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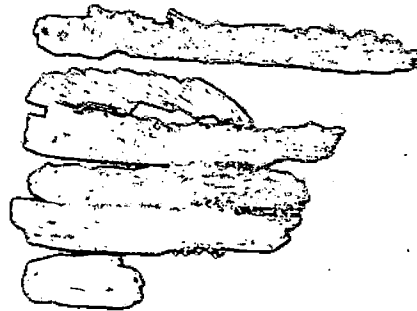
THE UNIVERSITY OF SYDNEY
FACULTY OF LAW



PROCEEDINGS
of the
INSTITUTE OF CRIMINOLOGY

No. 45

VICTIMS OF CRIME



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**INSTITUTE OF CRIMINOLOGY
SYDNEY UNIVERSITY LAW SCHOOL**

Address: 173 - 175 Phillip Street, Sydney, N.S.W. 2000

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**INSTITUTE OF CRIMINOLOGY
SYDNEY UNIVERSITY LAW SCHOOL**

Proceedings of a Seminar on

VICTIMS OF CRIME

CHAIRMAN:

*The Honourable Sir Laurence Street
Chief Justice, Supreme Court, New South Wales*

17th September, 1980
State Office Block, Sydney

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FOREWORD

William Clifford,
Director, Australian Institute of Criminology.

The victims of crime are, indeed, the forgotten tribe of our criminal justice system. It is quite remarkable that, for so long, the interests of the victims (except as witnesses for the prosecution) have been given so little public attention. It is to the credit of the University of Sydney Institute of Criminology that the subject has been so comprehensively treated in this collection of papers delivered at the Seminar which the Institute organised on 17 September 1980. Here the question of public interest in victims, the levels of public compensation, the needs for support programmes, the wide range of diverse angles on victimisation and even the concept of the offender himself as a victim are all covered to provide an unusually balanced view of a serious issue.

Balance is crucial, of course. An equilibrium between the public, the victim and the offender is a continuing requirement of justice in our society. And this counterpoising of interests is what our courts are for.

The criminal law developed out of the need to restrain vengeance and limit the extent of victim retaliation. As central power grew, the satisfaction of the public need for order predominated, to be followed by an era of penal reform and concern for the offender. We are now aware that these phases are three important aspects of the one problem and no-one of the three can be neglected. If our criminal justice system is to be both just and effective, our scales will need all three arms to balance.

It is significant, therefore, that the papers collected here present the necessary case for the victim — but not exclusively.

COMPENSATING VICTIMS OF FEDERAL CRIME

The Hon Mr Justice M.D. Kirby,
Chairman of the Law Reform Commission

ABSTRACT

This paper is a modified version of Chapter 12 of the recent report of the Australian Law Reform Commission, *Sentencing of Federal Offenders* (ALRC 15) 1980. In its report, the Commission has recommended Federal legislation for a Commonwealth victim compensation scheme. Draft legislation is attached to the Commission's report for a Commonwealth Bill applying to the victims, and in the case of death, their dependants, of bodily injury or death resulting from Commonwealth crimes, crimes in the Australian Capital Territory or in certain circumstances the other Territories.

The paper begins by setting the proposed victim compensation legislation in the context of the Commission's report. Improved attention to the predicament of crime victims is one of three major themes of the report. The extent of crime victimisation in Australia is described as are new developments towards a greater sensitivity to victims. The paper outlines the arguments for and against publicly funded money compensation schemes and describes the ways in which the Law Reform Commission reached the view that in the Commonwealth and Territories' spheres, such legislation was now needed. These are the only jurisdictions in Australia in which there is not now a victim compensation scheme.

The paper then turns to the available models. The United Kingdom scheme, the longest continuously operating system, is described as are various Australian State schemes. Each of the Australian schemes includes a statutory maximum for compensation. In this regard, they are described as the "poor and distant relations" of the United Kingdom model, which contains no such maximum. The procedures of the Australian schemes are contrasted. On the one hand, New South Wales and other States have opted for assessment of compensation by the courts, incidental to the criminal trial. In Victoria a special tribunal has been established and this innovation is preferred, for reasons given.

The paper then outlines the principal recommendations of the Australian Law Reform Commission. It argues that it is insufficient to adopt the principle of victim compensation and then half-heartedly to implement it, with inadequate procedures, limited applicability and arbitrarily fixed maximum amounts. It is submitted that victim compensation schemes, if they are to be limited, should certainly be no less than for New South Wales sporting injuries (\$60,000). In preference to arbitrary limits, it is suggested that the community would prefer a general increase in the level of fines to fund an adequate and fair system of money compensation. The problem is described as one for society as a whole, requiring a fresh approach which is not blinkered by past attitudes of centuries of neglect of crime victims.

More than a Palliative

Clifford Hughes is a 32 year old man from Collie in Western Australia. In October 1979 he was severely crippled by a shotgun blast. The blast was fired by a prisoner Brian Edwards who had walked away from a Bunbury Prison outing and set upon a course of crime which culminated in the fatal shooting, at random, of a young engaged couple who were picnicking in the bush near Mandurah, Western Australia. Edwards also shot at Clifford Hughes causing him to be permanently crippled. Hughes did not know Edwards. He just happened to be in the wrong place when Edwards came along. He was struck at close range in his right leg just above the knee. He very nearly died from the loss of blood caused by the injury. According to evidence, he will be in constant pain for the rest of his life. Edwards, sentenced to death, is without means to compensate Hughes from his own property.

Hughes brought proceedings under the Western Australian *Criminal Injuries Compensation Act*. The action came before Mr Justice Lavan in the Supreme Court. He was awarded the maximum compensation of \$7,500. But when asked his reaction he is reported to have said:

I'm not particularly pleased about it — its just something I accept. Nothing could compensate for the way my health and my life have been ruined.¹

Awarding Hughes his compensation, Mr Justice Lavan said that there was no doubt that he would suffer lasting disability, disfigurement and discomfort.

Had this action proceeded on the basis of a civil action, the amount of damages awarded would be far in excess of the maximum provided by the *Criminal Injuries Compensation Act*.²

The case of Clifford Hughes is not typical. Most claims for money compensation for the victims of crime in Australia involve injuries which are less serious. There are, however, sufficient such cases to warrant fresh attention to the principles upon which society approaches the predicament of innocent victims of crime like Hughes. Until now, they have been the largely forgotten participants in the criminal justice drama. Times are changing.

On 21 May 1980 the Commonwealth Attorney-General (Senator P.D. Durack, Q.C.) tabled in the Australian Parliament the 15th report of the Australian Law Reform Commission, *Sentencing of Federal Offenders*.³ The report is the first concerted national study of sentencing ever carried out in the Australian Commonwealth. Specifically, it is the first study of the punishment of Federal offenders. The terms of reference to the Law Reform Commission

1. Reported in *West Australian*, 20 June 1980, 5.

2. *ibid.*

3. A.L.R.C. 15, A.G.P.S., Canberra 1980

required it, among other things, to "take into account the interests of the public and the victims of crime" when considering the imposition of punishment on Federal offenders. The report of the Commission deals with many subjects but three chief themes are identified, namely:

- ways of securing greater consistency and uniformity in the punishment of Federal offenders;
- ways of diversifying the punishment of Federal offenders, particularly by proffering alternatives to imprisonment; and
- the need to do more for the victims of Federal crime.

The report suggests a greater emphasis on compensation and restitution orders. It foreshadows possible further efforts to provide supportive services, advice, counselling and facilities for victims of Commonwealth crimes. Specifically, it addresses a *lacuna* by which only the Commonwealth and the Australian Capital Territory, amongst the jurisdictions of Australia, provide no publicly funded scheme of money compensation for the victims of violent crime. Attached to the report is a draft Criminal Injuries Compensation Bill for a Commonwealth Act. This paper reviews the Commission's proposals and the path by which the Commission came to its conclusions. The Commission's report is an interim report, although on this subject final recommendations are made. For the detail of the machinery provision operation of the proposed Crimes Compensation Tribunal, tribunal practice and procedure, calculation of compensation, recovery proceedings and details as to costs, regard should be had to the Commission's report and, specifically, to the draft Bill attached. This paper is confined to the main themes and is based on Chapter 12 of the report.

Crimes Victims and the Criminal Justice System

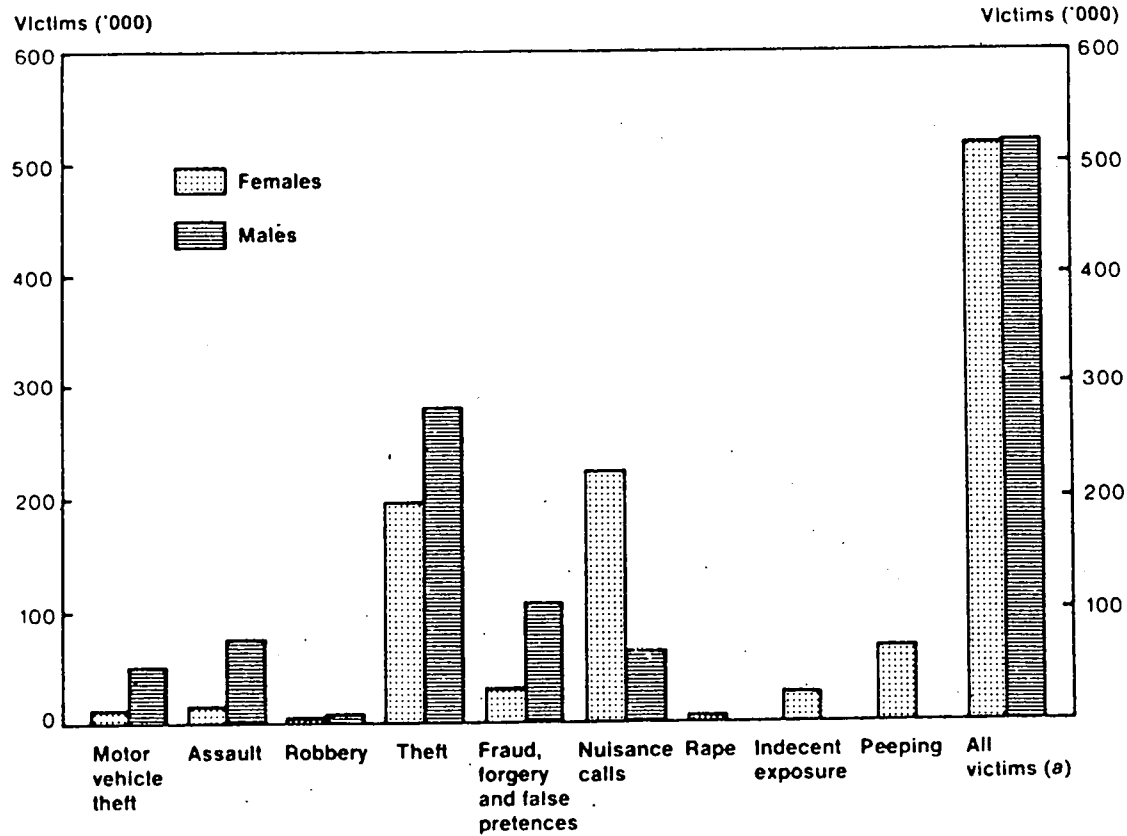
Australian Crime Victim Survey. That the interests of victims of crime in Australia — Federal and State — are of significant dimension, can be realised from the fact that at least one million Australians each year, against their will, are victims in some way or other of criminal conduct. The recently released results of the first national survey conducted in Australia of crime victimisation showed that in 1975, the year in which the survey was undertaken, an estimated 967,000 persons were the victims in the preceding 12 months of one or more of the offences shown in **Figure 1.**⁵ This represented 11.7% of the Australian population. Almost half of all victims were victims of theft. At the upper end of the seriousness scale 1.6% of all victims were victims of robbery. Of those who were the victims of assault and robbery 26,000 reported that they received some form of medical treatment, although in most instances this was not for serious injuries.⁶

4. A.L.R.C. 15, Appendix F, Draft Criminal Injuries Compensation Bill, hereafter Draft Bill.

5. Australian Bureau of Statistics, *General Social Survey Crime Victims May 1975* (1979) 8.

6. *ibid*, Tables 39, 41.

NUMBER OF VICTIMS OF SELECTED OFFENCES BY SEX OF VICTIM



(a) Persons who reported being victims in the last 12 months of one or more of the offences listed.

Source: A.B.S., General Social Survey of Crime Victims (1979)

New Developments Towards Sensitivity to Victims. In many overseas countries, and particularly in the United States, bodies such as the recent South Australian "Good Samaritan Institute"⁷ have received widespread support from members of the public and have acted as a catalyst for the development of new methods of alleviating the plight of victims of crime.⁸ These methods have included:

- *Assistance Units.* Establishing victim and witness assistance units in police and prosecutor agencies.⁹ These units are intended to offer advice to victims and witnesses about the progress of the investigation and prosecution of particular offences, as well as to direct victims to other agencies which may be able to provide them with help. The units have also helped victims make application for compensation to programs run by government bodies. No victim witness assistance units have as yet been set up in any Australian jurisdiction.
- *Rape Victim Facilities.* Establishing special facilities for the treatment of rape victims and the victims of other forms of sexual assault.¹⁰ Much of the momentum for changes in the response of society to crime victimisation has stemmed from the moves to reform rape laws. In addition to leading to law reform and new methods for the handling of rape cases by criminal justice agencies these pressures have resulted in the creation of rape crisis centres and specialised medical services providing counselling and allied assistance to the victims of sexual assault. These developments have extended to Australia. In a number of jurisdictions of Australia sexual offence referral units have been set up, and procedural and allied changes have been made in the way in which rape and other sexual offences are handled by police, other criminal justice agencies and in the courts.¹¹

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7. *The Advertiser* (Adelaide), August 14, 'Samaritans May Help Crime Victims'. The founder of the Adelaide Samaritan Institute (Victims of Crime Service) is Mr R.W. Whitrod, formerly Police Commissioner of Commonwealth Police, Papua New Guinea Police and Queensland Police. See *The Advertiser*, *ibid*.
 8. In the United States for example, a National Organisation of Victim Assistance (Nova) has been formed with the express aim of promoting on a national scale the interests of crime victims. The most recent international symposium on this subject was the 3rd International Symposium on victimology, was held in Munster, Westfalia, in the Federal Republic of Germany in September 1979.
 9. Extensive literature exists describing the nature of victim witness assistance programs. See Cain and Kravitz, *Victim/Witness Assistance A Selected Bibliography* (1978).
 10. See in general Chappell and Fogarty, *Forcible Rape a Literature Review and Annotated Bibliography* (1978) 30-37.
 11. See O'Connor, 'Rape Law Reform — The Australian Experience, Part I [1977] 1 *Crim. L.J.* 305; Part 2 [1978] 2 *Crim. L.J.* 115.

- *Victim Impact Statements.* Making "victim impact statements" available to judicial officers at the time of sentencing. In certain American jurisdictions there have been recent developments designed to ensure that a judicial officer, when sentencing an offender, not only has access to pre sentence reports about the offender and his background but also to materials describing the impact of a crime upon the victim.¹² Such statements are intended to provide a balance to the information considered by a judicial officer when imposing punishment. In the view of some observers this balance is at present unduly weighted in favour of the offender rather than the victim. Victim impact statements have not yet been introduced in any Australian jurisdiction but have been proposed in South Australia.
- *Expanded Restitution Programs.* Provision of expanded restitution programs for crime victims.¹³ A variety of restitution provisions have tended to be available in most jurisdictions allowing courts to award monetary and allied compensation to victims.
- *New Victim Programs.* Provision of victim compensation programs. Such programs have become widely accepted in many jurisdictions during the past two decades and they have, as will be seen in more detail below, extended to Australia.

These are some of the more significant contemporary developments reflecting an increasing international awareness of the needs of crime victims. Not all such developments fall within the Australian Law Reform Commission's reference on the punishment of Federal offenders.

Compensation for Non Violent Crimes. Before delivering its interim report the Law Reform Commission circulated its proposals in a discussion paper outlining its tentative ideas.¹⁴ At the public hearing in Canberra to receive comments on the discussion paper a police submission was received which suggested that any Federal victim compensation scheme should also encompass the victims of profit crimes. In cases such as fraud losses could often be substantial and the victim might have no redress from the offender because the latter was normally without means. It is difficult in logic to justify a distinction between victims of non-violent and violent crimes for the purpose of the State's compensating such victims. However, the practical problems of providing a total form of compensation are enormous and would appear to be so expensive as almost certainly to make them unacceptable and to delay unfairly the implementation of a scheme for victims of crimes causing death or bodily

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12. 10 Criminal Justice Newsletter, No. 13, June 18, 1979 quoting a report in *The Washington Post* 9 June 1979.
 13. Hudson, *Restitution in Criminal Justice* (1976) and Schafer, *Restitution for Victims of Crime* (1960).
 14. A.L.R.C. D.P. 10 (1979) para. 104f.

injury. No jurisdiction in Australia or overseas has yet afforded a comprehensive publicly funded scheme of compensation for victims of property offences. Indirectly some attempts have been made to meet such losses through criminal bankruptcy orders, treble damage provisions in trade practices legislation and class actions. These are remedies which are of a mixed civil and criminal nature and illustrate the overlapping of the sanctioning process which is apparent generally in victim compensation. The Australian Law Reform Commission is already considering class actions under a Reference on that topic. As part of the future work on the Sentencing Reference, it is intended to look in more detail at criminal bankruptcy orders and compensation and allied orders associated with the provision of restitution to victims of non violent crime. In the interim report on *Sentencing of Federal Offenders* the Commission's proposals were limited to monetary compensation for victims of crime causing bodily harm or death.

Justification for a Victim Compensation Scheme

Arguments For and Against a Scheme. The arguments concerning a Federal victim compensation program were outlined in the Commission's earlier discussion paper. I recapitulate them in brief. First, the arguments for such schemes:

- *State Assumption of Citizen Protection.* It has been suggested the State, having assumed responsibility for the protection of the citizen and at the same time having largely prohibited him from seeking redress by direct action; having discouraged him from carrying weapons for use in his self-defence; having given priority to criminal over the civil actions for compensation; and in many cases, having incarcerated the offender and thus removed the possibility of his earning money to meet his civil debts; should assume the responsibility for compensating the victim.
- *Sharing the Costs of Crime Control.* Through taxes and allied revenue-raising devices all citizens are compelled to contribute to, and share in, the cost of crime control measures. When these measures fail, the cost of that failure should also be shared by all citizens. It is said to be unjust and inequitable that the costs of victimisation, which in the case of violent crime can include serious physical injury, ruinous financial harm, and grave social dislocation, should be borne by an unfortunate minority of citizens, usually entirely innocent of any wrongdoing.
- *Aiding Crime Prevention.* The establishment of a victim compensation scheme would, it is claimed, aid crime prevention by making it more likely that citizens would come to the aid of potential victims and the police, since if injured they would be compensated. Such schemes would also ensure prompt reporting of crime, and collaboration by the victim in its investigation and prosecution, since the victim's assistance in those tasks could be a necessary condition of the payment of compensation.

