

Crimes compensation: Three approaches to a common purpose

The rationales behind the implementation of compensation schemes for victims of crime are well established. The Australian experience has seen different systems put in place in each state and territory. This article looks at the differing regimes in Queensland, New South Wales and Victoria and considers how effective they are in achieving what is ultimately the same aim.

gradually provided for payment by the state. The social justification for such state payments has always been tempered by concerns over financial obligations imposed on taxpayers.

In Australia, we have seen different views on the needs of victims and diverse approaches to the protection of state funds result in statutory compensation schemes which vary significantly between jurisdictions.

QUEENSLAND

The crimes compensation regime in Queensland is governed by the *Criminal Offence Victims Act 1995* (Qld). In practical terms, the Act is set up in such a way that practitioners need to differentiate between two types of potential claimants:

- A person against whom a personal offence has been convicted and where the offender has been convicted on indictment of that personal offence. (Note that an indictable offence heard summarily will not suffice for compensation under the Act).¹
- A victim of a personal offence where:
 - (a) The offender has been tried on indictment, but found not guilty because the person charged was of unsound mind.
 - (b) The offender would have been tried on indictment, but was found under relevant mental health legislation to be of unsound mind when perform-

Photo by Lana Vshivkoff.

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The justifications for state payment of compensation to victims of crime are varied, but generally well accepted. The last three decades have seen the evolution in all state and territory jurisdictions of criminal compensation schemes, which have

ing the act, or is not criminally responsible because they were under 10 years of age when doing the act.

- (c) The offender would have been tried on indictment, but cannot be identified or found after appropriate enquiry and search.
- (d) The victim receives an injury while assisting a police officer to make an arrest or in attempting to prevent a suspected offence.³

In cases of murder or manslaughter, it is also possible for members of the deceased person's family or a dependant of the deceased person to claim funeral expenses or other expenses for damage caused in the course of the crime.

Victims in the first category are empowered under the Act to bring an application directly against the offender in the same jurisdiction as the criminal offence was handled. Once the court has made an order of compensation, the applicant must take steps to attempt to enforce this order. One of the fundamental reasons for the imposition of a state-based compensation scheme is the recognition of the impecunious nature of many offenders.

The Queensland scheme differs in that the first step an applicant must take results in them gaining an order against the offender with no immediate right of

payment from the state. A further application to the Department of Justice and Attorney-General is necessary and this must establish, to the department's satisfaction, that attempts have been made to enforce the order against the offender.

Any ultimate payment by the state in these circumstances is made in the form of an *ex gratia* payment, although it is the general policy of the Attorney-General in these circumstances to make payment in the amount of the order. However, it should be noted that payment will be reduced by any lump-sum compensation received by other means for the same incident.

In the case of the second category of clients, the Act empowers the victim to bring a direct application for an *ex gratia* payment.⁴ Again, it is worth noting that if the victim has received payment from any other means for injuries sustained in the relevant incident, it is the Attorney-General's policy not to make an *ex gratia* payment. In particular, this

arises in situations where the victim has received a lump-sum payment through workers' compensation legislation as a result of having sustained a permanent injury.

This policy seems to ignore the fact that the basis of any payment under workers' compensation legislation is fundamentally different to the basis on which criminal injury compensation should be, and indeed is, awarded.

Applications in Queensland must be made within three years of the date of the offender's conviction or, in the case of a claim directly to the Attorney-General,

within three years of the date of the offence.

Compensation

The maximum award of compensation under the Act is \$75,000.⁵ Common law principles of assessment of damages do not apply.⁶ The court is unable to make an order for costs and special damages cannot be awarded. In deciding the relevant amount to be awarded, the court or the Attorney-General is limited to

Statutory regimes which are founded on a 'table of maims' concept are indicative of legislation created to protect state revenue.

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making an award pursuant to the compensation table and Schedule 1 of the Act. In essence, this is in the style of a 'table of maims' and provides a list of 36 categories of injury and a percentage range for each.

It is clearly stated that the maximum amount for each type of injury is reserved for the most serious cases and the amounts provided in other cases are intended to be scaled accordingly.⁷

The 'table of maims' includes three categories of mental and/or nervous shock and provides for compensation between \$1500 and \$25,500. The total amount of compensation is determined by adding up the award for each injury until the total reaches \$75,000, at which point the amount will become the award.⁸

Further consideration to the assessment must be given in the case of sexual offences. It is possible for the court or the Attorney-General to make an award of damages for what is termed the 'adverse effects' of the sexual offence.⁹ It is imperative that the advocate, either before the court or in written submissions to the Attorney-General, differentiate between the adverse impact suffered by the victim and the mere symptoms of a mental or nervous shock injury. If this can be done, it is open to the court to make an award of up to \$75,000 for adverse impacts.

NEW SOUTH WALES

The criminal compensation scheme in New South Wales is governed by the *Victims Support and Rehabilitation Act 1996* (NSW). The Act provides three categories of persons who can receive compensation.

