendments to the State's *Criminal Code*. Every other state and territory in Australia has at some stage introduced a comprehensive scheme for the compensation of criminal injuries. The Queensland legislature has, on the other hand, 'created a new concept without bothering to define it or place it in the context of existing law'.[158]

2. That the ex gratia award system be replaced by a system which provides a statutory or legal basis for awards of compensation.

Under the compensation system presently operating in Queensland, the only state-funded avenue of compensation open to victims is to seek an ex gratia payment from the Minister for Justice and Attorney-General.[159] A victim's compensation claim in such cases is left entirely in the hands of a politician who is under no obligation to even consider the application. Other ex gratia award systems are currently being replaced by systems which provide a statutory or legal basis for awards of compensation, for example, the English Criminal Injuries Compensation Scheme was put on a statutory footing in 1988.[160] It is becoming widely accepted that a victim of crime is 'as of right' entitled to compensation.[161]

3. That a separate Criminal Injuries Compensation Tribunal be established.

The Law Reform Commission of Western Australia in a report on criminal injuries compensation,[162] discussed in detail the many positive advantages of establishing a separate tribunal. It was argued that a single tribunal could evolve a consistency of approach, a tribunal could more easily and appropriately conduct its proceedings informally and expeditiously and that the creation of a tribunal would ensure that the question of guilt or innocence would be kept as separate as possible from the question of compensation.[163] One argument which was raised by the Commission, and which is of particular relevance in Queensland, is that only a separate tribunal can determine claims in situations where there have been no criminal proceedings.[164] Those in favour of leaving compensation orders with the trial court argue that the advantage of this is that the trial judge is already acquainted with the facts of the case and therefore there is no necessity for a second hearing of the same factual situation.[165] It is further argued that this advantage results in a system which is more convenient and less costly

158 *R v Sainty* [1979] Qd R 19,222 *per* Denmack J.
159 The portfolios of Justice and Attorney-General were separate in 1989.
160 *Criminal Justice Act* 1988 (UK).
161 Miers D 'The Compensation Provisions' [1989] Crim L R 32.
162 Law Reform Commission of Western Australia 'Report on Criminal Injuries Compensation' 1975.
163 Ibid 5-12.
164 Ibid 6.
165 Comment 'Recent Legislation: Criminal Injuries Compensation Act 1970 (WA)' [1972] WALR 305-306.

to administer than a separate tribunal system.[166]

It is submitted that the primary duty of the judge in a criminal trial is to determine the guilt or innocence of an offender. The facts raised and considered during the trial are only those relevant to this determination. Accordingly, even where jurisdiction in this area is left with the trial courts, a second hearing of the same factual situation from a different perspective may be warranted.

A separate tribunal system would enable compensation proceedings to take place before criminal trials thereby avoiding lengthy delays.

4. Provision must be made for compensation applications by persons who were financially dependant upon deceased victims.

   The present Queensland scheme makes no provision for state-funded compensation in cases where a victim dies. The Queensland scheme is the only scheme in Australia which makes no such provision. It follows logically that if a victim who lives is able to claim compensation, then if the victim dies those financially dependant upon him or her should in turn be able to claim compensation.

5. (i) The extensive definition of the term 'injury' used in the Australian Capital Territory scheme[167] should be adopted in Queensland.
   (ii) The categories of 'primary victim' and 'secondary victim' as used in the New South Wales scheme[168] should also be adopted in Queensland.
   (iii) The Queensland scheme should specifically provide that the standard of proof required in compensation proceedings is on the balance of probabilities.

6. That the prescription of minimum and maximum payments of compensation be abolished in Queensland.

7. That a suitable appeal structure be implemented for compensation proceedings.

Conclusion

It is widely recognised that state-funded compensation schemes are of vital importance to victims of criminal injuries. This is primarily because the two alternatives, the civil claim and the compensation order against the offender, are of little practical utility.

The various governments of the Australian states and territories have each recognised the need for state-funded schemes. The scope of the state and territory compensation schemes has varied from jurisdiction to jurisdiction. An analysis of the various schemes presently in operation shows that none of

166 McCann, 133-134.
167 Section 2 *CICO* 1983 (ACT).
168 Section 10 *VCA* 1987 (NSW).

them are without shortcomings. The Queensland scheme, which has been described as a 'bureaucratic farce',[169] is the scheme most deserving of reform. Queensland is the only state or territory in Australia not to have enacted a specific statute relating to compensation. Queensland also holds the dubious honour of being the only state or territory in which provisions from its 1960's scheme continue to operate. The establishment of a tribunal system and the abolition of the ex gratia system would be moves in the right direction. Queensland is also placed in the enviable position of being able to learn from the experiences of the other Australian jurisdictions which have already introduced such systems.

The Queensland scheme is currently funded by the State's Consolidated Revenue Fund. In South Australia in 1987, a small levy payable by all convicted offenders was imposed.[170] The stated purpose for the imposition of the levy is to provide a source of revenue for the state's Criminal Injuries Compensation Fund. In 1989, the New South Wales and Northern Territory Legislatures enacted similar systems of compensation levies.[171] The writer supports the adoption of a similar system in Queensland, although ultimately this question of funding is a political and economic one.

Monetary payments are, of course, not the only relevant requirement for victims of criminal injuries. There are many other necessary considerations and services. Calls have been made for an upgrading of the information and consultation mechanisms for victims at all stages of the criminal process.[172] A declaration of victims' rights is seen as one method of providing statutory recognition of the need to provide information and services to victims. In 1989 the former Queensland Government released a charter of rights for victims of crime for public examination and comment.[174] The proposed Queensland charter was closely modelled upon the South Australian 'Declaration of Victims' Rights' which was introduced in 1985.[175] Some of the principles recognised by the South Australian charter are recognised by statute, whilst the majority are established by, and rely upon, administrative action.[176]

Any change which is being made to improve the plight of victims is to be commended and encouraged. However, such moves should never distract from, nor act as a substitute for, the fundamental obligation of governments to provide a just system of compensation. In Queensland there is clear evidence of a failure to recognise this fundamental obligation. It is hoped that the recently elected Queensland Government will evaluate and reform the present system of compensation as part of its proposed overall review of the State's criminal law.

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169 Mr Gerry Murphy, former President of the Queensland Law Society and Law Council of Australia cited by W Goss 'Criminal Compensation - The Need for Reform' (1985) QLSJ.

170 Section 6 *Criminal Injuries Compensation Act Amendment Act* 1987 (SA).

171 *Victims Compensation (Amendment) Act* 1989 (NSW) and the *Crimes Compensation Amendment Act* 1989 (NT).

172 Sumner CJ 'Victim Participation in the Criminal Justice System' (1987) 20 ANZJ Crim 195 215.

173 Corns C 'Crime Victims: help is on the way' [1989] LIJ 36, 37.

174 'Declaration of the Rights of Victims of Crime in the State of Queensland' [1989] ACL Bulletin 11.

175 Sumner, 20 ANZJ Crim 195, 200-201.

176 Ibid.