- *Alleviating Suffering.* The injured person has already suffered enough in being the random victim of a violent crime. Society should not leave to him and his family the further burden of financial suffering. However, if he has precipitated the violence and contributed to it, it may be just to reduce or even eliminate compensation.¹⁵

The main arguments against victim compensation programs are:

- *Cost.* The cost of a scheme to compensate crime victims would be prohibitive. As will be seen, the cost of existing programs varies substantially, depending to a large degree on the limits, if any, set on maximum awards to victims and the level of publicity associated with the scheme.
- *Arbitrary Exclusion of Property Losses.* To restrict compensation, as do all existing programs, to the victims of violent crime and excluding property loss as a result of criminal action is to draw an arbitrary distinction. In response to this argument it has been pointed out that the cost of a scheme to compensate the victims of crimes against property would be large and possibly prohibitive. In addition, the losses suffered by the victims of property crime are more likely to be insured against and are of a kind different from those experienced by victims of violent crime.
- *Fraudulent Claims.* Provision of a victim compensation program would encourage fraudulent claims, as well as remove a possible deterrent to the commission of violent crime because offenders would feel less concern for the ultimate fate of their victims. Neither of these assertions has been borne out by the operating experience with victim compensation schemes. Fraudulent claims have been virtually nonexistent, and there is no evidence to suggest that the incidence of violent crime has increased because of the establishment of compensation programs.
- *Compensation From Other Sources.* Victims of crime can already obtain compensation from social security or other public sources. Responding to this argument, it is clear that victims of violent crime may on occasions be able to secure some compensation from public sources, such as social security, or even from private charitable funds. However, this compensation is often likely to be no more than a token amount when measured against the gravity of the losses which may result from the commission of a violent crime.
- *Why Crime Victims?* There is no special principle upon which State compensation for criminal injuries alone can be justified. Further "the idea of selecting yet another group of unfortunates for special treatment is not easily defensible". It is more difficult to provide a

15. *ibid*, para. 106.

social principle upon which to justify the singling out of crime victims to receive official compensation for their injuries rather than the victims of other types of social disaster.¹⁶

Waiting for Comprehensive National Compensation? The principal reasons for the establishment of a Federal victim compensation scheme arise out of a mixture of practical and humanitarian concerns. In terms of desirable legal concept and overall social justice, victims of violent crime in all jurisdictions in Australia should ideally and logically be compensated within the framework of a national accident compensation and rehabilitation program. One such scheme was proposed in Australia in 1974 by the National Committee of Inquiry (the Woodhouse Report).¹⁷ It seems unlikely that such a program will come into operation in Australia in the near future. The Law Reform Commission has recommended that the introduction of a Federal victim compensation scheme should not be delayed pending the introduction of such a national compensation program. There is already in Australia widespread public support for the argument, advanced by the United Kingdom Government when introducing its victim compensation program in 1964, that compensation for crime related injuries is morally justified as, in some measure, salving the nation's conscience about its inability to preserve universal law and order.¹⁸ Crime, including violent crime, can strike any member of the Australian community. Bodily injury or death to a neighbour arising out of criminal conduct is a concern of all good citizens, for there, but by chance, goes oneself or one's family. Reviewing the operation of the United Kingdom victim compensation program in 1978, the Royal Commission on Civil Liability and Compensation for Personal Injury (the Pearson Report) noted that:

The scheme has now been in operation for 13 years, and the basis on which it was introduced appears to have been generally accepted by the community. We think that criminal injuries form a special category; criminals may not be found or convicted, they often have no funds of their own and there is obviously, no compulsory insurance. We think that it is right that there should be reasonable provision for the victims of crime, and we accept that these compensation schemes have come to stay.¹⁹

Justification in the A.C.T. It is quite apparent that "reasonable provision for the victims of crime" is not made at present in the Australian Capital Territory, Capital Territory victims of violent crime do suffer injuries which remain uncompensated from existing sources. In most cases where an offender is apprehended for the commission of a violent crime he, or she, proves to have

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16. See A.L.R.C. D.P. 10, para. 106f. The arguments are adapted from Morris and Hawkins, *A Letter to the President on Crime Control* (1977) 72-73.
 17. Report of the National Committee of Inquiry, *Compensation and Rehabilitation in Australia* (1974), Vol 1, para. 362.
 18. See (1972) *Victorian Parliamentary Debates*, 2300.
 19. *Report*, Cmnd. (1978) 7954, para. 1588, 1591.

no funds with which to recompense the victim.²⁰ Where, as is quite frequently the case, the offender is not apprehended, the victim is left to cope with the aftermath of the crime without the possibility of receiving compensation from the criminal or from anyone else.

Justification in the Commonwealth's Sphere. The position of victims of a violent crime committed within the jurisdiction of the Commonwealth is less certain and more complicated. Although no provision is made to compensate such victims from Federal sources it appears likely that most of them would be eligible to make claims under existing crime victim compensation schemes in their respective States. For example, a person injured in the course of a violent crime committed in a Commonwealth place, such as a post office, Commonwealth bank or airport, geographically located in one of the States but in law a "Commonwealth place" could argue that the laws of that State, including those concerned with victim compensation, applied to the circumstances.²¹ This argument is based upon the provisions of the *Commonwealth Places (Application of Laws) Act 1970* (Cwlth). This Act seeks to make surrounding State laws, both statute and common law, applicable in relation to Commonwealth places.²² However, express provision is made in this Act to exclude from its operation any provision of a State law which would have been invalid in relation to Commonwealth places for some reason other than s.52 of the Constitution.²² For instance, the Act does not apply to a Commonwealth place the provisions of a State law which are inconsistent with any valid Commonwealth law.²³ If the Commonwealth were to enact its own crime victim compensation program designed to "cover the field" in regard to injuries received by victims as a result of crimes committed in a Commonwealth place, State laws on this subject would not apply unless specifically saved.²⁴

Although the *Commonwealth Places (Application of Laws) Act 1970* (Cwlth) seems to ensure that a proportion of the victims of a violent crime committed within the jurisdiction of the Commonwealth are eligible for compensation, the nature and extent of this compensation will depend upon the vagaries of the individual schemes presently operating in the States. Some of these schemes are seriously deficient and they are not uniform in the benefits they offer. They vary in important respects in different parts of Australia. All set arbitrary and artificially low maximum amounts to be paid as compensation. Moreover, there is a proportion of these victims who cannot obtain compensation of any description from official public sources, namely those who suffer an injury which flows from a crime committed in the A.C.T. or other

20. The source of this information is the Australian Federal Police.

21. The number of persons injured in a "Commonwealth place" as a result of the commission of a violent crime is not known.

22. *Commonwealth Places (Application of Laws) Act 1970* (Cwlth), s.4 (1).

23. *ibid.*

24. *R. v. Loewenthal; ex parte Blacklock* (1974) 131 CLR 388.

external territories: jurisdictions of the Commonwealth which at present possess no victim compensation program. This gap in protection for certain victims of violent Federal crimes is perhaps more serious than appears at first sight. Take one example cited to the Commission. An Australian registered aircraft, hijacked while flying from Darwin to Singapore, and in the course of the hijacking several passengers are injured by gun shots. Subsequently, the hijacker is apprehended and is brought to trial in Australia. The *Crimes (Hijacking of Aircraft) Act 1972* (Cwlth), provides that in this situation the substantive criminal law which applies is that of the A.C.T.²⁵ This provision is necessitated because the *Crimes Act 1914* (Cwlth), and allied Commonwealth criminal laws do not extend to the range of offences found in State and Territorial criminal laws, such as homicide, various forms of serious assault, robbery and rape.²⁶ Though a Commonwealth crime of violence was committed no compensation scheme of the States could be looked to for the benefit of victims or their dependants. No Federal scheme exists. The victims of crimes which arose from the hijacking would be unable to receive compensation from official sources because of the absence of a Federal or even an A.C.T. victim compensation scheme.²⁷

Establishment of a Federal Victim Compensation Program. Hijacking of Australian aircraft has been a rare event. But it has occurred, including as recently as 1979. Potential *lacunae* in the protection afforded victims of crime injured within the jurisdiction of the Commonwealth, and the deficiencies and inequalities in the compensation which may be available to victims of Federal crimes under existing Australian State programs, led the Law Reform Commission to the conclusion that a new Federal crime victim compensation scheme should be established. As a long term aim, compensation should be provided for victims of all Commonwealth crime, violent and non violent. However for the present, it is proposed that the Commonwealth victim compensation program should be limited to apply only in respect of persons who die or suffer bodily harm as a result of offences committed against a law of the Commonwealth, the A.C.T. and the external Territories consequent upon breach of Commonwealth laws extending to such Territories. The Commission set out to propose a realistic scheme which by its substantive rights and procedures afforded just monetary compensation to the victims of bodily injury (and in the case of death their dependants) where the crime involved was a Commonwealth or Territory crime.

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25. s.9(1). The actual offence of hijacking is created by s.8 of the same Act. see also s.7 *Crimes (Aircraft) Act 1963*.
26. There are offences provided for under the *Crimes Act 1914* (Cwlth) which envisage an element of violence and from which bodily injuries or death could flow to victims. Thus s.24 concerned with treason, s.24AA with treachery and s.24AB with sabotage might all occur in a violent manner. The expansion of A.F.P. involvement in narcotics, security and terrorist control make it likely that the area of Commonwealth crime will be more important in the future than it has been in the past.
27. This excludes the possible compensation which such hijack victims might secure by civil actions against the airline or other bodies. Provision is made against double benefits. See Draft Bill, cl.34

Victim Compensation Schemes: Potential Models

The United Kingdom Scheme

A Scheme of Ex Gratia Payments. The United Kingdom has the victim compensation scheme which has been operating for the longest time in the common law world.²⁸ It is also by far the most liberal scheme in terms of the maximum awards which can be made to victims. Both these facts have made it a "bench mark" against which to measure other compensation schemes. When the United Kingdom Government first introduced the scheme in 1964, it rejected the concept of the State accepting *legal liability* for victim injuries but accepted that compensation should be paid at public expense on an *ex gratia* basis as an expression of public sympathy to the victims of violent crime. From the outset, the scheme was designed to pay compensation even where the criminal had not been found and prosecuted and also in cases where an individual had been hurt when helping the police to make an arrest. Since the scheme was seen to be of an experimental nature, it was decided that it would be of a non-statutory structure and would be administered by a Compensation Board. The victim was to remain free to sue the offender but would have to repay the Board any compensation received from it out of any damages obtained from the offender.

The Criminal Injuries Compensation Board. At present the United Kingdom Criminal Injuries Compensation Board comprises a Chairman and thirteen members all of whom are legally qualified. It operates throughout the country. Finance for the program is provided by a grant in aid from public funds. To qualify for compensation under the scheme, the circumstances of the injury must either have been the subject of criminal proceedings or have been notified to the police, unless the Board waives these requirements. Injuries caused by traffic offences are excluded unless a deliberate attempt is made to run the victim down. Also excluded from the scheme until very recently have been offences committed against a member of the offender's family living with him at the time of the offence.²⁹ The Board has also to be satisfied that the victim's character, way of life and conduct generally justify an award being made.³⁰ The nature of compensation for injury or death is based on common law damages but the rate of loss of gross earnings to be taken into account is not

28. Victim compensation schemes are not a recent innovation. A pioneering scheme was set up in New Zealand in 1963. In 1964 the United Kingdom followed New Zealand's lead and since then programs have also been established in each of the Canadian provinces. Schemes also exist in almost a third of the States of the United States, in the Federal Republic of Germany, The Netherlands, Sweden, and in several other jurisdictions. The claim on the part of the United Kingdom now to have the longest operating victim compensation scheme is based upon the fact that the New Zealand scheme has now been superseded by a National Compensation program akin to that also proposed for adoption in Australia in the Woodhouse Report in 1974, but not yet implemented.

29. Criminal Injuries Compensation Board, *Fifteenth Report*. Cmnd. 7752 (1979) 32.

30. See in general Parliamentary Debates (*House of Commons*) (U.K.) 23 July 1979, 17-25. Also Criminal Injuries Board *Fifteenth Report* Cmnd. 7752. (1979) 15-6.

permitted to exceed twice the average of gross industrial earnings at the time that the injury was sustained.³¹ Compensation is also available for non-pecuniary loss. A minimum loss of £150 has to be established before a person is entitled to any award.³² Compensation awards are reduced by the value of any social security benefits and analogous government payments to which the victim may be entitled. Compensation will also be reduced by the amount of any damages award in civil proceedings or compensation paid under an order made by a criminal court.

Amounts of U.K. Awards. The number of awards made in the United Kingdom by the Criminal Injuries Compensation Board, and the total sums paid out in compensation, have been increasing annually since 1964. In the first full year of its operation, 1965-1966, there were over 1,000 awards with payments amounting to about £400,000.³³ In the last year for which figures were available, 1978-79, there were more than 16,000 awards with payments totalling about £13.0m. The average award is about £790 but about 60% of all awards fall in a level below £400.³⁴ Only 1.8% of awards are greater than £5,000. The highest award made in 1978-79 was £75,700 to a man who was stabbed in the back by two assailants, who were never traced.³⁵

Appeal and Review in the U.K. Scheme. While no appeal lies directly to the courts from orders of the Board, the Queen's Bench Division of the High Court in England and Wales has exercised on a number of occasions its jurisdiction to supervise the discharge of the Board's functions and to review its awards. The Pearson Report, in its general review of the civil liability and compensation for personal injury in the United Kingdom, recommended the continuation of the Criminal Injuries Compensation Scheme. However it recommended that the scheme should now be put on a statutory basis having regard to the fact that it had developed well beyond an experimental program. The Pearson Report also recommended that compensation under the scheme should continue to be based on tort damages. It did not consider that administration of the scheme should be vested in the courts. It preferred the continuation of a separate Board. The Royal Commission also felt that the scheme should not be administered through a social security system. In its view the questions to be decided for crime victim compensation were of a different kind from those dealt with under that system.³⁶

31. *Fifteenth Report* 47.

32. *ibid.*, 45. In the case of victims who are injured in the course of family violence which is now incorporated within the United Kingdom Victim Compensation Scheme the minimum is increased to £500.

33. *ibid.*, p.25.

34. *ibid.*

35. The award in 1979 followed an attack in 1972 when the victim was 19 years of age. In all 5 awards in excess of £60,000 were made by the Board during the year. *ibid.*, 8.

36. Pearson Report, ch.29.

Revision of the U.K. Scheme. In addition to the Royal Commission on Civil Liability and Compensation for Personal Injury, a Working Party on Criminal Injuries has also recently reported to the United Kingdom Government.³⁷ This Working Party Report, which has been accepted in large part by the Government, recommended that the provisions of the Criminal Injuries Compensation Scheme should be extended to victims of violence within the family. This recommendation has since been implemented as have other recommendations made by both official enquiries.³⁸

Australian Compensation Scheme Awards: Poor and Distant Relations

Statutory Maximum Awards. The present victim compensation programs in Australian States and the Northern Territory bear little, if any, resemblance to the United Kingdom scheme.³⁹ They are by comparison poor and distant relations. Undoubtedly the most striking difference between the United Kingdom and Australian schemes lies in the maximum awards which can be made under the latter programs. **Table 1** shows these maxima.

Table 1

MAXIMUM AWARDS PAYABLE UNDER AUSTRALIAN VICTIM COMPENSATION PROGRAMS

N.S.W.	\$10,000 (\$1000 summary matter)
VIC.	\$ 5,000
TAS.	\$10,000
S.A.	\$10,000
W.A.	\$ 7,500
QLD.	\$ 5,000

In *R. v. Tcherchain* Mr. Justice Isaacs commented on the consequence of such maximum provisions⁴⁰:

[T]he most that the court can do in considering an application of this nature is to award the applicant something by way of compensation or solatium, not a full compensation, but something by way of consolation for his injury.

37. *Review of the Criminal Injuries Compensation Scheme: Report of an Interdepartmental Working Committee*, (1978).

38. The revised scheme based on the recommendations of the two official enquiries was announced to the House of Commons in July 1979 and came into effect on 1 October, 1979.

39. The first Australian victim compensation scheme was introduced in New South Wales in 1967. Since then, programs have been introduced in Queensland (1968), South Australia (1969), Western Australia (1970), Victoria (1972), Northern Territory (1975) and Tasmania (1976).

40. (1969) 90 WN (N.S.W.) (Part 1) 85, 90.

Commentators have suggested that the maxima are so low that they amount to no more than a "political placebo", offered as a palliative to public demand for fairer treatment of the victims of crime.⁴¹ One recent graphic example of the inadequacies of awards available under Australian schemes opens this paper. Another occurred in New South Wales when a man taken hostage during the course of a crime was shot and killed as police moved in to capture the offender holding him captive. The crime victim left behind a family which became destitute as a result of his death. As a result of representations made directly to the Premier of New South Wales, an *ex gratia* payment of \$25,000 was made to assist the family.⁴² If the normal rules had applied, the maximum sum available to the family under the State's *ex gratia* victim compensation program would have been \$4,000. The N.S.W. Government subsequently raised the ceiling of compensation awards to \$10,000. The new ceiling came into effect on 28 May 1979.

Range and Amount of Australian Awards. Since it commenced operation on January 1, 1968, almost \$1,200,000 has been distributed to crime victims under the provisions of the New South Wales compensation program. In the last year for which figures are available (1977), more than \$300,000 was paid to victims and the maximum payment of \$4,000 was made on 33 occasions. Further details of the number of claims made since the inception of the New South Wales program are shown in Table 2.

Table 2

PAYMENTS MADE UNDER N.S.W. CRIMINAL INJURIES
COMPENSATION ACT 1967 AND ASSOCIATED EX GRATIA
SCHEME

Year	No. of Claims	Payment
		\$
1969	5	4,865
1970	40	21,503
1971	27	25,196
1972	39	38,240
1973	75	76,206
1974	132	142,479
1975	168	284,104
1976	143	233,620
1977	151	303,052

Source: Information Bulletin, the New South Wales Department of Attorney-General and of Justice.

41. See, for example, Chappel, 'Providing for the Victim of Crime: Political Placebos or Progressive Programs' (1972) 4 *Adelaide L. Rev.* 294; Edelhurtz and Geis, *Public Compensation to Victims of Crime* (1974) 4.

42. *Sydney Morning Herald*, 20 November 1978.

Detailed comparable figures are not available from other Australian jurisdictions to show the level of claims made upon the respective schemes since their date of commencement.⁴³ However, the most recent annual report of the Crimes Compensation Tribunal in Victoria, for the period July 1, 1977 to June 30, 1978 reveals that 987 awards were made totalling almost \$1,050,000. This annual sum was almost as large as the total of all such payments made to crime victims in New South Wales since the inception of that State's compensation scheme. The average award in Victoria in 1977-78 was approximately \$1,000 and the range of awards was as follows:

- \$50 to \$750 — 63%;
- \$750 to \$1,500 — 22%;
- \$1,500 to \$3,000 — 10%; and
- \$3,000 to \$5,000 (the maximum in Victoria) — 5%.

Australian Compensation Schemes: The Court and Tribunal Models

N.S.W.: Crimes Act Orders. Two basic models have been adopted in the design of Australian victim compensation schemes. The first is a court-based program in New South Wales. The second is a tribunal-based program in Victoria. Under the New South Wales scheme, which has also been adopted as the prototype in Queensland, South Australia and Western Australia, two separate methods apply to the payment of compensation to crime victims. Under the first of these, which is provided for in the *Criminal Injuries Compensation Act 1967* (N.S.W.), reliance is placed on provisions which have been in the New South Wales *Crimes Act* since 1900 authorising the courts, on the conviction of an offender, to make an order for the payment by the offender to any aggrieved person of compensation for either personal injury (meaning bodily harm and including pregnancy, mental and nervous shock) and/or property loss sustained by reason of the commission of the offence.⁴⁴ Where the offender was dealt with on indictment, the court could, pursuant to s.437 of the *Crimes Act 1900* (N.S.W.), make an order for the payment of compensation of up to \$2,000 (now \$10,000). Under s.554(3), a court of summary jurisdiction could make an award of up to \$300 (now \$1,000). Although the powers to award compensation under these *Crimes Act* provisions have been in existence for many years, the courts have seldom used them, probably because the whole thrust of the criminal justice system is directed to dealing with the offender. Most offenders lack the means to pay compensation, and few applications are made for such orders. Victims are generally simply witnesses, who are unrepresented. Often they do not know of this provision.

N.S.W.: Determinations in the Criminal Trial. The *Criminal Injuries Compensation Act 1967* (N.S.W.) provides that, where a judge or court makes a compensation order in respect of injury (specifically defined as bodily harm but

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43. There is little regularly published, statistical or other, material describing the activities of individual victim compensation schemes in Australia or the amounts expended.
44. See *R. v. McDonald* [1979] 1 NSWLR 451, [1979] 3 *Crim LJ* 354. In this case, the N.S.W. Court of Criminal Appeal drew attention to the need for reforms of the N.S.W. provisions for victim compensation.

including pregnancy, mental shock and nervous shock) under these *Crimes Act* provisions against an offender, the victim (the aggrieved person under the legislation) can apply to "the Under Secretary for payment to him from the Consolidated Revenue Fund of the sum so directed to be paid"⁴⁵. The Act also provides that where a charge is dismissed or an alleged offender is acquitted, a judge can nonetheless grant a certificate stating the compensation he would have awarded had the accused been convicted. Although the award of compensation is left in the hands of the judge or court as part of the criminal trial, payment of compensation does not follow automatically upon the making of the judicial order, or certificate in the case of an acquittal or dismissal situation. The Under Secretary, a civil servant, upon receipt of an application is required to provide the Treasurer, a Minister of State, with a statement setting out first the amount of compensation ordered or recommended by the court and, secondly, the amounts which the victim has received or might receive from other sources through the exercise of his legal rights. The Treasurer is then given the discretion to authorise payment of the sum awarded by the court, less any sum otherwise obtained in compensation.