- Primary victims of acts of violence.
- Secondary victims of acts of violence.
- Family victims of acts of violence.

In essence, primary victims are those who have been injured or have died as a direct result of the relevant incident,¹⁰ and will be eligible to receive compensation for injuries and financial loss.

Secondary victims are defined as those who suffer an injury as a direct result of witnessing an act of violence, and can extend to a person who receives such an injury as a direct result of subsequently becoming aware of the act of violence.¹¹ A secondary victim can receive compensation for the injury sustained and for financial loss arising from that injury.¹²

Family victims are those who are a member of the primary victim's immediate family. It is not necessary that they suffer an injury as a result of the original incident.

The Act provides a right for these categories of individuals to lodge an application for compensation with the local court or the Victims Compensation

Tribunal. An assessor deals with the application and a hearing is not required. In most cases, the application must be lodged within two years of the occurrence of the violent act.¹³ The compensation assessors are able to require an applicant to undergo an examination by a doctor or a psychologist, the cost of which would be borne by the Compensation Fund.¹⁴ In determining an appropriate payment, the assessor can take into account the applicant's past behaviour, whether the act was reported to police and the offender's involvement in the act of violence itself, among other factors.¹⁵

Any award of compensation is subject to conditions which require the person to advise of any future money received as a result of the incident and to make relevant repayments if that occurs.

A person aggrieved by the compensation assessor's decision may appeal to the tribunal.¹⁶ The tribunal may determine matters with or without a hearing, depending on whether it feels it can properly assess the matter 'on the papers'. It is possible for the tribunal in these circumstances to hear further evidence brought by the appellant if it is satisfied that special grounds exist for that to occur.¹⁷

Compensation

Compensation for injuries is based

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on Schedule 1 of the Act, which outlines the injuries and the 'standard amounts' of compensation that can be awarded.

In circumstances of multiple injuries, it is necessary for the victim to identify the most serious injury for which the full standard amount can be paid. Following that, 10% of the standard amount for the second-most serious injury can be paid and 5% of the standard amount for the third-most serious injury. No further payments are available in circumstances where there are more than four injuries. Psychological injuries generally require evidence from a qualified person designated by the tribunal director.¹⁸

As noted, the New South Wales legislation provides for compensation for financial loss. There appears to be an attempt to preclude claims for loss of earning capacity,¹⁹ and thus compensation is confined to an actual loss of earnings in these circumstances. The maximum amount of compensation for financial loss is \$10,000. It will not be paid to the extent that the person has already received entitlements by some other means, such as workers' compensation.²⁰

Up to \$1000 can be claimed for loss or damage of personal effects carried by the primary victim at the time of the violent act.²¹

The maximum amount of compensation a single person can receive is \$50,000.²² The total compensation all family victims, secondary victims and the primary victim can receive is also \$50,000. This means a substantial award to the primary victim will severely limit the amount that can be paid to other people affected by the violent act.

The legislation also provides for payments to victims for up to 20 hours of approved counselling services.²³

Court Ordered Compensation

It is possible for a court to order an offender in a matter to pay up to \$50,000 to 'an aggrieved person'.²⁴ An aggrieved person is one who has sustained injury due to an offence for which the offender has been convicted, or in the case of a death, a member of

the person's immediate family.

This process is intended to act alongside the process relating to compensation for loss of earnings and for the injury itself. The court must also take into account any amount paid to the aggrieved person by way of civil damages from substantially the same incident. In circumstances where civil proceedings are subsequently undertaken, the amount of any court ordered compensation will affect the amount that can be pursued against the defendant.



VICTORIA

Victoria's crimes compensation regime is governed by the *Victims of Crime Assistance Act 1996 (Vic)*. The legislation establishes three classes of victims:

- Primary victims are those who are injured or die as a direct result of an act of violence.²⁵
- Secondary victims are those who are present at the scene of a violent act and injured as a result of witnessing the act, or those who are injured as a direct result of subsequently becoming aware of the act of violence and they are the parent or guardian of the primary victim (who must be under 18 years at the time of the act of violence).²⁶
- Related victims are those who are dependants or close family members of the primary victim where the primary victim has died as a result of the act of violence. Those who had an intimate personal relationship with the primary victim may also be regarded as related victims.

The Act provides for these categories of victims to make an application to the

Victims of Crime Assistance Tribunal. The application must outline the relevant materials and be filed within two years of the act of violence. Once the application is filed, the tribunal can determine the application without conducting a hearing if the applicant chooses.²⁷ Otherwise the tribunal may conduct a hearing and subsequently make an award of compensation.

The tribunal must refuse to make an award of compensation in situations where the violence was not reported to police within a reasonable time or the applicant has failed to provide reasonable assistance to the investigation.²⁸

Compensation

A primary victim can be awarded up to \$60,000 compensation, consisting of amounts for:

- Expenses actually incurred or likely to be incurred by the primary victim for reasonable counselling services.
- Medical expenses actually and reasonably incurred or reasonably likely to be incurred.
- Expenses incurred by the loss of damage to clothing worn at the time of the offence.²⁹
- Up to \$20,000 for loss of earnings or reasonable likelihood of loss of earnings. It is worth noting that there is further scope in Victoria than in New South Wales for this to include loss of future earnings.