Weaknesses in the N.S.W. Statutory Scheme. The final result of the extremely cumbersome process described above applies only to awards for compensation for victims injured in offences where an offender is apprehended. The *Criminal Injuries Compensation Act 1967* (N.S.W.) makes no provision for the victim of the attacker who is either unapprehended or untried. This serious gap was recognised at the time of the passage of the legislation through Parliament and it was announced that, to supplement the provisions of the new Act the government would, after an administrative investigation including police reports, make *ex gratia* payments to the victims of crimes injured in circumstances where no one was apprehended or tried.⁴⁶ Limited modifications have been made to this procedure in the other States which have used the New South Wales scheme as the prototype for their own victim compensation programs.⁴⁷ However, the basic feature of all these schemes is their use of the criminal courts as the assessment body for compensation awards with Executive determination of the appropriateness of claims by crime victims not involved in court proceedings. Critics of the New South Wales model have pointed to the long delays which may occur before a victim can receive any compensation. It is not unusual in serious criminal offences for a case to take up to a year or more to reach trial.⁴⁸ Meanwhile, the victim of crime may have urgent and immediate needs for compensation which cannot be met under the New South Wales scheme, if there is an apprehended accused.⁴⁹

45. *Criminal Injuries Compensation Act 1967* (N.S.W.) s.3.

46. The two forms of payment in New South Wales to crime victims, one under the statutory scheme and the other under the *ex gratia* program, are maintained.

47. See Waller, 'Compensating the Victims of Crime in Australia and New Zealand' in Chappell and Wilson, (2nd ed, 1977) 426, 430-435.

48. See Institute of Criminology, University of Sydney, *Problems of Delay in Criminal Proceedings*, (1980) *Syd Inst Crim Proc* No. 42, (1980).

49. Waller, 438.

Another serious criticism of the New South Wales scheme relates to its reliance on a criminal court concerned with different and serious business, to deal with victim compensation:

[T]he use of the ordinary criminal courts to determine compensation for victims (because) it may be seen to introduce an irrelevant consideration into a judicial forum whose primary responsibility is determining whether or not an accused person is guilty of a particular crime. The criminal trial in common law countries is a well-defined procedure, one of the best-known characteristics of which is the unique standard of proof imposed on the prosecution. It is not just possible but probable that the standard of proof beyond reasonable doubt may also be employed in the process of determining a claim that a victim's injuries flow from a particular crime where the accused has been acquitted. Conversely, the victim waiting in the wings for compensation may conceivably affect the court in its determination of criminal guilt, though this should be regarded as less likely than the former matter.⁵⁰

Victorian Tribunal: Compensation Orders. Influenced by these criticisms, and also by the experience of an alternative model developed in New Zealand before its adoption of the National Accident Compensation Program, Victoria in 1972 decided upon a different structure for its victim compensation program. This was introduced by the *Criminal Injuries Compensation Act 1972 (Vic)*.⁵¹ Under the terms of this Act, a Crimes Compensation Tribunal was established. Applications for compensation are now made to this tribunal which is required to determine claims

expeditiously and informally... having regard to the requirements of justice and without regard to legal forms and solemnities.⁵²

The Victorian legislation also permits the Tribunal to act without regard to the normal rules relating to evidence or procedure, and to require that information be supplied from police and medical records about a crime and any injuries which may have flowed from it. Awards made by the Victorian Tribunal are not subject to governmental or administrative scrutiny. The legislation provides that the award is to be cast as an order which the successful applicant then presents for payment out of Consolidated Revenue. Compensation is not *ex gratia* or discretionary. It is a matter of legal right. Operating experience with the Victorian program suggests that the Tribunal determines claims with a minimum of delay and formality and that victims are generally satisfied with the awards they receive. In determining the cause of the victim's injuries, a civil standard of proof is applied by the Tribunal. In common with the other State programs, it must consider any conduct of the victim "which directly or indirectly contributed to his injury or death." A total

50. *ibid.*

51. See Sallmann, *Victim Compensation in Australia: The Victorian Experience* (1978) *International Journal Crim. and Penology* 203.

52. *Criminal Injuries Compensation Act 1972 (Vic.)* s.1.

bar exists under the Victorian legislation against making an order where the injury has been inflicted on the victim by a spouse or a member of the household. This particular provision is more drastic than those in other Australian schemes where the relevant authority or court considering the application for compensation is only required to "take account" of the relationship existing between the offender and the victim. In the most recent report of the Victorian Crimes Compensation Tribunal it was noted that this bar was causing injustice in certain cases:

A significant number of cases have emerged when the infliction of the injury has meant the end of the matrimonial relationship, but the severely injured victim (usually the wife) can receive no compensation. Again, children who are the victims of parental violence, including sexual assault, cannot be compensated where the provision applies.⁵³

Tasmanian Scheme. The Victorian model has subsequently been used as a prototype for the Tasmanian victim compensation program established by the *Criminal Injuries Compensation Act 1976*, (Tas.). However, a special tribunal has not been created to deal with claims which are instead determined by the Master of the Supreme Court of Tasmania, or his delegate, the Registrar.

A.L.R.C. Proposals for a Victim Compensation Scheme for the Commonwealth

The Basic Model. Of the three basic models for victim compensation programs described above — the United Kingdom, N.S.W. and Victorian — the Australian Law Reform Commission expressed the view that the Victorian model should be adopted, with modifications as the most suitable for introduction at the Federal level. Several reasons were cited for this conclusion:

- the United Kingdom scheme, which continues at present on a non-statutory basis, is designed for a small but densely populated country, long accustomed to flexible Executive experiments with social welfare programs;
- the N.S.W. scheme gives the appearance of a cumbersome *ad hoc* arrangement for compensation which cannot respond rapidly to meet victim needs; and
- the Victorian scheme combines substantial advantages of a flexible operating procedure, prompt and informal method of determining claims, and provision of compensation as a legal right.

The Commission proposed a Federal crime victim compensation scheme and attached to its report draft legislation to implement this recommendation. It is proposed that a Commonwealth Crimes Compensation Tribunal should be established.⁵⁴ Because of the small workload likely to be experienced by a tribunal reviewing claims by victims of Federal and Territory crimes, an entirely new body and staff to perform this function would not be required.

53. Crimes Compensation Tribunal (Vic.) *Report* (1978), 3.

54. Draft Bill, cl.7(1).

Instead, claims should be made to a tribunal, constituted by a person who for the time being constitutes a Commonwealth Employees' Compensation Tribunal.⁵⁵ A right of review of the decisions of the Tribunal in the Administrative Appeals Tribunal was also recommended.⁵⁶ An appeal to the Federal Court of Australia on questions of law was proposed.⁵⁷ Following the making of an order for compensation, a successful applicant should be entitled to payment of the sum ordered as a debt due and payable by the Commonwealth to the applicant.⁵⁸

The Number of Claims. Claims under the proposed new Federal victim compensation scheme would come from two principal groups: persons suffering bodily harm or in the case of death, their dependants as a result of crimes committed anywhere within the criminal jurisdiction of the Commonwealth, and victims of such crimes in the A.C.T. and external Territories of the Commonwealth to which the Act is extended.⁵⁹ The number of claims arising from the first group is likely to be very small. Very few crimes of violence committed within the Commonwealth jurisdiction were prosecuted and resulted in a conviction in 1977-78.⁶⁰ In that period 53 assaults and 8 robbery charges dealt with by the Australian Federal Police (A.F.P.) produced convictions nationwide. It is not known how many offences of this type were reported to the A.F.P. or other law enforcement agencies which did not result in the apprehension and/or conviction of an offender.⁶¹ Nor is it known with precision what types of injury are suffered by the victims of criminal conduct committed within the jurisdiction of the Commonwealth. Whether such victims receive compensation from an existing Australian victim compensation scheme is simply not discoverable from published material.⁶² Eligible victims in this group would in future make application to the new Federal victim compensation scheme rather than to State programs although for all other purposes offences against the laws of the Commonwealth would be dealt with under the existing structure of the "autochthonous expedient".

The number of claims arising from victims in the second group, notable those occurring in the A.C.T. is also likely to be small. The number and rates of serious violent crime in the A.C.T. in 1976-77 are shown in **Figure 2**.

55. *ibid.*, cl.7(2).

56. *ibid.*, cl.28.

57. Draft Bill, cl.29.

58. Draft Bill, cf.37(4)

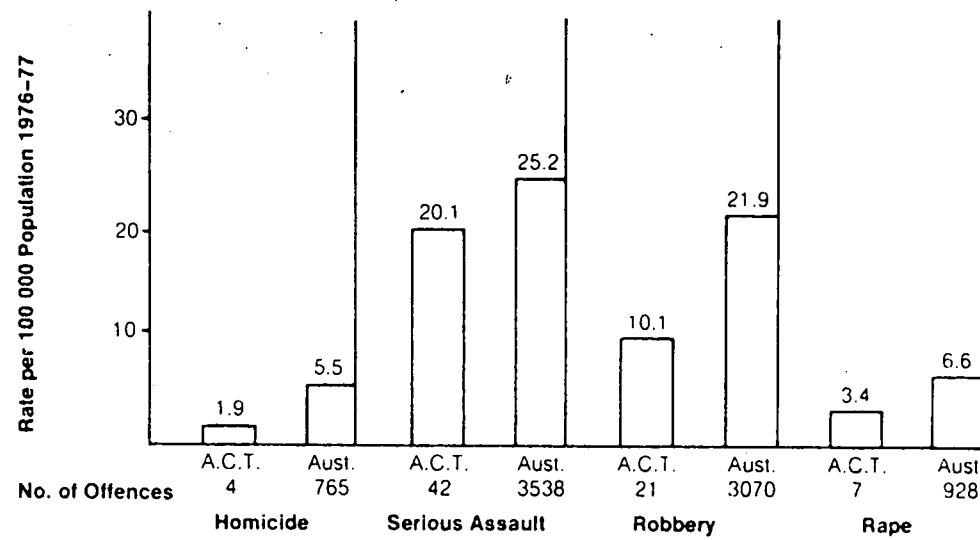
59. Draft Bill, cl.5.

60. See A.L.R.C. 15, Tables 7, 10 and para. 79.

61. See A.L.R.C. 15, para. 89f for comments on the deficiencies in Australian criminal justice statistics, particularly as they relate to Federal criminal matters.

Figure 2
SERIOUS CRIME:

**RATES PER 100,000 OF THE POPULATION FOR THE
 AUSTRALIAN CAPITAL TERRITORY AND
 AUSTRALIA AS A WHOLE**



Source: A.B.S. See ALRC DP10, para 16.

It will be seen that in that period there were 4 homicides, 42 serious assaults, 21 robberies and 7 rapes reported to the police. The injuries suffered by victims which resulted from these crimes, and their eligibility for compensation, could only be determined by undertaking a substantial research study. The Commission recommended that studies should be conducted in respect of the victims of Commonwealth and Territory crimes, which do not involve death or bodily injury but that the introduction of a Federal victim compensation program should not be delayed by the completion of such a study. Important questions of social principle were said to be at stake. Present research suggested to the Commission that neither in Federal nor Territory jurisdiction would the numbers of claims be large or the aggregate amount of Commonwealth liability be substantial.

The Cost of a Federal Scheme. The cost of any scheme is obviously directly related to the number of claims and the size of the awards made. The Law Reform Commission recommended that awards of compensation to victims of crime should not be limited by artificial ceilings as they are at present in each Australian compensation scheme. The United Kingdom approach, which is to have no artificial maximum, should be preferred. Such maximum provisions do not bar the great majority of claims. But where they do operate they are clearly unjust and cannot be supported on any principle of fairness. The fear that without a maximum the scheme would be prohibitively expensive is simply not borne out by the experience in the United Kingdom. The basis for fixing awards for the Federal victim compensation scheme also should be that adopted in the United Kingdom, namely, common law damages excluding exemplary or punitive damages.⁶² This is the basis adopted in Australia, but limited by the statutory maxima. Experience with existing victim compensation programs both in Australia and overseas shows that in only a very small proportion of cases do claims involve substantial sums for injuries caused as a result of crime. As noted above even under the generous United Kingdom program, most claims are for relatively small sums. The artificial ceilings which are at present placed on Australian schemes would not, if omitted from the Commonwealth's scheme, be likely to lead to marked escalation in the costs of a Federal program. It is only in the rare case in Federal jurisdiction that a victim is killed or very severely injured and thus likely to claim for very substantial compensation. But when such injuries do occur, the claim should be met. Payment of \$5,000 or even \$10,000 to a quadriplegic or a person permanently crippled or blinded as a result of a criminal act is little more than token charity. Yet this is what occurs under the programs presently available in all Australian jurisdictions. In sporting injuries, the government sponsored schemes to provide compensation are far more generous than those available in criminal victim compensation programs. The maximum sum, for example, payable in New South Wales under the *Sporting Injuries Insurance Act, 1978* (N.S.W.) is \$60,000 which is payable in the case of a quadriplegic. These payments are funded by levies on sporting organisations which are members of the New South Wales Sports Insurance Scheme. The public contribution has been limited to initial establishment costs. Injuries which are compensable under most State workers' compensation legislation would result in significantly higher payments than under present criminal victim compensation schemes, especially where there are major injuries or where the death of the victim has occurred.

62. Draft Bill, cl.13 (Nature of Compensation) and cl.14 (Excluded matters).

Alternative Proposals. Should the cost of a victim compensation program as proposed by the Commission, be considered unacceptable, two alternatives were identified in the report. The first was to adopt a statutory maximum as an interim measure but otherwise to follow the Commission's scheme. If this were done (and it was declared to be a distinctly second best solution) the Commission proposed that the maximum compensation sum should be fixed at a more realistic figure than provided for in present Australian legislation. It should certainly be no less than the maximum provided in the *Sporting Injuries Insurance Act 1978* (N.S.W.) namely \$60,000. A second, preferable, course proposed was for part of the substantial sums obtained from fines in the Commonwealth, A.C.T. and external Territory jurisdictions to be devoted to establishing a fund to provide compensation for crime victims. It was suggested that such provisions would help to instil a sense of equity in the members of the Australian public, increasingly and rightly concerned at the apparent indifference shown by our criminal justice system to the victims of crime.

Conclusions: A Question of Priorities. If the Law Reform Commission's proposal for a new Federal victim compensation scheme were adopted the law would for the first time in any Australian jurisdiction make adequate provision for the financial needs of victims of violent crime. It may be argued by some that the provision is unduly generous, and discriminates in favour of a special group of crime victims indeed a special group of victims of misfortune. But the existing levels of compensation provided for victims under other Australian schemes can undoubtedly operate unfairly both in their procedures their applicability and in the amounts that may be awarded to victims and their dependants. They represent acceptance of a proper principle followed by half hearted implementation of it. The Commonwealth, as a late entrant to the field, should avoid these errors. The time has come for a thoroughly new approach to supporting those who suffer injury as a result of crime in our society. The dependants of those who suffer death deserve more than the ephemeral sympathy of the community, a sensational headline and then neglect. Crime is an offence against the whole community of Australians and the community should shoulder its responsibility to the victims of crime. The Commonwealth can, with responsibility, take an initiative in the reassuring knowledge that the likely claims against it will be few in number and generally small in amount. If an increase in revenue is found to be necessary to fund the proposed scheme, the Australian Law Reform Commission has expressed the view that law abiding citizens would applaud an increase in Commonwealth revenue for fines and penalties for this purpose. Until now the plight of the crime victim has been largely overlooked by the personnel, procedures and rules of the criminal justice system. A major national initiative is needed to reverse centuries of neglect. The Law Reform Commission has expressed the view that it is appropriate and just that, in Australia, the Commonwealth should take that initiative. It should do so promptly and in doing so should not be blinkered by the approach which, until now, has been taken to this problem. It is a problem for all of us. The provision of money compensation, even adequate money compensation is by no means the whole answer to the problems of victims of crime. But it is often the start of the solution.

PRESENTATION OF PAPER

Mr Justice Kirby

I would like to present the main points in my paper which is a modified version of Chapter 12 of the Report of the Australian Law Reform Commission, *Sentencing of Federal Offenders*. That Report was tabled in the Federal parliament in May by the Commonwealth Attorney-General but only this week have printed copies of the Report become available. It is available from AGPS for \$21.00, and considering the magnitude of the task that was involved in the enterprise it is a bargain.

In introducing my paper I make the point as to how the issue of victimisation arose for us in the Federal sphere. First, our terms of reference from Senator Durack required us to have regard to the problems of victims of crime. I think that signals the growing political concern about this issue, and I hope it is a political concern that will lead to close attention in the Executive Government and the Parliament, especially at the Commonwealth sphere. Secondly, I make the point that the Commonwealth is, at the moment, the only jurisdiction in Australia with its Territories, the Australian Capital Territory, and the off shore Territories that does *not* provide a system of publicly funded compensation for the victims of crimes against its statutes. Therefore this Report is addressed to the rectification of that lacuna. Thirdly, I point to the fact that this year there was released by the Australian Bureau of Statistics a Report on the so-called "Victimisation Survey" which was conducted in respect of crime victims in Australia in the year 1975. That was a novel enterprise. It brought forward some very interesting statistics, new to Australia which does not enjoy good crime and like statistics. It brought forward the fact that nearly a million of our fellow citizens complained that during the year they had been the subject of some form of criminal activity. Half of them complained that they were the victims of theft which is outside the scheme we propose, it being confined to compensation to the victims of bodily crime and dependants of people who are killed. About a quarter of the victims in the Australian Bureau of Statistics survey indicated that they were the subject of nuisance telephone calls which, of course, would not give rise normally to any form of assessable personal injury. Twenty-six thousand of them claimed to have had hospital treatment, i.e. twenty-six thousand out of nine hundred and sixty thousand. Many of the people who sought hospital treatment did not do so for serious injury. So we are dealing really with a small tip of a rather large iceberg and smaller still when one confines the "tip" to the Commonwealth's interest in it.

The paper goes on, as the section in the Report does, to analyse new recent efforts to deal with the problems of victims of crime in the criminal justice system. I have to say at the outset that in many ways the papers delivered by the other writers, including those that will come from the floor, are more sensitive to the immediate difficulties of crime victims. I agree entirely that money compensation is not the entire answer to the need to deal with the problems of victims of crime.

We relate in our Report some of the initiatives that have been taken in the United States. First, the setting up of units within police forces to provide assistance, comfort, counselling advice to the victims of crime. For example, advice on how to change the lock, advice on where to go for medical treatment, advice on how to go about making insurance claims. In the United States police take an active and supportive role in this regard. Secondly, the rape referral system which has come to Australia is a recent innovation. It attempts sensitively to deal with the victims of a particular type of crime. Thirdly, there is the suggestion of the Victim Impact Statements in the United States. These statements are in some States put before the judge so that in determining the proper punishment he will take into account the extent to which people have suffered as a result of the anti-social conduct of the accused. It has been suggested that a similar scheme be introduced in South Australia. That suggestion met some opposition on the basis that it would lead to punishment for consequences of acts which the offender did not foresee and had no means of foreseeing and might be unfair to offenders. It is a matter that may have been referred to the South Australian Committee. But it may have been excluded from the terms of reference — Mr Whitrod is a member of the Committee in South Australia and could perhaps advise us of that. I then talk of the alternatives of better restitution schemes by which offenders make compensation themselves to victims.

We exclude in our Report, first of all, State crimes because we are a Federal Commission. I am a Commonwealth Officer. It is not my province to talk of the State schemes except by way of the lessons we can learn from them. They have been in operation for some time and we in the Commonwealth having done nothing so far to provide a publicly funded scheme. Nor do we deal with non-violent crime; i.e. theft and the great bulk of Commonwealth crime which by and large is "white collar" crime and would be outside the scheme altogether. We say that this is an important area, especially in the Commonwealth sphere. In principle it is hard to distinguish it from the violent personal bodily types of crime. But for several reasons it ought not be dealt with at this stage. First, it is complicated by the involvement of insurance and would require close attention to the insurance implications of dealing with compensation publicly funded for victims of burglaries and other such crimes against property. Secondly, there would be problems of verification which do not arise so readily in the bodily injury cases. Thirdly, the amount at stake would be very great indeed. No country, so far as we were able to ascertain, has yet introduced a scheme for publicly funded compensation for victims of property crimes. It is a big issue. In principle it is hard to distinguish but we have left it to another day.

The proposal that we made weighs, as my paper does, the arguments for and against a victim compensation scheme publicly funded and comes down in favour of introducing such a scheme. It says that we ought not to wait for national compensation, that being conceptually perhaps the most appropriate way to deal with the problem. It is now fairly clear that the Woodhouse Meares Scheme which was put forward in 1974 is not in the immediate offing. We have suggested that our scheme should be introduced in the Federal sphere to deal with the areas of Territory crime, which are identified, and Federal crime, some instances of which I have sought to identify. In the Australian Capital Territory

for example in the last year for which there were figures there were 4 homicides, 42 serious assaults, 21 robberies, 7 rapes. All of the victims, unlike their New South Wales counterparts, have no recourse against a publicly funded scheme for money compensation. In the Federal sphere I have identified the admittedly limited number of cases where Federal crimes could lead to bodily injury, crimes on Federal premises, crimes against Federal officers, the hijacking of a plane, assaults. Fifty three assaults were reported in the Commonwealth Police Year Book as having been prosecuted under the *Commonwealth Crimes Act*.

We then looked to the various models having come to the view that there was a gap and that it was desirable that something ought to be done. The question became "What should be done?"

When one looks at the United Kingdom model, which is sketched in the paper, the advantage of it is that unlike all Australian victim compensation schemes the U.K. model provides no arbitrary monetary limit. There is no fixed limit beyond which compensation may not be awarded. But the disadvantages of the U.K. scheme is that it is not set up by statute. It is an administrative creation of the Executive Government and the amounts paid are not as of right. They are *ex gratia* resulting from recommendations of the Board to the government of the day. In practice, this second problem has not proved to be a difficulty. Compensation, as I understand it, has always been paid in accordance with the recommendation of the Board.

Having got the U.K. model clearly in our mind we looked to the Australian models. The three faults that we identify in our Report and I seek to repeat in the paper are: first, the fixing of arbitrary limits — \$10,000 in New South Wales, in Victoria in the last few weeks it was raised, \$10,000 in Tasmania and South Australia, \$5,000 in Queensland and \$7,500 in Western Australia. My paper begins with the case in which the judge said in awarding \$7,500 that it was obviously much less than the person would have recovered had there been no limit. So the first defect in the Australian schemes is the arbitrary limit. The second defect in some of the schemes is the fixing of the compensation at the tail end of the criminal trial. The third defect in some of the schemes is that it is not "compensation as of right". As in the U.K. in some States it is a mere recommendation to the Treasury. We looked to the Victorian scheme (and based on it the Tasmanian model). This we considered preferable because it provides an independent Tribunal, not assessment at the tail end of the trial; preferable because it gives awards of compensation as of right, not *ex gratia* in the gift of the Executive. But it was considered undesirable in that it fixes an arbitrary amount, as in all Australian schemes.

So, having these various schemes before us we then put forward our idea: a Federal Act applicable to the Territories in the form of a Bill annexed to the Report. It does, we believe, really help our political masters if we draw a Bill annexed to our Reports so that they can give close attention to the detail of a scheme. It helps us in formulating proposals to deal with the practical detailed provisions. And it also, we trust, avoids the "too hard basket" into which many law reform tasks tend to get placed. We suggested the establishment of a Tribunal, or at least the conferring on the Compensation Tribunal of relevant

jurisdiction, with rights of appeal to the Commonwealth's Administrative Appeals Tribunal.

In relation to "How much?" we said "No limit". I saw in a recent newspaper editorial criticism of this proposal. It was said it would cost too much. But when one looks at the figures from both the United Kingdom and the Australian schemes, it is seen that in the U.K. only 1.8% of claims exceed £5,000. In other words we are dealing, in the case of big claims, with a very small number. The average claim in the U.K. was £750 so that most claims in that country, where there is no limit, gravitate around £750. The number over £5,000 is very small, and the largest claim ever awarded was £75,000. That is pointed out in the paper. In Australia, the Victorian figures are recorded. The position is much the same. The numbers of claims over \$3,000 was 5%. When we said "No limit" we had in mind the argument about the floodgates being opened, so constantly put before law reformers, would not be likely to be cited here. Especially would this be less relevant in the Commonwealth sphere where Commonwealth crime is generally "white collar" property type crimes rather than crimes of physical violence.

So far as funding it is concerned our first preference is Consolidated Revenue. Crime is an offence against the whole community. The whole community should bear the expense of it in respect of the fall-out of victims. But if that was not acceptable to the Treasury or to others who are concerned about the potential cost, and if they are not persuaded by the U.K. and State figures in Australia, we suggested that the maximum should certainly be more than the amount in the State schemes of \$10,000. We looked to the *Sporting Injuries Compensation Act* in New South Wales for a maximum, admittedly one partly funded by contributions of those involved, which is \$60,000. We could not see a point of principle to distinguish the compensation of victims of sport in Australia from victims of crime innocently injured and suffering physical disabilities. But in turn if that were not accepted, we suggested that an alternative third possibility was a levy on fines in the Commonwealth's sphere so that the very large sums collected could be increased in order to ensure that adequate funds were available to provide for compensation for victims. We concluded that the time had come to end "hand outs" and *ad hoc* arrangements.

It is said to be the genius of English speaking people that they reduce problems to a routine: to institutions. If we are to reduce this problem to an institutional solution we ought to do so in an effective way. Payments of gratuities indicate acceptance of the fact that \$10,000 is not enough. Therefore the question is whether payment of adequate sums ought to depend on particular cases, particular pressures, or whether it ought to be a matter whereby we do equal justice to all by a routine institution. The Law Reform Commission suggests that it is time for a national initiative on this subject which the Commonwealth could happily take without too much risk of vast sums being involved for it. The Commonwealth should give a lead. It should look to the United Kingdom and borrow the precedent there in respect of the maximum sum. It should look to Victoria and borrow the precedent there in respect of the machinery in awarding that sum. It should approach crime victim compensation freed from the blinkers of the past.

THE WORK OF THE VICTIMS-OF-CRIME SERVICE¹

Ray Whitrod, CVO, QPM, MA, Dip Crim (Cantab)
Victims-of-Crime Service
Adelaide, South Australia

SUMMARY

The following report describes the inauguration of VOCS, details its aims as set out in the constitution, provides a brief history, gives an overview of its operations for the first nine months of its existence, comments on the major outcomes including the terms of reference for the members of the State Committee of Inquiry on Victims of Crime, and gives some coverage of future activities. It supplies argument for the continued use of volunteers, and the considerable achievements which are outlined in the report support that argument.

However its continued refusal to apply for a government grant, which may attract increased citizen backing, on the other hand may have prevented an even greater success. Equally the failure to establish committees to accept responsibility for some tasks has meant an excessive workload to be borne by the executive officer. This may have been another limiting factor in its expansion. Likewise its slowness in developing support from the industrial sector, i.e. from trades unions and employer groups, probably has meant that avenues for financial and other assistance have not been exploited fully.

Nevertheless the overall results have been most commendable. For a small voluntary movement, generated spontaneously amongst the aged in response to a perceived community need, with no resources, no paid staff, no model to follow, it has demonstrated remarkable skill in overcoming customary public inertia, to reach its present development.

The ever-increasing membership shows the programme's appeal to citizens concerned about the welfare of others and who voluntarily contribute towards its expenses. Today there are few welfare agencies that are not government employed or government funded. So far VOCS has succeeded in attracting adequate public support. Whether it can continue to do so remains to be seen. The West German project suggests that eventually it becomes necessary to divert a large share of an organization's resources to maintain that backing.

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1. Generally, see William F McDonald, *Criminal Justice and the Victim*, Sage Publications, 1976, Beverley Hills, and for a selected bibliography, Anthony A Cain and Marjorie Kravitz, *Victim/Witness Assistance*, National Criminal Justice Reference Service, Rockville, U.S.A., June 1978. For periodicals, see *Concern*, published monthly by the National Victim/Witness Resource Centre, 108A S. Columbus St., Alexandria, VA 22314, U.S.A.

A REPORT OF THE FIRST NINE MONTHS OF OPERATION

Preamble

In the context of a paper on this subject it is relevant to first note the universal absence in national Bills of Right of any guarantees of freedom from crime. This omission is emphasized by the fact that in recent years the international community has instituted well organized campaigns to draw attention to disadvantaged sections of our society, but it has overlooked, so far, victims of crime.

In 1963 the birth of a compensation scheme in New Zealand promised a substantial advance in the welfare of such victims in the western world. However some twelve years later a United States President was still able to say;

For too long the law has centred its attention more on the rights of the criminal than on the victim. It is high time we reversed this trend and put the highest priority on the victim and potential victims.

That statement by Gerald Ford in 1975 gave presidential recognition to the development of a growing American interest in the welfare of crime victims. By the late 1960's this concern had generated two major programmes to help them. One was a project to assist victims who became court witnesses, and the other to compensate victims for losses suffered as a result of injury incurred in a crime. Stemming from experience gained from these two activities, and from impetus received from women's liberation groups, many American organizations now offer a comprehensive range of services to victims. These can be classified as medical, psychological, legal, financial, and informational. Typically they include crisis intervention counselling, crime prevention education, court escorts, budgeting advice, domestic and family assistance. The centres are usually staffed by volunteers supervised by a paid professional, funded by federal, state and local grants.

European countries have lagged behind in the provision of such services. It was only in November 1979 that a national campaign to ensure increased financial, medical and therapeutic aid was launched in England. The United Kingdom government provided £30,000 as an annual grant to encourage the creation of local victim support groups.

In West Germany the screening of the film "Holocaust", three years ago apparently created or revived strong feelings of guilt at their treatment of wartime Jewish victims. A Mainz journalist, Edward Zimmermann, then produced a national television series on crime victims generally, which generated much public sympathy for them and culminated on June 1, 1977, in the formation of "The Weisner Ring".³

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2. Gerald R. Ford, *Message to Congress, June 1975*, as quoted by McDonald, p.17.
 3. *Weissner Ring Gemeinnütziger Verein zur Unterstützung von Kriminalitätsopfern und zur Verhütung von Straftaten e. V.*, Mainz.

The Weisner Ring is a voluntary organization, now of 10,000 members throughout the Federal Republic, dedicated to the welfare of crime victims. Each member contributes \$1.50 monthly from his pay, and the courts also divert a percentage of fines to meet the costs. Supervision of the Ring's operations in each of the provinces is by local police commissioner or University administrator. One unique feature of the Ring's operations is that it uses earlier victims to counsel new ones. Its experience has been that volunteers who can speak from their own knowledge of a criminal attack achieve better results than professionally qualified, and paid, social workers.

In Australia the victims' cause has been gaining public recognition slowly. Most debate has been dominated by concern for rape victims, and discussion sometimes has been carried on in extreme terms. In consequence the setting up of rape crisis centres, unfortunately, has developed sexist overtones. Nevertheless there seems to be an increase in people's awareness of crime victims generally. This may have been reflected in the results of a public opinion poll in November 1979 which revealed an overwhelming majority of Australians considered that police should have more power to deal with law and order. Most support for that view came from Adelaide where 78 per cent of respondents reported feeling that way.⁴

Perhaps Adelaide's high figure arose from reaction to the intense media presentation of the circumstances of the gruesome murders of five local girls. A few months earlier South Australians had viewed the first of a protracted series of the filming of the discoveries of these bodies in graves in the Truro district. Later they were informed that the man allegedly responsible had been on parole at the time of the killings. Because of committal, trial and subsequent appeal hearings public interest in this case has been maintained. Graphic accounts of the responses of the girl's parents has been part of the presentation. Possibly as one consequence of this prolonged exposure on the plight of victims and their relatives, a routine weekly meeting of retired people in Adelaide on August 2, 1979, had an unexpected outcome.

The speaker on this occasion was the director of the S.A. Offenders Aid and Rehabilitation Service, Mr Ray Kidney, who described the wide range of facilities available to offenders to overcome the difficulties caused by their conviction. When he was asked if the same assistance was available to the victims of these offenders, he replied it was not, but that he personally thought there should be. The audience then decided that some action should be taken to remedy this deficiency.

On October 11, 1979, at a well attended public meeting, sponsored by the retired group and the members of a local church, it was decided to establish "The Victims-of-Crime Service" as an independent, non-political, non-profitmaking, non-sectarian, voluntary organisation of concerned citizens to help victims of crime. News of its formation was well received by the media, which endorsed the concept, and editorial support from both Adelaide newspapers encouraged its public acceptability. The then State Attorney-General, Mr Chris Sumner, announced his welcome of the proposal and offered Government financial help.

4. *The Australian*, 27.11.79.

The Aims

- Helping those individual persons who have been victims of crime. This can take the form of short or long range assistance to enable a satisfactory return to normal living. It may include public action in the interests of such victims, and ensuring relief is provided by appropriate agencies.
- Providing a unifying centre for such victims and developing a public voice for their views.
- Supporting official authorities, in particular by providing information and advice to citizens about the actual danger of crime, and of ways by which they can counter it. By discovering the procedures by which the victims' interests can best be brought more fully to the attention of the courts, and seeking their implementation. By monitoring the effectiveness of the criminal justice system in providing for the security of citizens from attack, and offering comment on their behalf on how this effectiveness can be improved. In cooperation with other bodies, or by itself, encouraging a more widespread acceptance and greater practice in the community of a social ethical code.
- A small committee of four persons, i.e. the chairman, the deputy chairman, the treasurer, and the executive officer, was elected to implement these aims.

History

From the outset VOCS ("vox" = voice in Latin), found it difficult to define a victim of crime. The criminal law concentrates on those individuals or corporations most directly victimized, but the civil law recognizes that dependents can also be harmed and should have recourse to remedies. Whilst the present laws may only recognise these two main categories, sociological investigations suggest that there are other groups in the community which suffer in varying degrees from the criminal action of offenders.

In an introductory interview with the then Attorney-General mention was made to him of this difficulty. It was pointed out that courts were supplied with only limited details of the degree of social harm caused by the incident even where primary victims were concerned. It was recommended to him that there should be research into the social consequences of major types of serious offences so that the judiciary could be better informed when they were deciding appropriate penalties. The use of such "social-impact" statements, it was argued, could improve the public image of the courts as arbiters of justice.

However presumably the Attorney-General was not convinced of the necessity to widen the enquiry to include other than primary victims for shortly afterwards he announced the government's intention to investigate the use of "victim-impact" statements to help judges and magistrates, and from the context it appeared he was confining the use of such statements to injuries suffered by a primary victim. However his press statement did convey governmental increased support for victims overall.⁵ Within a few weeks his party lost office following upon a reversal at an election poll.

5. *The Advertiser* (Adelaide), 28.8.79.

In the absence at this stage of any adequately researched information VOCS has adopted the following operational categories of victims:

1. Primary victims.
2. Those individuals financially or psychologically dependent on primary victims, e.g. spouse, child, parent.
3. Those individuals whose lifestyles are greatly inconvenienced by fear of crime.
4. All income tax payers, ratepayers, insurers, consumers, and the like who have to pay higher charges because of a crime cost component.
5. Those individuals financially or psychologically dependent on the offender, e.g. spouse, child, parent.

Another early decision which VOCS had to make was in connection with its funding. The new government made it clear that it was equally sympathetic, and that therefore any application for funds would receive consideration despite an all round reduction in grants. However, VOCS decided that it would remain financially independent for as long as possible, and so far no application has been made for a money grant. The Government is providing assistance by way of provisional tenancy of adequate office accommodation for a nominal rent.

It was estimated that by the exclusive use of volunteers expenditure for the first twelve months could be restricted to \$1000, and that this amount could be met by the fees paid yearly by members. (\$5 per family, \$3 pensioners and students). The principal items budgeted for were printing \$400, postage and telephone \$400, lighting etc. \$50. Capital items \$150. With the increasing number of elderly persons in the community, retired individuals were seen to offer the best source of volunteers to staff the office on a daily basis, with the executive officer's home telephone providing an after hours contact point.

The decision not to follow the American pattern of having a professionally qualified office supervisor employed to filter calls for help and coordinate response was based on the knowledge of the activities of the Crisis Care Unit of the State Department of Community Welfare. The Crisis Care Unit has been operating in Adelaide since early 1976, and provides a twenty four hours service by trained crisis intervention workers employed by the Department. It operates from a central office and is equipped with radio cars.⁶

Common problems that the Unit deals with are domestic disputes, attempted suicides, rape counselling (in conjunction with the Police Rape Enquiry Unit and the Queen Elizabeth Hospital Sexual Assault Clinic), drug overdose, and indeed any crisis situation where there is great stress.

The Supervisor of the Crisis Care Unit is a member of VOCS on a private basis, and participates in its planning, together with the Inspector in charge of

6. Department of Community Welfare, Crisis Care Unit, March 1978.

the South Australian Police Department's policy section. Police attending to emergency situations offer the facilities of Crisis Care to the persons involved, and some sixty per cent of the Unit's work is originated in this way. Many crime victims of course do not fall into this category, and of those that do, not all take advantage of the offer.

Crisis Care is essentially a short term activity whereas the effects of victimization are often long lived. Nevertheless the existence of the Unit does mean that VOCS does not need to provide those facilities, and can concentrate on other problems arising from criminal behaviour. A similar referral system by investigating police, and public awareness generally of the aims of VOCS should ensure a steady flow of clients.

One essential task which VOCS was not able to complete was to produce a reliable and valid method of evaluating the effectiveness of its operations. It was decided that actual experience of seeking to meet VOCS' aims should generate a better basis on which to formulate a method of measuring success or failure.

In Operation

The office opened at 61 Flinders Street, Adelaide, on October 16, 1979, and set itself three short term objectives: (i) to make VOCS known to the public, (ii) to attract 100 members, and (iii) to give some immediate support to the parents of the Truro victims.

Regular nationwide (including New Zealand) and frequent statewide media coverage — television, radio and press — together with a schedule of over forty addresses to members of service clubs, parents groups, church organizations and elderly citizens clubs, have ensured that information about VOCS has reached a large number of persons.

In consequence a branch of thirty members has been formed in Hobart, a Western Australian member of parliament who is a former magistrate is planning one for Perth, the Victorian Chief Commissioner of Police has arranged a public meeting on August 13, 1980, and membership has extended to Denver, Colorado, U.S.A.

Overall, membership is now 390, mainly families, so that in terms of individuals, 700 would be the approximate figure. So far applications have been received principally from those sections in the community which research has established have most fear of crime, i.e. the elderly and women. Another class of person who has shown interest in joining and supporting the aims are those individuals who are engaged in applying for compensation through the *Criminal Injuries Compensation Act*.

In South Australia this procedure is complex, tedious and long drawn out (about two years for completion), and those who seek advice from VOCS have been referred to one of its members who practices at the Bar. This lawyer has reported to VOCS that in its present form the procedure is most unsatisfactory.

This opinion has been conveyed to the State Government, together with a recommendation that funding of the scheme should not be from general

revenue, but from a special account. Input into this account should come from a surcharge of five per cent on all fines imposed on lawbreakers convicted and fined in the State. This input would amount to \$300,000 annually and be sufficient to meet all expected claims. As well as the submission addressed to the Premier, members of VOCS living in this State were asked to forward copies to their local parliamentary representatives seeking their endorsement to the proposal.

Shortly after formation VOCS arranged an informal social gathering for the parents of the Truro victims, and whilst not all parents attended, a good number did, together with the parents of two other murdered children, and one victim of an attempted murder and his wife. Despite the fact that many of the parents had been undergoing similar stress for some months this was their first contact with each other, and after some preliminary hesitancy they appeared to obtain benefit from their sharing of experiences. Since then they have maintained contact with each other and with VOCS, and recently were guests at a dinner given by a parent of a murdered boy. Regrettably one of the most active of the group has had a recent mental breakdown.

Contact with this group occurred because many of them on their own volition joined VOCS as early members. Other victims have been referred by individual police officers as the existence of VOCS became better known. These victims included a young mother of twins, separated from her husband, attacked by a male friend who attempted to kill her by strangulation by rope when she decided to return to her husband in the country. The offender is now serving a five year sentence for attempted murder. An engineer shot in the stomach by an elderly migrant whom he and his wife had befriended. The offender died of heart attack when in police custody. Another mother whose two children were threatened with murder when she told her male friend that she proposed returning to her husband. Offender was convicted of kidnapping and presently in prison.

A female high school teacher directly contacted VOCS for help in combating the effect of an indecent assault on her two sons by their stepfather. A cleric referred a middle-aged couple who are under stress because of threats received from their brother-in-law currently serving life for killing their parents and their sister.

VOCS initiated contact with an elderly couple, owners of a lonely shop, who were attacked by two masked and armed intruders, and responded by shooting one of the offenders. The offenders were subsequently arrested by police but have not yet been tried.

Direct requests for help have come from a wide range of people for "less serious" reasons. The owners of a car, and not wealthy, complained that they were refused the name and address of a juvenile offender, who had stolen their uninsured vehicle and totally destroyed it, although the police had charged the offender. An elderly lady sought advice as to whether she should claim compensation for a bite from a dog wandering at large. Another enquirer sought advice on how to deal with two ghosts who were seeking to communicate the name of a murderer. A number of calls have come from other people, some

seeking advice of a routine nature, some have been to every other agency first and came to VOCS as a last resort to resolve a vague dilemma nurtured over many years.