In 2000, a further category of 'special financial assistance' was provided for situations where the primary victim had suffered a 'significant adverse effect' as a result of the violence. This has brought back into the Victorian regime some compensation for the pain and suffering associated with the act of violence. The Act requires a practitioner to consider not only the effect the violence has had on their client, but also the type of violence involved. There are four categories of violence that will determine the amount of compensation that can be

awarded, ranging from \$100 to \$7500.

Secondary victims and related victims can be awarded up to \$50,000 compensation. The total cap for all related victims is \$100,000. There is also provision under the Act for payment of reasonable funeral expenses.

The tribunal can award costs at its discretion after the hearings. However, this is only the case in relation to primary and secondary victims.

Court Ordered Compensation

Under sections 85 and 86 of the *Sentencing Act 1991* (Vic), it is possible for a court to order compensation for pain and suffering and for loss and destruction of property. These orders are placed directly on the offenders and are made against the offenders convicted in relation to the relevant act of violence.

The *Victims of Crime Assistance (Miscellaneous Amendments) Act 2003* (Vic), which was assented to on 11 June 2003, makes provision for easier access to interim awards and gives more scope for the tribunal to determine matters without a hearing.

EFFECTIVENESS OF THE SCHEMES

The Queensland and New South Wales statutory regimes, which are founded on a 'table of maims' concept, are indicative of relatively rigid legislation created to protect state revenue.

For instance, it is well established in Queensland that the upper limits in Schedule 1 of the Act are to be reserved

for the most serious injuries. Seen in that context, the amounts of compensation available are not particularly generous. This is especially so given that no award of costs can be made, and thus must be borne by the applicant.

The Queensland system is also heavily reliant on establishing that an offence has occurred, either by the offender being convicted on indictment, or in cases where they have been found unfit to stand trial or not found at all, the applicant must establish that the relevant offence would have resulted in the offender being tried on indictment. This often requires evidence from police and/or prosecuting authorities relating to the seriousness of the offence.

In situations where the relevant offence is heard summarily, there is little scope for the victim to receive substantive compensation. A magistrate can award compensation in such circumstances, but it is the writer's experience that it is usually a token amount.

The victim has no scope to establish on the balance of probabilities that an act of violence has occurred if a person is not pursued by the authorities or has been found not guilty at the criminal standard of proof.

New South Wales and Victoria are a step ahead of Queensland because they have introduced specialist authorities to deal with claims. Despite arguments against the extra level of bureaucracy, the assessment of applications in these states is more focussed on the needs of victims. Assistance for specific coun-

selling services, medical expenses and loss of income, although limited in New South Wales, are examples of this.

The decision by the Victorian Government in 2000 to reinstate a component for pain and suffering recognised that the decision four years earlier to remove this component was potentially mean-spirited and failed to recognise that the state's obligation goes beyond merely addressing tangible loss.

The potential problem in Queensland is that the system provides no payments for loss of earnings or for medical expenses. This means the applicant is reliant on the court or the Attorney-General to take these aspects into account when considering the 'overall seriousness' of the injury.

Each system has its own advantages and disadvantages, and it is difficult to find a regime that addresses the victim's loss in both a tangible and intangible sense to a reasonable degree, while ensuring it does not become a drain on state coffers. ■

Endnotes: 1 s 24, *Criminal Offence Victims Act 1995* (Qld). 2 s 33. 3 Note that the Attorney-General has refused to accept applications for police officers under this section in situations where they are helping other police officers. 4 s 33. 5 s 2, *Criminal Offence Victims Regulation 1995* (Qld). 6 s 25(8)(a), *Criminal Offence Victims Act 1995* (Qld). 7 s 22(4). 8 s 25(3). 9 s 1A, *Criminal Offence Victims Regulation 1995* (Qld). 10 s 17(1), *Victims Support and Rehabilitation Act 1996* (NSW). 11 I Freckleton (2001) *Criminal Injuries Compensation: Law, Practice and Policy*, LBC Information Services, p 200. 12 s 15, *Victims Support and Rehabilitation Act 1996* (NSW). 13 s 26(1). 14 supra 11, p 209. 15 *Victims Support and Rehabilitation Act* s 31(a)-(e). 16 s 36(1). 17 s 38(3). 18 supra 11, p 204. 19 *ibid*, p 206. 20 s 18(5), *Victims Support and Rehabilitation Act 1996* (NSW). 21 s 18(2). 22 s 19(1). 23 s 21(2). 24 s 71(1). 25 s 7(1), *Victims of Crime Assistance Act 2003* (Vic). 26 s 9(2). 27 s 33(1). 28 supra 11, p 294. 29 p 272.

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