Contact with each of these victims has varied in frequency and duration to meet individual needs and the availability of VOCS support. One victim for example, under treatment in the intensive care ward of the hospital for eight weeks, was visited twice to three times a week. On the other hand the country storekeepers, after being put in touch with VOCS legal adviser, have not been seen since the original visit. They reside quite some distance in the country.

Interviews with victims are used to offer two kinds of unique support to persons under stress. In neither approach is there any attempt to provide the intense psychological counselling available from professionally qualified psychiatrists or senior social workers. VOCS does provide advice from people wise in the ways of the criminal justice system, or who have been through a similar traumatic experience, purely because they care about people and wish to undertake the responsibilities of a friend to someone in need. Experience to date suggests that many victims of a criminal offence do not regard themselves as in need of "counselling" but they are grateful for advice from persons in the above two categories.

Many members of VOCS obviously would not fit either of these two categories, but some of these whose sympathy has been aroused at the plight of the victims, would like to participate by offering personal aid, of various types. Most of this kind of assistance is already available from long established charitable organizations for those few victims who seek it, and so it is necessary to devise other avenues to meet the wishes of "the Good Samaritans".

The more obvious activities of recruiting other members, forwarding copies of requests to politicians, and raising funds to augment VOCS' meagre resources, are so similar to projects for school, church, or sporting bodies, that they have long shared in, they now have little attraction and much tedium for these people.

It is VOCS' philosophy that each person is equally important, volunteer no less than victim, so that the challenge presented by these volunteers to VOCS to provide some personally satisfying activity for them, places additional demands upon VOCS' creative ability.

Elderly volunteers, while presenting an ever increasing source of staffing, also constitute the age group with the most variance. Undergoing a lifetime of individual experiences means that each one has acquired a personality of differing aims and abilities which separates them from each other in a way no other sector of the population can do. Some of VOCS' staff are mature, independent thinkers who readily and happily "mind the shop" for a few hours each week. There are others who need much encouragement in order to assume the responsibility for even minor chores, and for these few their office minding duties can become boring. As yet VOCS does not appear in the telephone directory so that calls are infrequent on that number, and except for lunchtimes, callers are equally few.

The special problem in their case, and in the case of other members living in country areas or fully committed to other tasks, is how to keep them well informed of the many activities in which VOCS is engaged. The two-monthly newsletter does meet this need to some extent, but to do it adequately it ought to be bigger than its four pages of duplicated foolscap. Unfortunately its preparation and production, even in its present format, already consumes too much scarce time.

This and other difficulties associated with solely relying upon volunteer labour will disappear in time. The newsletter problem only arose because a journalist member, about to retire and willing to assist, was recently subjected to a series of heart attacks. VOCS believes that from its volunteer members can come great ideas to improve and expand its service to victims, they can be effective advocates for the changes in the system that VOCS campaigns for, they have valuable personal contacts in the community who can help get things done for the organization and the victims it serves, and they can help VOCS know what people in the community are thinking. Volunteers enable VOCS to provide a service to deserving people in the community at a minimum cost.

Outcome

From discussions with the Truro parents and other victims the following items were nominated as matters which should be given early attention: abolition of the unsworn statement; undue secrecy about parole decisions; need for the Crown to have a right of appeal against inadequate sentence; better arrangements for court witnesses; and, an improved compensation procedure.

Frequent mention was made of these matters in the media and in addresses by VOCS to the various groups it was invited to speak to. These included three well attended Liberal Party meetings which expressed their support for VOCS' objectives.

On July 31, 1980, the Government announced its intentions to remove the right of an accused person to make an unsworn statement, and to give the Crown the right of appeal against sentences.⁷

Earlier the Attorney-General had announced the establishment of a ten member committee to conduct a Government Inquiry on how best to overcome the hardship caused to people who are victims of crime in the community. Included in the committee were representatives of the police, Health, Law and Community Welfare Departments, the women's adviser for the Premier's Department, and the executive officer of VOCS.⁸

The Committee's terms of reference require it:

1. To evaluate the quality of existing information concerning the victims of crime in South Australia and the availability and quality of services provided to victims of crime.

7. *The Advertiser*, (Adelaide), 31.7.80.

8. *The News*, 27.6.80.

2. To assess the needs of privately based community victim services programmes, review the adequacy of co-ordination of services between those agencies and Government, and recommend the most appropriate avenues of liaison with Government Departments and between those Departments.
3. To assess the need for additional victim-related research and for improvements in services.
4. To review the *Criminal Injuries Compensation Act* to ascertain whether or not it is the best way of assisting victims of crime, whether or not its operation should be amended, and if "yes", in what way, and whether or not "restitution" programmes by offenders to their victims are feasible.
5. To make recommendations concerning legislative and/or administrative arrangements appropriate to these needs.
6. To report to the Attorney-General by 15th December 1980.

Members of VOCS are pleased that the South Australian government has taken the initiative to provide for such a wide ranging investigation into the needs of victims. However, they understand that some considerable time must elapse before any practical benefits can flow from its results. In consequence they have decided to push ahead with arrangements to provide relief to victims appearing as witnesses in subsequent court hearings.

Victims who have undergone the experience of appearing in court as witnesses consistently report their dissatisfaction with both the process and the outcome. They complain that they did not have an opportunity to relate the incident fully in court so that judge and jury would have an adequate understanding of what occurred; that they were only used for the information they could supply and no attention was given to their need; and that they were treated like defendants and not victims.

Most victims reported being ignorant of court procedure and physical layout so that when they did appear they were hesitant and confused and so did not respond as well as they should have to questions directed to them in the witness box. To overcome this particular problem and to provide some emotional support for victims called as witnesses, VOCS has offered to supply a "court companion" to accompany these people to court, sit with them in the waiting room and in court, and to escort them home afterwards. Familiarization with court layout and procedure could be provided by a pre-trial inspection and explanation.

The suggestion has been approved by the Police Commissioner, the Chief Magistrate, the Chief Justice, and the Crown Prosecutors, and has reached the stage where the Police Department has appointed a liaison officer to arrange instruction in their duties for these volunteer companions, and to coordinate requests for their service from officers in charge of cases. The volunteers are members of the South Australian Dental Wives Association, who, as a group of friends, have offered to provide this service. Experience will show if it is

desirable and practical to continue this "companionship" after the hearing, or if the follow-up should come from other members of VOCS.

The Future

In the remaining twelve weeks of its first year of existence VOCS plans to publicly launch its Court Companions programme; build its membership to 500 families/individuals; maintain its association with its panel of "serious" victims; fully participate in the State Inquiry; have a representative attend the First World Congress on Victimology in Washington; in conjunction with the University of Adelaide, Department of Continuing Education and the Workers Educational Association, conduct a weekend seminar on 20/21 September 1980 on "Victims of Crime"; present a paper at the Sydney University, Institute of Criminology seminar in Sydney on "Victims of Crime" on 17 September 1980; consolidate the creation of a committee to be responsible for the future promotion of VOCS; address the West Beach Lions Club, the Holdfast Bay Rotary Club, the Tusmore Park Uniting Church, the Tuesday Group, the Justices of the Peace Association, the annual dinner of the Thirtyniners' Association, the Catholic Women's Guild, the Security Institute of South Australia, Brighton Baptist Women, the Seaforth Thursday Group, the Teatree Gully Liberal Party branch, the Australian Tape Recording Association (for circulation to blind persons), and to be a speaker and panelist at the International Prisoners Aid Association A.G.M. this year in Adelaide.

Next year's programme will be decided at its annual meeting on October 25, but clearly there is a requirement to build up its resources to cover those aims which so far have been largely neglected. There has been no real scrutiny of the effectiveness of the different segments of the criminal justice system, and apart from commencing a newsclipping programme no commencement of resource material for this purpose. Little attention has been given on how best to encourage the greater acceptance of an ethical code, and inadequate accumulation of knowledge of actual degrees of crime risk.

It is hoped that next year will see a second branch emerge, this time in Perth, and possibly Sydney may follow. The infant VOCAL in Victoria should flourish under the stimulus of the Chief Commissioner of Police, and there may be reason to instigate a national organization of victims associations (NOVA!) as a result.

PRESENTATION OF PAPER*Ray Whitrod*

I was asked to describe the work of the Victims of Crime Service in Adelaide. I have done that rather exhaustively in my paper. VOCS is a voluntary organisation which was generated spontaneously by a group of people such as yourselves, perhaps older, when they heard how so much of the community's resources was being devoted to the rehabilitation of prisoners and none to their victims. In the course of my own research into fear of crime I found that there is usually a long lasting effect of violence. It is like a ripple in a pond — the ripples go out in many directions. Mr Justice Kirby started his paper by mentioning a Collie case where a man was shot in the leg, and he suggests that in certain aspects it is a somewhat unique case. It is not so. Most crimes, do, in fact, have a long lasting effect and I have encountered many of their victims.

Of course, it is difficult to define or describe who are the victims of crime because the law itself tends to concentrate on the primary victim and not look at the other people who are involved. If you do some sociological investigation you find that there is an ever growing number of people who are adversely affected, sometimes quite seriously, but who are, in terms of relevancy, fairly well removed from the actual incident. Perhaps I can illustrate this by talking about Judy. Judy is the mother of a boy, Alan, whose body was found in the Adelaide hills fifteen months ago badly mutilated about the anus. He had a bottle pushed up his anus, but he was also very badly mutilated, and he was found dead. They have not found the perpetrator of that crime. But Alan was then a lad of eighteen and his sister was then nineteen. Alan and his sister were very close in the family relationship. She had been married not very long before the body was found. She was pregnant at the time, subsequently had a miscarriage, possibly due to the shock produced by the sudden death of her brother in fairly difficult circumstances. She and her young husband were living at Mallala which is about 80 miles north of Adelaide. They had purchased a house up there for \$25,000 or thereabouts and got a mortgage for \$23,000 to cover it. She became very upset because of both losing the baby and her beloved brother's death. Her husband was on shift work, and when he was away at night time she really had a very difficult time, crying and feeling very distressed, and not knowing many people in that area she wanted to go back and live near her mother, Judy, who lives at Salisbury 40 miles south. In order to do so she would have to sell the house and buy a house down at Salisbury. In the meantime house prices collapsed around Mallala and she found that the market price, if the house were sold, was \$19,000 — i.e. if she sold it she would not even be able to cover the cost of the mortgage. So Alan's sister is up there in a state of fairly bad shock, she has difficult times at night. Her mother goes up at weekends and so forth. The ripples go out a long way and, of course, in a court of law if claims are being made for compensation it would be difficult to judge just how much compensation ought to be paid in such cases, but clearly I do not think you can shut off the effect at the primary victim or even the secondary victim in the sense of mother or child. There are other people involved, other lives involved.

We find this very much with the people who come to us with their problems. There are many people who are unaware that there is compensation available. There are lawyers in Adelaide who really are not very well informed about the process and they give wrong advice to victims that we sometimes have to amend.

Probably as a result of our campaign in Adelaide we were able to convince the State government to set up a State Committee of Inquiry — its terms of reference are set out in my paper on pages 45-46. You will find there are five points of reference. For some two months now the Committee has been having regular weekly meetings interviewing people who wish to make submissions to us. We now have one project officer who is making field inquiries, but in every aspect of our inquiry we find a great deal of ignorance. It seems that society has really paid very little attention to what happens to victims of crime; particularly victims where there has been a court case, an offender has been sentenced and the man is in gaol. I think, on the whole, society no longer seems to worry a great deal about those people.

My own incomplete research on fear shows that there tends to be a U-shape graph of fear. Girls who have been raped have great fear immediately after the rape which tends to diminish when the offender is sentenced and goes to gaol, then it starts to rise again as he gets near a possible parole or release date. Some of the girls are quite terrified, refuse to go out at night, lock the doors and windows all day and so on, and become recluses. These are people who were formerly quite stable whom you would not suspect would have responded with this sort of consequence. For example, a lass who sometimes helps me called Marian, is a former school teacher from Papua New Guinea now married to an agricultural scientist. She is a woman aged 30, has two boys aged 7 and 8 going to the local school at Magill. Her husband went to work at half past eight in the morning, her two children went at ten to nine, she retired back to the kitchen, and at 9 o'clock a knock at the door and a man forced his way in and sexually assaulted her for about two hours. She is a big strong woman and put up a deal of resistance. He was picked up soon by the police and convicted on five counts of rape. He escaped a short time ago and she really lived through private hell for some time because she was convinced that the first thing that he would do would be to come back and finish her off, because she was to blame for his incarceration. She had given evidence in court, identified him and she felt she would be blamed. There are lots of people who have been victims of violent crime who entertain this feeling, and I have been saying to them for some time that the chances of retaliation like this are minimal. It will not happen, and not in this State. But about six weeks ago a man was released from Mount Gambier gaol and on the very first day of his release he went to Mount Gambier city, bought a shotgun, went over to a lonely farm, shot his wife and her *de facto* husband on the spot. This was given some newspaper media publicity in South Australia and the women rang me and said: "Mr Whitrod, you have been misleading us — they will come back and get us!"

There are a lot of consequences to each criminal act which, on the whole, have not been considered seriously enough. We have written to the Premier of South Australia suggesting that there ought to be a social impact statement placed in front of each of the judges when they are considering the sentence that

should be imposed. It is my experience that on the whole defence counsel are well able to present all sorts of reasons in the defendant's history which would in some way support or make his actions understandable for committing the offence. Very seldom is there any account of the social harm which has been caused by the offence.

I spoke to a young 17 year old girl whose first job was working in a chemist shop. In the second week of her employment she was present when a man came in with a hood over his head and a two barrelled shotgun, fired one shot into the ceiling and kept the store at bay while he went and got the money out of the till, stole some drugs, and then disappeared. She was absolutely petrified. I saw her a week afterwards and she had had nightmares every night that week and I guess it will be a long time before she really shuts that thing out of her mind.

The Truro girls' parents are a strong case in point. I was speaking to one of the fathers of one of the girls who is a lecturer at a tertiary institution. I will call him Mick. He is a stable, intelligent, educated man. Now, he is on one of his periodic fits of depression because he tries to shut out of his mind completely the thought that he ever had a 15 year old daughter in whom he had a great deal of pride and joy. He has these fits of depression from time to time despite all the help we can give him, and it is two years ago since the girls were murdered.

We believe very strongly that there ought to be some community support for these people, and I am glad to see that the Chief Commissioner of Police in Melbourne has started a similar group there called VOCAL — Victim of Crime Assistance League. But it would, I think, be timely if the most crime ridden State in Australia provided some sort of voluntary citizen support for victims of crime. For me, they have been too long forgotten.

VICTIMS OF CRIME:**SOME CONSIDERATIONS IN NEW SOUTH WALES**

Paul V. Johnson,
Special Project Officer,
Criminal Law Review Division,
Department of the Attorney General and of Justice.*

Although provision has existed in the *Crimes Act* since 1900 for courts to order offenders to pay compensation for injury or loss to aggrieved persons, it was not until the commencement of the *Criminal Injuries Compensation Act*, 1967 on 1st January 1968 that these provisions of the *Crimes Act*, and in particular s.437, came to be regularly used. As most offenders have little or no means to satisfy an order for compensation, the making of such orders was regarded as a virtual waste of time. The guarantee of payment from government revenue made by the *Criminal Injuries Compensation Act*, has encouraged courts to make orders for compensation under the *Crimes Act*.

The passing of the *Criminal Injuries Compensation Act* was an acknowledgement by the government of the day that the existing methods of compensating victims of crime were ineffective and inadequate and that the government had an obligation to provide some assistance to these people. Recovery of damages by civil process initiated by a victim of a criminal act is rarely an effective means of obtaining compensation — either the victim is without the means or inclination to go to court or the offender is without the means to satisfy a judgement. There was clearly a need for government action to guarantee some financial compensation. New South Wales was the first Australian state to introduce such legislation. New Zealand and Great Britain introduced schemes in 1964.

The Present Compensation Provisions in New South Wales.

The *Crimes Act* 1900 provides that where a person is convicted of an offence the court in which he was tried may direct the offender to pay out of his property, to a person aggrieved, compensation for injury or loss sustained by reason of the commission of the offence. The maximum amount payable under s.437 where the offender is convicted of a felony or misdemeanour is \$10,000 and under s.554(3) where the offender is convicted by a Court of summary jurisdiction, \$1,000.

Where an order is made under either section for payment for injury of more than \$100, the person aggrieved may apply to the Under Secretary of Justice for payment from the Consolidated Revenue Fund. Where a person is acquitted of an offence or an information for an offence is dismissed, a person claiming to be aggrieved by reason of the commission of the offence, may apply to the court for a certificate stating the amount that the court would have awarded by way of compensation for injury if the offender had been convicted

* On secondment from Magistrates Courts Administration.

and an order made under s.437 or s.554(3). A person granted such a certificate may apply to the Under Secretary of Justice for payment of the amount of the certificate from the Consolidated Revenue Fund.

The Under Secretary then prepares a report to the Attorney-General specifying the sum directed to be paid or the amount of the certificate and the amounts received or that would have been received by the applicant for the injury if he had exhausted all relevant rights of action. If the Attorney-General considers the application justified, payment is made. The Act gives the Under Secretary the right, once payment is made, to recover from the offender by civil enforcement, the amount it has paid.

An *ex gratia* system of compensation exists alongside this statutory procedure. The Attorney-General on recommendations made to him by the Under Secretary of Justice can authorise payment of compensation in those cases where an order cannot be obtained under s.437; for example, where the offender is unknown or absconds, where the offender is found not guilty on the grounds of mental illness, or unfit to be tried or discharged at the committal hearing. The amount is fixed by the Attorney-General on recommendations made to him by senior officers of his department. The maximum payable is the same as under the Compensation Act and amounts are fixed as nearly as possible in line with court awards made in similar cases.

Only where a claimant has received compensation greater than that awarded by the court from another source as a result of his injury (e.g. workers compensation), would an application under the Act be refused.

Is the scheme successful? It may be claimed that it is because all claims where an order under s.437 or s.554(3) has been made have been considered favourably and payments made from government revenue. The *ex gratia* system also helps those people who cannot obtain orders under the *Crimes Act* for compensation. The Act attempted to do no more than this. What it does do is really only touch the tip of the iceberg. For numerous reasons many victims of crime receive no financial compensation. The Act was passed in 1967 in more or less experimental form. The experiment has shown that this legislation is inadequate and that an urgent review is necessary.

In 1978, the year for which the latest crime statistics have been published by the Bureau of Crime Statistics and Research, the number of crimes likely to have resulted in personal injury dealt with in all courts are shown at Table 1.

Table 1

Offence	Found Guilty	Found not guilty, dismissed, withdrawn, Governor's Pleasure	Total
<i>Petty Sessions Courts</i>			
Assaults (various kinds)	2,624	4,522 72	7,146 251
Assaults (sexual)	179		
<i>Higher Courts</i>			
Murder	32	7	39
Attempted Murder	5	1	6
Manslaughter (not m/vehicle)	33	7	40
Assaults	329	43	372
Rape/Attempted Rape	74	32	106
	<u>3,276</u>	<u>4,684</u>	<u>7,960</u>

In the same year there were 114 payments under the *Criminal Injuries Compensation Act* and 33 payments under the non-statutory *ex gratia* scheme. The Bureaus' figures do not show those cases, serious and minor, which were not reported to the police or where the offender was not brought to trial.

It is perhaps unfair to say that the number of compensation payments made under the Act is very small when compared with the number of offences committed. The number of payments under the Act depends on the number of orders made under s.437 and s.554. Some offenders may pay the amount of compensation. Some of the assaults may have resulted only in minor injury or loss. Many victims for whatever reasons, may not have applied for compensation.

Whatever variables there may be, there is no doubt that only a very small proportion of those persons aggrieved by reason of the commission of criminal offences, are ever compensated under the Act.

The *Criminal Injuries Compensation Act* and the two provisions of the *Crimes Act* on which it depends can be criticised on a number of grounds.

1. *Distinguishing the offence*

The *Crimes Act* appears to distinguish between compensation payable in respect of offences of an indictable nature (s.437) and offences dealt with summarily (s.554(3)). The seriousness of the injury suffered does not necessarily correspond with the criminal seriousness of the offence with which the offender is charged. To restrict a person aggrieved to a claim of \$1,000 solely because the offence is tried summarily is unnecessarily restrictive.

Considerable use is made by magistrates of s.437 when dealing with summary offences, particularly assaults under s.493/494. Authority for this is taken from *Smith v. Eadon*, a judgment of Carmichael J. in the Supreme Court on 26th May, 1978 (*Petty Sessions Review* p.1807), although Thorley D.C.J. in *Appeal of Leon Tenenbaum* (4th October, 1979) held that s.437 applies only to courts presided over by judges.

Regardless of the type of offence committed, the important matter so far as compensation is concerned is the seriousness of the injury. Compensation should be assessed on that basis. Categorisation of offences as indictable or summary should not affect the quantum of damages that can be awarded to an aggrieved person.

2. *Monetary Limit*

Although the limits under s.437 and s.554(3) have recently been increased to \$10,000 and \$1,000 respectively, these are only the third increases this century. These statutory limits are only restrictions on the courts' jurisdiction to make an order. They are not absolute maximums that can only be assessed for the most serious of injuries with all other injuries being scaled down. (*R v. Forsythe* 1972 2 NSWLR 951).

Thus one claimant may receive \$10,000 where the court regards that as the proper amount of compensation. Another claimant may receive the same amount even though without the statutory limit his damages would have been much greater. A person who is blinded, paralysed, brain damaged or who loses a limb can hope for no more than the present maximum.

In addition where one offender by the commission of one offence injures more than one person, the total amount of compensation that can be ordered against the offender is \$10,000.

In Great Britain, the criminal injuries compensation scheme has operated since 1964 without any upper statutory limit on amount of compensation. Despite the large number of cases coming before the courts in New South Wales involving personal injuries the greatest number involve minor assaults dealt with in Courts of Petty Sessions (7,146 of 7,960 cases in 1978). Up to the end of 1978 the total paid since the commencement of the Act has been \$1,484,839 (this includes \$267,308 paid under the *ex gratia* non-statutory scheme).

Whilst acknowledging the present restrictions on government spending ((but when was there a government that did not make such claims?) the present cost to the government is negligible in its overall budget.

Why should a person made a paraplegic in a car accident be entitled to a compensation in \$100,000's whereas a crime victim suffering a similar fate can only get \$10,000? Consideration should be given to removing the monetary limit altogether.

3. *Who should make the orders?*

Applications for compensation under the *Crimes Act* may be made immediately after the conclusion of the trial or at any time thereafter. The advantage of this procedure is that the trial judge has heard all the evidence (if there was a plea of "not guilty" and can give a decision without the victim having to again give evidence. In some cases, however, the victim may not have given evidence at the trial or there may have been no trial.

Some think it is inappropriate for a criminal court to assess damages which are primarily of a civil nature. Once a trial has concluded and the offender dealt with, the criminal aspect ends and the civil consideration as to compensation begins. In some jurisdictions, including Victoria and Great Britain, an independent tribunal determines the amount of the compensation for victims of crimes. These tribunals are not concerned with determining guilt, but only with ascertaining if injury has been caused by the commission of a criminal offence and how much to award.

There are considerable advantages in using an independent tribunal rather than the criminal courts to assess compensation. Some of these are:-

- An application could be made independently of criminal proceedings and an award made quickly if necessary. At the moment, a claimant may have to wait years until trials and appeals are finalised, before becoming eligible for payment.
- The hearing before a tribunal would be a much less formal procedure than court hearings. A procedure could be adopted that would not put the person aggrieved through the same anguish that is often experienced in the witness box at a criminal trial.
- A tribunal could hear applications from claimants who were not the direct victims but who are still aggrieved persons within the meaning of the Act. It could also hear applications from persons who now make claims for *ex gratia* non-statutory compensation where the offender has not been found. It is preferable if these matters were considered by an independent tribunal rather than administratively as is done at present.
- A tribunal would relieve the already overburdened criminal courts.

Serious consideration should be given to creating an independent tribunal to deal with compensation claims. The great advantage to the victim would be that compensation could be paid soon after the offence when it is most needed rather than months or years later.

4. *Who is entitled to compensation?*

In 1974 Glass J.A. in *R v. McCafferty and Ors* (No.2) (1974) 1 N.S.W.L.R. 475 held that the wife and children of a murdered man did not come within the definition of "any aggrieved person" in s.437 of the *Crimes Act*.

Their applications for compensation for injury (emotional and nervous shock) and financial loss were dismissed.

The effect of this decision was to deny compensation to anyone other than the immediate victim of the felony or misdemeanour. This would exclude any bystander related to the victim or not, who suffers nervous or emotional shock in witnessing the crime; it would exclude relatives of the victim who suffer nervous emotional shock after witnessing or hearing of the offence and would exclude dependant relatives from claiming for financial loss caused by the death or injury of the victim. The situation has not been beyond doubt, however, because in some cases compensation has been awarded to persons other than the immediate victim. In *R v. Baxter*, Slattery J. in Griffith Supreme Court in 1974 awarded the then maximum of \$2,000 to a widow who had witnessed a savage attack on her late husband.

In an attempt to overcome the decision in *McCafferty*, the following definition of "aggrieved person" was inserted in s.437 in 1979:

"Aggrieved person", where the felony or misdemeanour of which a person is convicted is in respect of the death of another person, means, except in subsection (3), the spouse (if any), or the person (if any) who was living with the dead person as the spouse and any parent or child (as defined in s.7(1) of the Compensation to Relatives Act of 1891), of the dead person.

This amendment does not seem to have really solved the problems created by *McCafferty*. A spouse, child or parent of a victim can now only apply for compensation if the victim is killed; presumably if severely injured, the relatives will not be able to claim either for injury (nervous or mental shock) or financial loss. Where a person is killed as a result of a criminal act any bystander who witnesses the killing and suffers nervous or mental shock will not be entitled to claim. The effect of the words in the definition "except in subsection (3)" are not at all clear. That sub-section requires the court to take into account the behaviour of the aggrieved person which directly or indirectly contributed to his or her loss or injury, when deciding whether or not to make an order for compensation under s.437. It is not clear if the exception in the definition of "aggrieved person" now means that when a claim is made by a relative that sub-section 3 is ignored or if "aggrieved person" in sub-section 3 is such a case is meant to refer to the immediate victim of the crime.

The present confused state as to who is entitled to an order for compensation under the *Crimes Act* is no doubt a contributing factor to the small number of claims that are made. The restrictive definition of aggrieved person from *McCafferty* was a result of the amendments to s.437 made at the time of the commencement of the *Criminal Injuries Compensation Act*. Before that, there was no such restriction. It is submitted that the amendments to s.437 (sub-sections 2 and 3) were not intended to restrict in any way the class of persons who could claim to be "aggrieved persons" under sub-section 1. Compensation for innocent victims of crime should not be limited by harsh and complicated rules. If the present compensation scheme is retained or in any new scheme, it is essential that all those who have been injured or have suffered

loss be compensated. The line will have to be drawn somewhere, but somewhere to allow dependants and innocent bystanders who have witnessed violent crimes to apply. There is an immediate need for the situation to be clarified and put right.

5. *What does the scheme pay - why not for loss?*

No explanation has ever been given as to why orders for *injury and loss* can be made under the *Crimes Act* but only the amount for *injury* will be paid under the *Criminal Injuries Compensation Act*. As *injury* is defined in s.437 as "bodily harm and includes pregnancy, mental shock and nervous shock", any financial loss suffered by the aggrieved person is not recoverable under the Act, even though the court has made an order for payment of such a loss. Compensation orders under the *Crimes Act* are assessed on the same principles as damages for tort but excluding punitive or exemplary damages. As damages are awarded in an attempt to, as far as money can do, restore the injured party to his former position, it is difficult to understand why the victim of a criminal act is only entitled to be compensated under the Act for personal injury and not economic loss. In many cases the economic loss may be more severe than the personal injury. In the case of dependant relatives, economic loss caused by the death or injury of the breadwinner could be catastrophic.

In practice many courts include within their awards for "injury" actual economic loss (e.g. wages, medical expenses) notwithstanding the definition of "injury". This is done so that full compensation will be paid from government revenue. It is also the policy of the Attorney-General to make payments from consolidated revenue for financial loss even though the court may have separately determined and awarded amounts for injury and loss.

This policy, of recompensing for both injury and loss despite the provisions of the Act, is commendable. It should, however, be put on a firmer basis by amendment of the Act.

6. *The conduct of the aggrieved person and his/her relationship to the convicted person.*

In determining whether or not to make a direction for compensation under either s.437 or s.554(3) the court shall have regard to any behaviour of the aggrieved person which directly or indirectly contributed to the injury of loss sustained by him. The sections do not provide that the behaviour of the aggrieved person shall be taken into account in assessing the *quantum* of damages but only in determining if a direction will be made *at all*. If the aggrieved person's behaviour is to be taken into account so far as quantum is concerned, then this will be because of the common law principles for assessing damages generally and not because of the provisions of s.437 or s.554(3). (*R v. McDonald* (1979) 1 N.S.W.L.R. 541).

The assessment of damages under s.437 and s.554 by applying common law principles is a proper and fair procedure. Although a direction under those sections is not meant to be an alternative to an award for damages at common law, such directions, with a guarantee of payment of the government, are in fact

alternatives; most convicted persons are unable to meet any civil judgment against them for damages. It is therefore desirable that the aggrieved person's right to a claim for compensation under the *Crimes Act* should not be restricted any more than a claim he could make in civil proceedings.

As it stands, a claimant could be denied a direction for compensation because he, in the heat of the moment or because of intoxication, provoked an attack, the consequences of which were beyond his imagination.

The rationale for directing the courts to take into account whether the aggrieved person is or was a relative of the convicted person or was living with the convicted person as his wife or her husband, or a member of the convicted persons's household, has been said to be that fraudulent claims by such people are more likely and that compensation awarded may find its way into the hands of the convicted person. Whilst these are matters which the court "shall have regard to", a finding that such a relationship did exist does not necessarily prevent the making of a direction for compensation. Nevertheless, it is unjust that such a provision even exists. The reasons for the provision have nothing to do with any legal reason why such people should be denied compensation; the reasons are procedural difficulties which should be relatively easily overcome. Even if, on occasions, fraudulent claims are paid or a convicted person gets some benefit from payment of compensation, should that be sufficient reason for denying compensation to every other *bona fide* claimant?

7. *Recovery of compensation from the offender.*

Since the commencement of the *Criminal Injuries Compensation Act* many more orders are being made for compensation under the *Crimes Act*. The guarantee of payment has breathed new life into the compensation sections. And whilst orders for compensation are not part of the offender's sentence, offenders are now being faced with large amounts to pay after they have served their sentences. If the sentencing court feels that it is appropriate for an offender to provide restitution to the victim or to society generally then an order for restitution should be made as part of the offender's sentence. The commencement of the community service order scheme is one way of doing this. Ordering an offender with means to pay compensation as part of a condition of a recognizance is another.

Professor Stephen Schafer in an article "Restitution to Victims of Crime — An Old Correctional Aim Modernized" (1965) 50 *Minn. L. Rev.* 243 at 248 said:

To be regarded as a proper adjunct of a criminal procedure, restitution or compensation must be given a correctional character... the administrator of criminal justice would not deal with civil damages, but with correctional restitution. This becomes part of the sentence and thus an institution of the criminal law.

An offender, faced with a large amount of compensation to pay after having served his sentence, would regard himself as again being punished for the offence for which he has already paid the penalty. In our eagerness to help the victims of crime we must not lose sight of the fact that in many cases, people

who have broken the law are victims themselves — victims of a society in which they may have been denied a stable, happy family upbringing, denied educational and job opportunities. In many cases these people are victims of circumstances over which they had little or no control. Society owes it to such people to give them the opportunities that they have not had. We must not, therefore, in our rush to help the obvious victims of crimes, impose excessive “penalties” on the offenders. Rehabilitation is not helped if, after a sentence of imprisonment, an offender is obliged to pay large sums of money to the government in recompense.

An offender should only be obliged to pay compensation when an order for compensation is made as part of his sentence. If it is not appropriate for this to be done (for example, if the offender has no means), then it is unfair to the offender if, after having served his sentence, he is chased for compensation.

In Great Britain, there is no procedure whereby offenders are required to repay the government where a payment is made by the Criminal Injuries Compensation Board. The amount recovered from offenders in New South Wales is only a small percentage of that paid out and the cost of recovery may exceed the amount recovered. Since the commencement of the Act a total of \$1,984,365 has been paid out to the victims and \$103,130 recovered from offenders — a recovery rate of approximately 5%.

Consideration should be given to removing the power to recover compensation from the offender when a payment is made from government revenue to a victim of crime. This needs to be considered with my earlier suggestion to remove the statutory limit on compensation. A right to claim unlimited compensation under a criminal injuries compensation scheme would be in lieu of a right to sue for damages at common law. In such a situation the offender could not be required to pay compensation either by the victim after civil proceedings or by the government after a payment from government revenue. The sentence of the criminal court is society's penalty for a breach of its laws; if appropriate, an order for restitution should be included as part of that penalty. Restitution should not be an additional penalty.

Apart from a system of financial compensation there are a number of other areas where victims of crime could be assisted. For example, a person charged with rape cannot plead guilty under s.51A of the *Justices Act* and be committed for sentence. The evidence of the prosecution including that of the rape victim must be given in full. The victim must go through this trauma even though the offender may wish to plead guilty.

New South Wales is the only State in Australia where no procedure exists whereby full oral committal proceedings can not be circumvented to some extent by the use of documentary evidence. In all committal proceedings the witnesses must go right through their evidence and be subject to cross examination and then go right through it all again if the defendant is committed for trial. A system using documentary evidence could be implemented. With the consent of the accused, written statements could be tendered at the committal. Some advantages would be — the witnesses would only have to give their evidence once, the court would be saved a lot of time and the defendant would be saved expense and delay.

New South Wales also needs a statutory procedure for the disposal of exhibits before the completion of the prosecution. In some cases where property is recovered, the owner may have to wait years before it can be returned while the property is held as an exhibit.

Things might be worse if the property is recovered but the offender is not found. This is also a problem for the police who are required to hold the exhibits in safe custody. In some cases property can be returned when defence counsel agrees that the exhibit will not be required in the proceedings. There is, however, no formal procedure whereby exhibits which are needed by the victims of criminal offenders, can be returned before completion of the trial. A system where exhibits are photographed, identified and catalogued could be developed thus enabling an early return of property to the owners.

In many cases the victims of crime require urgent assistance. We have seen rape crisis centres set up for rape victims and refuges for women and children fleeing domestic violence. People affected by any type of criminal act usually need some assistance. Whether it is where to find a locksmith on Saturday night after your house has been burgled, or whether it is counselling for the family of a man who is murdered, the needs of the victims of crime are endless and yet there is little known of these needs and much less done to meet them. This task usually, in the first instance, falls to the police who, being on the spot, are obliged to render what assistance they can. They are not, however, specially trained for this and cannot provide other than some immediate assistance. They cannot provide continuing help. This is, of course, not their function and they should not be expected to do this.

In Britain and the United States many victim support schemes have been established which operate specifically to meet the needs of persons who have been effected by criminal acts. In South Australia the government has established a committee to report by the end of the year on the needs of victims and the best ways of providing help and information for them. The committee has sought the views of the public. This is the first step of its kind in Australia where help for victims stops with a small financial gesture. Australia lags well behind other western countries in this regard. The establishment of a committee in New South Wales as has been done in South Australia would be the first step necessary in determining what needs to be done. The provision of monetary assistance is not necessarily the best or only way to help victims of crime.

PRESENTATION OF PAPER

Paul V. Johnson

When I was asked to do this paper I was asked to do it as my own personal views of what the present situation of compensation is in New South Wales. The paper and comments are my own and do not necessarily reflect the views of the Department. I would like to thank those officers of the Department who provided me with information to enable me to do the paper.

There are a number of matters from the paper that I would like to perhaps clarify. There is a comment made on page 53 about the new definition of "aggrieved persons". I have been informed that there has been a recent case in the Supreme Court where the definition of that has been clarified to a certain extent. That was the case of *R v Fernando*, an application by Gillette on the 9th July 1980 before Mr Justice Ash, and he held that where the applicant for compensation was not the immediate victim of the crime, the immediate victim's actions would not be taken into account when assessing the compensation that would be payable to the applicant.

I have also been informed that since I wrote the paper the amount of compensation that has been paid in New South Wales since the commencement of the scheme has just exceeded \$2,000,000 and that the estimate for 1980/1981 will be \$1,500,000. That indicates that the government is spending a lot more money on victim compensation. The reasons for the increase in that period will be the increase to \$10,000 from \$4,000; the inclusion of some relatives within the definition of "aggrieved persons" and the increased publicity that is now being given to the scheme.

When the *Criminal Injuries Compensation Act* was passed in 1967 and commenced in 1968 it was an acknowledgement by the government that it had an obligation to the victims of crime to compensate them for the injuries that they suffered. That obligation has been endorsed ever since by successive governments by the fact that the Act is still there, and that they are gradually increasing the amount of compensation.

However, the scheme is fairly restricted in a number of ways and those restrictions help to limit and, in some cases, to deny compensation to certain victims. In my paper I have itemised a number of matters where limits and restrictions have denied people compensation and have pointed out areas where I think changes are needed.

The first one is that the *Crimes Act* distinguishes between summary offences and indictable offences so that depending on whether your case is dealt with on indictment or whether it is dealt with summarily the amount of compensation will vary from \$10,000 to \$1,000. That is a matter of dispute at the moment. Some magistrates think that they are entitled to award \$10,000 in summary matters or in indictable matters that are being dealt with before them summarily, and some judges think that they are not able to do that. The question had not been clarified and still requires clarification.

The imposition of the \$10,000 limit, which was referred to by Mr Justice Kirby, is a problem. As he said in his comments there are only a very small percentage of people where the amount of injury would exceed that amount. The compensation scheme in Great Britain has been operating since 1964 without any limit on the amount of compensation and I think that it is time that in New South Wales that we had a good look at it to decide whether or not there could be some removal of the arbitrary limit. As far as I am aware there has been no survey carried out in New South Wales of the number of victims who might be entitled to claim more than the \$10,000. No consideration has been given to the cost of how much such a scheme would be, no consideration has been given to possible funding. We could consider appropriating fines towards the cost of the scheme, or increasing the amount of the fines, and there are also possibilities of restricting the types of payment. In England I think the amount payable for lost earnings, or lost earning capacity, is restricted to something like twice the average weekly earnings. That is one way in which the scheme, if a maximum limit was removed, could be restricted so that costs do not get out of hand.

The third matter was the restriction on the payment for injury only. As Mr Justice Kirby mentioned there is no plan in his scheme to compensate people for losses other than personal injury, and that effectively excludes something like 90% of the victims of crime. Whilst it is a problem, and he did refer to all the ramifications of trying to compensate people in that way, I think that is another area where consideration could be given to compensating victims.

The basing of the compensation scheme on the criminal justice system is also a hindrance to people applying for and obtaining monetary compensation. The making of the application to a court has to wait until after the offender has been convicted which may take anything up to a couple of years if he lodges appeals. By the time you get the money the need for it has probably long since passed. I think that if the tribunal system were set up, as it has been in England and in Victoria, people could receive the benefits of the monetary compensation a lot earlier. Admittedly, there are cases where it is desirable to delay payment of compensation until the full extent of injuries are known but in those cases the tribunal would still be in a position to defer the making of any order for compensation.

There is still considerable confusion under the New South Wales Act as to who is exactly entitled to compensation. In *McCafferty's* case it was held that only the immediate victim would be entitled to compensation. An attempt was made in 1979 to define an "aggrieved person" in s.437 of the *Crimes Act* to try and get around the problems of *McCafferty's* case so that people who were not the immediate victims, people like the relatives of the victim or innocent bystanders who suffered mental or nervous shock at the time of the offence, could make an application. The definition of an "aggrieved person" has now included relatives of the victim who is deceased. It does not include the relatives of the victim who is only badly injured and it does not include innocent bystanders who may suffer some sort of mental or nervous shock. So that the effect of *McCafferty's* case is still with us except in one particular area.

The Act still requires the courts to consider the behaviour of the victim and also the relationship of the victim to the offender when it makes a decision

to award compensation. I have said in my paper (page 57) that I do not think that either of these matters are relevant to the determination of whether or not compensation should be awarded — in particular the relationship of the victim. The only reason that that has been used as a basis to exclude people from compensation is that claims may be easily fabricated, or the money that is paid to the victim may get to the offender. That is a matter that is really only an administrative problem that should be able to be overcome. The behaviour of the victim I think is tied a little bit to what Mr Whitrod was saying about victim impact statements. The victim of a crime who has been responsible for the instigation of the offence that resulted in the crime, say, someone who provokes an assault, whilst he may be guilty of provoking the assault he has no idea or certainly does not intend what the consequences may be. For example, if you have a bar room brawl where someone ends up being maimed for life should we then say to that person as he is sitting there in a wheelchair in front of us "Well, you are not going to get any compensation because you started the fight". I think that is a fairly callous attitude and some consideration should be given to removing any need to consider the behaviour of the victim.

A further matter that has affected the amount of compensation in a number of applications for compensation under the scheme has been a lack of publicity. The scheme has been going now for twelve years and only this year has the Department issued any publicity to inform people who are victims of crime of their entitlements. Those pamphlets have been distributed to police stations throughout New South Wales, and the police are handing them out to people who are victims of crime. That is a start but perhaps more should be done. The onus is still on the victim to fill in the forms and to pay for representation to get the case before the court. All that is a hindrance to people who are not conversant with the legal system and who do not have the necessary funds to make the applications, and does have an adverse effect on people who are genuinely entitled to compensation.

A further matter that was brought to notice in a case last week before Mr Justice Cantor in the Supreme Court was the problem of how much to award two aggrieved persons of the one offence. In a case involving the parents of a girl who was murdered and burnt the judge awarded \$10,000 to each parent. It appears from a reading of s.437 that the aggregate amount that can be awarded against an offender for the commission of one offence is \$10,000, so that in that case it may be that only \$10,000 could have been awarded against the offender. The judge was clearly of the view that the amount that he would have awarded if it had been a civil injuries case would have been much more than \$10,000 for each parent. However, he felt he was restricted to \$10,000 for each parent. I think that is a clear example of a further restriction in the Act which denies compensation to people who are genuine victims of crime. As Mr Whitrod pointed out it is not just the immediate victim who is entitled to compensation, it is the people who are around the victim who suffer as well.

In my paper I commented on the use of recognizances with conditions attached for the payment of compensation. I have had some further thoughts about that idea and the problem that arises is the need to distinguish between the criminal penalty for the offence and the awarding of civil damages for the offence. It is important to keep the two apart: a penalty to be imposed for the

criminal offence and the order for compensation. In some cases if you order someone to enter into a deferred sentence recognizance to be of good behaviour and make it a condition that that person pay compensation, then that person, if he has means, will pay the compensation and avoid the possibility of being in breach of the recognizance and brought back before the court for sentence. If he cannot pay the compensation then he will be in breach of the bond, he will be brought back before the court and possibly subjected to a gaol sentence.

The problem of using the criminal justice system as a means of ordering and enforcing the payment of civil compensation is fraught with difficulties. This problem arose to a certain extent in the recent case in the Supreme Court of *R v Brian Francis White* on the 29th May. An accused person had been ordered to pay something like \$7,000 compensation to the owners of three cars, one of which he was convicted of stealing and two of receiving, and the court in that case said and I will quote:

There was no perceivable source from which the appellant might hope to meet the very substantial amount of compensation. The imposition of this requirement could operate only to fetter whatever prospects there might be in this appellant realising the error of his ways and deciding to lead a law abiding life in the future.

The orders for compensation were quashed. So it is important that when courts are making orders for compensation they bear in mind the means of the appellant to pay and the effect that non-payment will have.

I would suggest that if compensation orders are to be made the court would be aware that the offender has, or is likely to have in the near future, the means of paying the compensation. If he does not have the means to pay the compensation, then it is clear that any order for compensation is only going to be an additional punishment on him if he is then pursued for the compensation or, as an alternative, if he is imprisoned for not paying the compensation. It would mean in effect that the poor offender who cannot pay compensation would be imprisoned; the offender who can pay the compensation would be imprisoned; the offender who can pay the compensation will not be imprisoned.

Apart from the provisions of the *Criminal Injuries Compensation Act* which provide for the payment of monetary compensation there appears to be little other that the government has done to aid victims of crime. As Mr Whitrod pointed out there is more than just monetary compensation needed. In the United States where a number of victims services have been established they provide the types of services as the following:

- Twenty four hour answering service
- Emergency food, clothing, shelter and transport
- Referral services, Counselling
- Crime prevention education
- Limited compensation
- Arrangement of legal services
- Arrange for the extension of credit

Arrange for the victim's job to be held
Child care, home care, grocery shopping
Funeral arrangements
Relocation of the victim and the family
Assistance in preparing insurance and compensation claims
Replacement of essential items such as glasses and walking sticks
The protection of victims from adverse publicity and media sensation,
and
Witness escorts to court and explanations of court procedure

They are just some of the things that victims require in an emergency situation which are not provided for in any sort of organised way in this State, and as Mr Whitrod said that is now being done in Victoria and in South Australia but there is an urgent need for that to be done in this State. Now is the appropriate time to do something about it.

When the New York scheme was set up a Victim Services Agency was established in 1978 its aims were: to minimise the inconvenience, costs and trauma associated with being a victim of crime by providing services to crime victims, coordinating existing victim programmes, identifying additional victim needs, developing and administering programmes to meet those needs, and conducting research into the problems of victims and funding of the scheme.

I think the idea of a Victim Services Agency in New South Wales anyway would be to establish a coordinating unit to coordinate the services that are available, to identify the areas where more services are needed and to take action to implement programmes to cope with those needs. I do not think it is feasible to establish an overall government bureaucracy to take control of all the needs of victims. I think that is quite undesirable and would be most expensive and probably would not work.

The problem with criminal injury compensation or aid to victims is that it has always been a political issue and it has taken usually a dramatic incident for the government to get something done. In Adelaide it was the plight of the parents of the Truro victims; in one State in America the government of that State did nothing until a victims rally was held on the steps of the parliament. I hope that this seminar will be the instigation for the government in this State to set up a Committee of Inquiry similar to that in South Australia so that New South Wales will be the leader in Australia in providing services and help to victims of crime.

**CRIMINAL INJURIES COMPENSATION:
THE URGENT NEED FOR REFORM**

Glenn Bartley B.A., LL.B.
Barrister-at-Law

Victims of crime in New South Wales presently are suffering from not only injuries caused by crime, but also:

- A lack of adequate and efficient remedies for obtaining compensation; and
- Inadequate awareness of the need for proper presentation of their cases to the courts from which awards of compensation are sought.

This paper supplements those prepared by The Honourable Mr Justice M D Kirby, Ray Whitrod and Paul V Johnson.

1. Injustice to Victims of "Summary" Offences

Law

Traditionally, magistrates were of the view that they could give directions for compensation only under s.554 of the *Crimes Act* 1900. However, on 26th May, 1978 Carmichael J brought down his landmark judgment in *Smith v Eadon*¹. His Honour held that a magistrate had jurisdiction to give a direction for compensation under s.437.

Thereafter, many more victims of crime were able to obtain adequate compensation. For example, the applicant in *Glanville v Stevenson* (Burwood Court of Petty Sessions, 7th August 1979)² suffered from marked restriction and pain in the neck movement of indefinite duration, equally due to the offence and an earlier motor vehicle accident, and also a severe anxiety neurosis which was expected to dissipate over the course of two years subsequent to the offence. Stackpool S.M. awarded \$7000 compensation, comprising \$5000 for the cervical injury and \$2000 for the anxiety neurosis. The applicant would have been awarded a maximum of \$1000 were it not for *Smith v Eadon*.

However, the applicant in *Smith v Eadon* sustained injury by reason of an indictable offence dealt with summarily in accordance with s.476. Magistrates disagree as to whether *Smith v Eadon* authorises a direction for compensation under s.437 where the relevant offence is a summary one provided for in the *Crimes Act* (see s.10, 493, 494, 546C).

The most marked manifestation of this controversy occurred on successive days in the Court of Petty Sessions, 302 Castlereagh Street, Sydney, NSW. In *Clifton v Martin* (20th November 1979) Webb S.M. held that he had

1. *Petty Sessions Review*, Vol. 4, p.1807.
2. *Petty Sessions Review*, Vol. 4, p.1988.

no jurisdiction to hear an application under s.437 where the offence giving to the application is one under s.494. In *Flemming v White* (21st Novem 1979) Briese C.S.M. awarded \$10,000 for injury sustained by reason of offence under s.494. The Chief Stipendiary Magistrate said:

... and it is my view that, if one accepts the reasoning of Carmichael, be correct and I am bound by his decision, by extension it is artificial; incongruous to conclude that because the assault charge was laid under s.494 rather than s.61 a magistrate cannot then go to 437(1) whereas if the charge been laid under s.61 he can...I presume that there consternation in some quarters that the decision of Carmichael J in effect gives power to magistrates to deal with injury cases involving amounts to \$10,000. My decision if correct can only add to that consternation. However, until some contrary ruling is given by the Supreme Court I propose to apply the interpretation I have outlined.³

Moreover, some District Court judges hearing appeals *de novo* in accordance with the *Justices Act* 1902, s.122 have also been giving directions under s.437 in respect of summary offences provided for in the *Crimes Act* (for example, *Feltis v Kenney*, Lincoln D.C.J., Penrith District Court, 30th Mar 1979). But in *Appeal of Leon Tennenbaum* (Sydney, 4th October 1979), which was considered by both Webb S.M. and Briese C.S.M., Thorley D.C.J. said:

I do not regard myself as bound by *Smith v Eadon*, but even if I were I would not regard that as deciding anything more than what might otherwise obtain when the Stipendiary Magistrate did in fact derive jurisdiction from the provisions of s.476.

It is true, perhaps, that His Honour's remarks can be read as ranging more widely than that. Indeed, I guess it was based upon that *obiter* comment that the Stipendiary Magistrate in this case felt enabled to make the orders which he did.

However, for my part, I would like to record my vigorous dissent from anything that fell from His Honour in that judgment.⁴

Policy

Thus, in the absence of an authoritative determination of the question of whether a court of petty sessions has jurisdiction under s.437 in respect of a summary offence provided for in the *Crimes Act*, the inferior courts remain in conflict.

In response to the abovementioned decisions the Commissioner of Police has directed police officers in New South Wales as follows:

... it is directed that in any case of assault, either on a member of the Police Force or other person, the nature and extent of the injuries of the victim be ascertained. This is necessary not only to see that the appropriate charge is preferred, but also to give due consideration to the possibility of adequate compensation in the event of a conviction.

3. Transcript of Judgment, p.4.

4. Transcript of Judgment, pp.2-3.

In any case where the injury is sufficient to cause a police officer or other person to visit a medical practitioner for treatment, as distinct from examination, "actual bodily harm" must have been inflicted and a charge under s.59 of the *Crimes Act* 1900 would be appropriate. Under certain circumstances, an assault which does not cause actual bodily harm may justify the preferment of either a charge under s.61 or sections 493 or 494.⁵

At the time of charging offenders, the nature, extent, and likelihood of deterioration, of their victims' injuries often are not fully apparent even to hospital staff and general practitioners, let alone arresting constables and station sergeants. If the offender pleads guilty, such cases often are disposed of quickly and before appropriate specialist medical assessment can be carried out and advice obtained. It is often not until after conviction that a victim of crime consults a solicitor and instructs him to seek compensation.

Even where the charge is defended and the hearing is delayed by several months, the nature and extent of the victim's injuries still may not be known at the time when the charge is heard. In one case, for example, an offender who very forcefully struck an applicant in the leg was convicted eight months later of an offence under s.494. The applicant alleges that she was examined at a hospital on the evening of the assault and, because of continuing pain in her leg, by a further three doctors until, twenty months after the offence, a fourth doctor correctly diagnosed her injury — an osteogenic sarcoma of the bone — whereupon her leg was amputated above the knee. The medical advice is that the development of the tumour was probably caused or precipitated by the assault. Having regard to the effects of the injury and to diminished prospects of promotion, general damages at common law may be approximately \$70,000. Yet the offender was charged with and convicted of a summary offence.

Further, a magistrate hearing a charge of assault in which the information alleges an indictable offence may proceed to hear the matter and convict the defendant of a summary offence: *R v Mitchell* (Court of Criminal Appeal, 2nd July 1971)⁶. Whether to do so is solely the magistrate's responsibility; he may disregard the wishes of the informant, defendant and victim. Where, as is usual, the victim is not the informant, he cannot even make a submission as to the section under which the offender should be convicted.

It is unrealistic to reply that victims of crime can, in the alternative, sue for damages at common law because "in most cases where directions for compensation or loss are being sought the aggrieved person's only real chance of obtaining money is under the provisions of the *Criminal Injuries Compensation Act*. Most persons convicted would not normally be worth suing civilly for damages." Begg J, *R v McDonald*.⁷

The law has been for some time, and is still, uncertain as to the maximum compensation that can be awarded to victims of crime by courts of petty sessions. Inferior courts have differing opinions, applicants do not know their

5. Circular No.80/90, Police Department, Commissioner's Office, 11 April 1980.

6. *Petty Sessions Review*, Vol. 2, p.705.

7. [1979] 1 NSWLR 451 at 468-9.

rights and respondents do not know their liabilities. This uncertainty is reflecting unfavourably on the law and the legal system. It would appear that when the Crimes (Compensation) Amendment Bill and Criminal Injuries Compensation (Amendment) Bill of 1979 were being considered by State Parliament, all speakers to the Bills believed that victims of crime whose injuries warrant compensation of \$10,000 or less would in fact be awarded an amount of compensation commensurate with their injuries, and that victims whose injuries warrant more than \$10,000 compensation would be awarded \$10,000. No speaker appeared to be aware of or envisage the legislative ambiguities and inadequacies referred to above.⁸ It is submitted that the narrowing or overruling of *Smith v Eadon* would have consequences which apparently were not desired by either the Legislature or the Government.

It is further submitted that the maximum compensation that can be awarded to a victim of crime should not depend on the categorisation of the relevant offence or on the forum in which the offender is tried. Injustice is being done to victims of crime who are barred from having recourse to s.437. There is urgent need for legislative intervention.

2. Jurisdiction of Children's Courts

By virtue of the *Child Welfare Act* 1939, s.4 (definition of "young person") and s.83 (4B) and (4C) a victim of crime cannot be awarded any compensation where the offender was aged under sixteen years at the time of the offence. If the offender was aged 16 or 17 years at the time of the offence then the victim may be awarded a maximum of only \$1000, even if the offence was an indictable one. If the offence is admitted or the charge is proved but the court, pursuant to s.83(3), does not proceed to a finding of guilt then no compensation at all can be awarded.

It can be seen that the provisions of the *Child Welfare Act* also can cause injustice to victims of crime. One particular applicant to a children's court last year had sustained permanent post-traumatic organic brain syndrome by reason of the indictable offence of which a young person had been convicted. Having regard to the effects of the injury and diminished prospects of promotion, general damages at common law may have been in the order of \$30,000. Yet the court was able to and did award only \$1,000 for what it described as a "particularly serious and vicious assault".

3. Indirect Victims of Crime

As is indicated by Mr Johnson in his paper, the restrictive spirit of *McCafferty's Case* lives on.

Compensation may be denied not only to a bystander who sustains nervous shock but also to persons who sustain "physical" injury during the commission of the offence, while the offender is fleeing the scene of the crime or while they are effecting or assisting arrest.

8. *N.S.W. Hansard*, 17th April, 1979, pp.4348-4362; 19th April, 1979, pp.4609-4617.

A common judicial view in New South Wales is that compensation can be awarded under s.437(1) for injury or loss sustained through or by reason of "such felony or misdemeanour" (emphasis added) and that "such" refers to earlier words in the subsection, namely, "where a person is convicted of any felony or misdemeanour". According to this view, injury or loss is compensable only if it was sustained through or by reason of the particular felony or misdemeanour of which the offender was convicted (and which usually is expressed in the information or indictment as an offence against a named person). If the actions of the offender out of which the injury or loss arose do not constitute an element of the particular offence of which the offender was convicted, then the court does not have jurisdiction under s.437 in respect of such injury or loss. Such actions of the offender may constitute a separate and independent offence (perhaps assault or resist arrest) in respect of which the offender must have been charged and convicted before any consequential injury or loss can be the subject of a direction for compensation under s.437.

For a contrary view based on the phrase "any aggrieved person" (emphasis added) in s.437 and also referring to *Hansard*, see the paper of The Honourable Simon Isaacs, Q.C., "The Criminal Injuries Compensation Act 1967 As Amended and Its Associated Problems", *Proceedings*, Institute of Criminology 1975, No 25.⁹

Is it just that an indirect victim of crime may not be able to obtain compensation because the offender was not charged with an offence against such victim? Should an offender be charged in respect of all the injury and loss which is sustained by reason of his unlawful activities? It is submitted that a court's attention should be directed towards the principal offence(s), and that it is undesirable for the administration of justice that there be a multiplicity of counts against the offender(s) in respect of the injury and loss sustained by each person involved in an offender's apprehension and in respect of the injury and loss sustained during the commission of or in connection with a principal offence. Otherwise, issues in trials would tend to become confused, trials would become longer, and delays would increase.

The Legislature should consider expanding the class of "aggrieved persons" who may be given a direction for compensation.

4. Applications under *Criminal Injuries Compensation Act*, 1967, Section 3

Mr Johnson makes reference in his paper to providing for restitution to the victim by ordering an offender to pay compensation as a condition of a recognizance. It is submitted that such condition would not be a direction under s.437 or 554(3) of the *Crimes Act* and therefore would not enable a victim of crime to apply under the *Criminal Injuries Compensation Act*, s.3, to the Under Secretary of Justice for payment from the Consolidated Revenue Fund. It is submitted that payment of compensation should not be made a condition of a recognizance unless the court is satisfied that the offender clearly has

9. p.51 at pp.61-63. See also *In Re Gollan* [1979] 21 SASR 79 at 83.

adequate means to pay all of the compensation within a few months of the condition being imposed.

5. Jurisdiction under *Criminal Injuries Compensation Act*, Section 4

A jury may acquit the accused because it has a reasonable doubt as to his guilt. It is submitted that the purpose of s.4 of the *Criminal Injuries Compensation Act* is to prevent a victim of crime being without a remedy where an accused person is acquitted because the Crown was not able to meet the high standard of proof in a criminal case.

In particular, it is submitted that s.4 is applicable in a case where the alternatives are that either it was the accused who assaulted the aggrieved person or no one did. In an application under s.4, the judge may determine whether to grant a certificate (s.4, *Criminal Injuries Compensation Act*; s.437(3), *Crimes Act*) and whether compensation should be reduced (*R v McDonald*¹⁰) by reason of any conduct of the applicant. This approach was adopted in the application of *Fuller* (Parramatta District Court 2nd April 1980) by Collins D.C.J. and in the application of *Kovac* (Sydney, 15th August 1980) by Barbour D.C.J., both of whom held that there was no contributing conduct by the applicant. However, it was also suggested this year by another District Court judge to an applicant's counsel that, in the event of an acquittal, a certificate could be granted under s.4 only where it is possible that it was a person other than the accused who committed the alleged offence against the aggrieved person. Whilst s.4 was amended by the *Criminal Injuries Compensation (Amendment) Act* 1979, it appears that further amendment would be appropriate to enable a certificate to be granted to all victims whose conduct did not contribute to the alleged offence.

Section 4 should also be amended to provide for the granting of certificates in respect of loss as, in contrast with s.437 of the *Crimes Act*, s.4 presently provides a remedy only in respect of injury. As Mr Johnson has indicated in his paper, the impact of economic loss on a victim can be more severe than that of his injury.

6. The Right of Appeal

A victim of crime has none.

In *Grzybowicz v Smiljanic & Anor* (unreported, 27th June 1980), the Court of Appeal held that a District Court judge was in error in holding that the *Limitation Act* 1969 applied to the exercise of the power to give a direction under s.437 of the *Crimes Act*. However, the summons for mandamus by the victim of the crime was dismissed as he had no remedy whether by way of prerogative relief or otherwise. Hutley J.A., said:

Though I agree with the judgment of my brother, Reynolds J.A., I consider that the situation there disclosed is thoroughly unsatisfactory and its unsatisfactory character should be drawn to the attention of the authorities.

10. [1979] 1 NSWLR 451 at 460-1, 468, 473.

The applicant has had his application rejected for unsupportable reasons and he has no remedy. Though there may be many good reasons for rejecting his application, the situation under which it is extremely difficult for any person to advise him of the course, if any, he can take to obtain a proper consideration of his claim based as it is on legislation designed to give a direct and simple remedy to a victim of crime merits the early attention of the authorities.¹¹

His Honour observed that "the only appeal which it appears can be brought is by the Attorney-General in exercise of the special power given to him under s.5D of the *Criminal Appeal Act*, to appeal against sentence: *R v Forsythe* [1972] 2 NSWLR 951; *R v McDonald* [1979] 1 NSWLR 451."¹²

In *R v McDonald*, Street C.J. said that it is not proper for the Attorney-General to withhold his nominal participation in the bringing of an appeal against the inadequacy of compensation directed to be paid under s.437.¹³

It is submitted that the legislation should be amended to give victims of crime a right of appeal against error of law and inadequate quantum. Victims have no other viable remedy as most offenders are impecunious and it is futile to sue them civilly. Under s.5 of the *Criminal Appeal Act* 1912 an offender may appeal against a direction for compensation — why should not his victim have equal rights?

Further inequality occurs by virtue of s.122 of the *Justices Act* — an offender but not a victim may have a compensation application to a court of petty sessions reheard in the District Court. Perhaps this latter, relatively inexpensive, avenue of "appeal" should also be made available to victims of crime. Certainly some adequate and unequivocal right of appeal from a decision of a court of petty sessions in relation to an application for criminal injuries compensation should be given to victims of crime. (*Quaere* whether an application for criminal injuries compensation is an "information or complaint" so as to enable an "appeal" by way of stated case in accordance with s.101-8 of the *Justices Act*. And has the Court of Appeal's decision in *Grzybowicz* in relation to "exercise of jurisdiction" reduced the availability to applicants for criminal injuries compensation of "statutory mandamus" pursuant to s.134 of the *Justices Act*?).

7. *Ex Gratia* Applications

Payments under the *Ex Gratia* Scheme may in some circumstances redress or reduce the unjust consequences to victims of crime of legislative deficiencies or restrictive judicial interpretations. However, it has been the writer's observation that victims of crime generally prefer to make their application to a court rather than a government department.

11. Judgment of Hutley, J.A., p.1.

12. *Ibid.*, p.3.

13. [1979] 1 NSWLR 451 at 458.

One aspect of the relevant procedure has been described as follows by the former Under Secretary of Justice, L.K. Downs¹⁴:

The biggest problem in dealing with *ex gratia* claims is to arrive at a reasonable amount for pain and suffering Then a conference is held of senior officers to determine what is regarded as a proper amount to be added to the out-of-pocket expenses, for pain and suffering.

Who are these departmental officers? What experience have they had with common law assessments? How does their expertise in this regard compare with that of the courts? Do they correctly recognise what are legally relevant considerations in a common law assessment and what are not? Do they base their determinations solely on evidence which would be admissible in a common law assessment (or admissible in accordance with section 437(3) or *R v McDonald*¹⁵)?

It is submitted that victims of crime and the community should be entitled to see that justice is being done, and that determinations of quantum should be made not anonymously but in open court wherever possible. As is discussed in 8 below, there can and do arise complex questions in which the full facts of a victim's application, or the full significance thereof, may not emerge or be appreciated by the relevant tribunal unless the victim of crime is legally represented before such tribunal. The Statutory Scheme should be expanded to reduce the need to resort to the *Ex Gratia* Scheme.

8. Conduct of a Criminal Injuries Compensation Application

In *Grzybowicz v Smiljanic & Anor*, Hutley J.A., but not the other two members of the Court, held that a victim of crime has no right to make an application for compensation and no right of audience either personally or by a barrister or solicitor. His Honour held, *inter alia*, that:

Any application for a direction can only be made by the Crown. It may be possible for a court to permit representation of a person aggrieved by a solicitor or counsel appearing as *amicus curiae* but this would, in each case, depend upon the attitude of the court. What can be done by a person appearing as *amicus curiae* is very limited (see *Corporate Affairs Commission v Bradley* [1974] 1 NSWLR 391 at 398-9) . . .

If, however, it is the intention of the legislature to confer private rights it should regularise the present practice by statute providing by whom such an application can be brought and for regular appeals. As the sum which may be awarded under s.437 is now increased to \$10,000, the rights, if they are to be private rights, are sufficiently substantial as to justify there being some right of appeal.¹⁶

14. L.K. Downs, "Compensation for Victims of Crime as Applicable to N.S.W.", *Syd. Inst. Crim. Proc.*, 1975 No. 25, 3 at 19.

15. [1979] 1 NSWLR 451 at 460-1, 468, 473.

16. Judgment of Hutley, J.A., p.4.

Hutley, J.A., disagreed with the express contrary ruling as to the law made by Street, C.J., in *R v McDonald*¹⁷. It is submitted that, were the abovementioned ruling of Hutley, J.A., to become the *ratio decidendi* of a decision of a superior court, the consequences for victims of crime would be disastrous.

At the 1975 seminar of the Institute of Criminology on the subject of compensation for victims of crime, The Honourable Mr Justice D A Yeldham said¹⁸:

So far as the judge who presided at the trial is concerned, it is clear that very little of the evidence at such trial will have any bearing upon the amount of compensation which he should award. Only rarely is the full extent of the injuries of the victim relevant, and in most cases it is highly prejudicial.

The Honourable Simon Isaacs Q.C. further observed that:

Evidence of injury is only dealt with in a relatively cursory way at committal proceedings and economic loss and other expenditure not at all. Only so much (evidence) of injury is adduced to satisfy the statutory requirement of the nature of the particular injury and at the trial the Crown Prosecutor is content, as a matter of fairness to the accused, to deal with injury generally in bald outline but sufficient to enable the jury to understand, for example, whether "grievous bodily harm" has been sustained.¹⁹

It has been the writer's experience that most applications for criminal injuries compensation require substantial additional evidence to that adduced at the trial. The applicant must have a conference with his legal representative who advises as to whether and what specialist medical assessment is required (usually it is). Any questions of alternative or multiple causation need to be identified and evidence and expert opinion obtained in relation thereto. An existing prognosis may need updating. Witnesses of how an applicant's condition has deteriorated after the offence may need to be interviewed and called. Evidence of any future economic loss must be obtained. Little, if any, of such evidence is available to a Crown Prosecutor, his instructing officer or the detective who has carriage of the prosecution. The additional evidence which is obtained and prepared by an applicant's solicitor can increase the compensation awarded by thousands of dollars above what otherwise would have been awarded.

During the hearing the victim needs a legal representative to argue any points of law arising in his application and to endeavour to satisfy the court on the balance of probabilities. Finding in favour of an applicant on an issue

17. [1979] 1 NSWLR 451 at 455-7.

18. The Honourable Mr Justice D.A. Yeldham, Commentary on paper by The Honourable Simon Isaacs, Q.C., "The Criminal Injuries Compensation Act 1967 As Amended and its Associated Problems", *Proceedings*, Institute of Criminology, 1975 No.25, 72 at 78.

19. Isaacs, Q.C., *ibid.*, at 68.

cannot result from a mere mechanical comparison of probabilities independent of any belief in its reality, but rather the court must feel an actual persuasion based on the preponderance of evidence: *Briginshaw v Briginshaw*²⁰. The victim's advocate must endeavour to take the evidence beyond a mere "*post hoc ergo propter hoc*" situation. Further, the extent of a physical disability flowing from broken limbs may be in issue. Or the respondent/offender may allege that the applicant has failed to mitigate his damage, or that the applicant is not suffering from a functional overlay but is merely malingering.

Criminal injuries compensation applications ought not to be regarded as a rushed ten-minute addendum to criminal proceedings requiring little time or attention by the legal practitioner who has carriage of an application. To obtain proper compensation a victim of crime needs to have his application conducted with considerable care and attention at all stages. Were Crown Prosecutors and their instructing officers or other Crown lawyers to provide these services in place of victims' own solicitors and counsel, a substantial increase in the number of, and facilities for, such personnel would be required. However, having regard to the role of the Crown in criminal injuries compensation applications laid down by the Court of Criminal Appeal in *R v McDonald*²¹, it is submitted that there would be a clear conflict of interest.

It is submitted that the legislation should be amended to give the victim an express right to apply for a direction for compensation and to appear by his solicitor or counsel.

9. A Tribunal?

Whilst there have been some outstanding exceptions, judicial performance in the interpretation of criminal injuries compensation legislation generally has been disappointing. Being remedial legislation, it should be construed liberally rather than restrictively so as to "give the most complete remedy which the phraseology will permit": *Gover's case*²²; *Bull v Attorney-General for New South Wales*²³; *Holmes & Anor v Permanent Trustee Company of N.S.W. Ltd. & Ors*²⁴; *Wilson v Moss*²⁵; *Wythe v Crimes Compensation Tribunal*²⁶. However, the legislation itself is hardly conducive to the provision of efficient and adequate remedies for victims of crime.

Perhaps the present system is so intrinsically deficient that a single tribunal should be established to hear and determine all applications for criminal injuries compensation. It is submitted that any such tribunal should have the following features:

- A. The amounts of compensation obtainable by victims of crime should be equivalent to the amounts of damages which would be awarded at

20. (1938) 60 CLR 335, 360-2.

21. [1979] 1 NSWLR 451 at 457, *per Street, C.J.*

22. (1875) 1 Ch.D.182, at 198.

23. (1913) 17 CLR 370 at 384.

24. (1932) 47 CLR 113 at 119.

25. (1909) 8 CLR 146 at 165.

26. [1980] V.R. 33 at 38.

common law for equivalent injuries. Awards of damages at the common law level are what the community, through the courts, has developed as a fair measure of compensation. There should not be a reduced scale such as that provided for in s.16 of the *Workers Compensation Act 1926* whereunder amounts of compensation obtainable are generally substantially less than the amounts of common law damages that would be awarded for equivalent injuries.

- B. A victim should have a right of appeal to a court against an error of law or the inadequacy of an amount of compensation.
- C. As proposed by Mr Justice Yeldham at the 1975 seminar²⁷, an applicant should have legal representation and legal aid.
- D. There should be provision for affidavit evidence with a right of cross-examination.

27. Yeldham, J., *op.cit.* at 79.

PRESENTATION OF PAPER

Glenn Bartley

Mr Justice Kirby and Paul Johnson have referred to the long wait that victims of crime have between the commission of the crime and the completion of the trial before they can obtain a direction for compensation. Unfortunately the matter does not end there — there is then further delay. Usually offenders have insufficient money and if courts gave directions according to the means of offenders to pay, not many victims would be getting any compensation at all. After a court gives a direction for compensation it usually is necessary to apply under s.3 of the *Criminal Injuries Compensation Act* to the Under Secretary of Justice for payment of the compensation from the Consolidated Revenue Fund. At my request a firm of Sydney solicitors recently examined its files in respect of its last twenty-four s.3 applications. Nineteen of those twenty-four applications were made before the 17th May 1979 when certain amendments to the *Criminal Injuries Compensation Act* took effect. The average period of time between making a s.3 application and receiving the money on behalf of the victim was, according to my calculations, 6.1 months. Since 17th May 1979 that firm of solicitors has made five s.3 applications in which compensation has been received, and the average time between making an application and receiving the money from the Consolidated Revenue Fund was *seven months*. That firm also has made a total of eleven s.3 applications since the 1979 amendments took effect and the average time between the date of an award and the date of forwarding the s.3 application was, according to my calculations, one month exactly. Thus there is still a substantial period of time, one month to get an application off and then a further seven months while the Department goes through its procedures, before compensation arrives after the direction by the court.

In my paper I have not particularised some of the cases that I have referred to because such cases are still on foot in one form or another, mainly in the form of an *ex gratia* application. I would like to elaborate further on the first section of my paper which deals with the problems experienced by some victims of summary offences. I mentioned that the decision in *Smith v Eadon* opened the way for courts of petty sessions to give directions for compensation under s.437, and I referred to the case of *Glanville v Stevenson* where \$7,000 was awarded under s.437, although were it not for *Smith v Eadon* only \$1,000 would have been awarded. Unfortunately, the law is unclear as to whether the maximum compensation is \$10,000 or \$1,000 where the offence giving rise to the injury is a summary offence provided for in the *Crimes Act*. There is no unambiguous authoritative decision on this point. The decisions of inferior courts are in conflict, and at present whether a victim receives \$1,000 or up to \$10,000 depends on who is on the Bench — the luck of the draw.

I submit that there is urgent need for Parliament to intervene and to intervene in favour of victims, because notwithstanding the helpful instructions to police officers issued by the Commissioner of Police in April 1980, there can be no necessary correlation between the seriousness of an injury and the legal categorisation of the offence or the forum in which the offender is tried. The full extent of a victim's injuries, or the injuries themselves, may not be apparent until after the offender has been charged and convicted. Injuries

can have complications and develop adversely. Doctors, I understand, refer to such complications as immediate, intermediate and late sequelae. The latter two can take weeks or months to manifest themselves. Quite often it takes some further months to obtain an accurate diagnosis from an appropriate specialist once the victim has consulted a solicitor.

Injuries which may develop slowly or remain undiagnosed for a long time include chronic subdural haematomata and permanent partial restrictions in movement of limbs, joints and necks due to the time-dependent phenomenon of fibrosis which is not revealed by an X-ray. Another time-dependent phenomenon is cerebral atrophy which often can be diagnosed only after an electroencephalogram and tomograms by an appropriate specialist. There are also various kinds of post-traumatic organic brain syndromes which have no accompanying physical neurological damage. Sometimes such brain damage can be diagnosed only after psychometric testing by a clinical psychologist and examination by a psychiatrist. Furthermore, an assault may aggravate pre-existing spondylosis or predispose the injured part of the body to early osteoporotic or osteoarthritic changes, but such aggravation or predisposition may not be detected prior to conviction.

Partially torn ligaments seem to be an injury which often does not come to light until after conviction, probably because it does not show up in an X-ray; yet an injury of this kind can cause prolonged disability. Until July this year I had firm faith that hospital casualty staff and arresting constables do, at least, appraise themselves of the fact that a bone has been broken. But then I had a case where a doctor in a hospital casualty section treated a victim on the day of the assault and, having examined the X-rays, later told the court that there was no fracture. Yet the victim's ear, nose and throat specialist had diagnosed an "obvious clinical fracture of the nasal pyramid". So it seems that even victims with broken bones are not safe from mistakes in this area. I regret that the time available this evening does not enable me to go into the ramifications of all these kinds of injuries.

On the night of an assault a victim might have sustained blows to his head or limbs which eventually may have serious effects. However, on examination in the hospital casualty ward, there may be no loss of consciousness, no amnesic period and nothing apparently abnormal neurologically or otherwise. A C.A.T. scan may not be done because it costs approximately \$200. I understand that a C.A.T. scan rarely is given to a victim of assault on the night of the assault. Having initially been seen for fifteen minutes by the casualty officer, the victim might be observed for the usual four hours and then be discharged. The police would be told that the injury is minor. They usually do not follow up afterwards to see whether there have been any complications. The reporting officer may not interview the relevant casualty doctor at all if it appears to such officer from his interview with the victim that there has been no injury of any consequence. On the hearing day, if there is a plea of guilty the victim and often also the reporting officer will not be at court. All the police prosecutor may have is a fact sheet concluding with half a sentence about the injury, if it is a s.493 or s.494 charge.

The Police Commissioner's direction of April 1980 in effect requires reporting officers to read, understand, remember and apply the direction. The

direction unfortunately is not foolproof for the reasons I have mentioned. I do not think any direction can be. In any event, the direction, according to my observations and other information, is in fact not always being carried out.

Where an information alleging a summary offence comes before a magistrate who holds that the maximum compensation for injuries sustained by reason of a summary offence is \$1,000, the effective decision as to maximum quantum was made when the charge was determined. Such decision was made out of court by persons who are not medically qualified and before the victim has had legal advice (including advice as to the desirability of specialist medical assessment). Maximum quantum effectively was determined in a context where there was no right of appearance before the reporting officer, station sergeant, detective or police prosecutor who ultimately settled on what the charge would be. If a victim does consult a solicitor prior to the hearing of a summary charge and it appears to his solicitor or counsel that an indictable charge would be more appropriate, or if the specialist's report will not be received before the hearing and an injury warranting more than \$1,000 compensation is suspected, then the victim's legal representative may try to have the matter changed to an indictable charge. To achieve this one has to work behind the scenes and attempt to persuade the relevant police officers to change the charge. It is an haphazard, inefficient and unseemly process.

If the offender has not been, and will not be, charged by the police with an indictable offence, the only alternative that the victim has is to bring his own prosecution. This is rather expensive as the victim himself must pay the costs of any such private prosecution. Moreover, the prevailing judicial view is that costs cannot be awarded in applications under s.437 because there is no express statutory provision for costs. Offenders can be ordered to pay the costs of applications under s.554 but such orders are virtually useless as offenders usually cannot or will not pay. Enforcement of such orders by having defaulting offenders imprisoned involves victims incurring more costs and in any event is ineffective. And in a s.3 application the Department will not pay costs from the Consolidated Revenue Fund. Therefore, requiring a victim to bring his own prosecution to ensure that the correct charge is before the court, so as to ensure that the maximum compensation is \$10,000, will cause the victim to almost double his costs through having to finance two hearings.

My submission is that the law should be amended to break any possible nexus between the legal categorisation of an offence and the maximum compensation for injury and consequential economic loss caused by the offence. To reply that there is not enough money for this reform is not a valid argument. It is a question of an equitable distribution of the available money. The amount of general revenue available for criminal injuries compensation should be distributed, subject to any ceilings, according to the actual seriousness of victims' injuries and not according to the outcome of esoteric ramblings through various sections of the *Crimes Act*, sections of other statutes and back through the common law.

In conclusion, I would agree with Paul Johnson that there is urgent need to review the existing criminal injuries compensation schemes, the numerous problems of which have been outlined in our papers. If the cost of a particular

proposed reform is of concern then appropriate experts, including perhaps a criminological statistician and an economist, should be commissioned to determine its likely cost. The data and methodology used in any such investigation should then be made available for scrutiny and comment by independent experts. If after genuine and adequate attempts it is concluded that there are too many variable or unknown factors, then comprehensive reform could be implemented in stages so that the additional costs of each particular reform could be determined and considered before implementing the next.

It is submitted that it is not a tenable position for the relevant authorities simply to make unsubstantiated assertions about the cost of reform and then do nothing. A suitable period of self-congratulation having elapsed since the 1979 amendments, it is now necessary that the deficiencies of the New South Wales schemes for compensating victims of violent crime be examined much more thoroughly than they have been examined to date.

VICTIM RESTITUTION AND SUPPORT PROGRAMMES: PRACTICAL SUGGESTIONS

John P. McAvoy,
Vice-President, Probation and Parole Officers' Association
of New South Wales

1. This Association supports the moves which have been made in the past decade in various parts of the world to improve the treatment afforded by the community to the victims of crime. However, we maintain that the victim/offender relationship is a complex one which as Mr Johnson points out should not be oversimplified by ignoring the fact that "in many cases people who have broken the law are victims themselves". Compensation should be an integral part of the sentence and should involve the offender as a person. Restitution programmes and victim support schemes should make use of citizen volunteer workers.
2. We would support an increase in the variety of methods of payment of compensation, and the use of a wide restitution process when appropriate. For example we would see *the restitution process*:
 - a. As part of the prison regime (e.g. payment to the victim of the offender's increased prison earnings).
 - b. As diversion from incarceration (i.e. as a condition of release).
 - c. As part of a residential "work release" programme (i.e. where the major part of earnings would be devoted to compensation).
 - d. As leading to parole "earned" on completion of payment of compensation.
 - e. As a condition of parole, with perhaps accelerated discharge of licence obligations upon completion of payment.
 - f. As including the possibility of victim/offender confrontation and direct, practical restitution to the victim.
 - g. As embracing symbolic restitution either simply by way of Community Service Orders, or by a variation of the scheme to include negotiation with the victim on the nature and extent of the community service work to be performed.
3. The Association also strongly supports increased citizen participation in the criminal justice process by the establishing of simple victim support schemes to perform many of the functions of the organisation described by Mr Whitrod. Such schemes can be simply established:
 - a. In a defined area a small local committee could be set up with representatives of the police, the Probation and Parole Service, and the community organisations (e.g. Church, Volunteer Bureau, Service Clubs, etc.).

- b. Volunteers are recruited and trained and a support network set up. Information from existing schemes confirms that the successful volunteer would possess a warm outgoing personality, a capacity to stick with difficult situations, an ability to act purposefully on behalf of others and tolerance of different viewpoints and lifestyles. The unacceptable volunteer would have a low tolerance of stress, a desire for power and status, or, a desire to proselytise for religious or political beliefs etc.
 - c. The training of volunteers would be carried out with the help of local expertise and a course might include segments on:
 - i. The criminal justice system.
 - ii. Community resources.
 - iii. The role of the Police.
 - iv. How to handle shock reaction.
 - d. A panel of local legal, medical, insurance and social work experts would be set up for consultation if necessary.
4. Victims would be referred by the police to an administrator, who could be paid an honorarium and who, in turn, would assign a volunteer to visit and provide, as necessary, advice and practical and emotional help.
5. During its first three years (i.e. to 1977) the Victim Support Scheme set up in Bristol, United Kingdom, on the above lines, saw 3000 victims visited by sixteen volunteers. Only one worker was refused entry.

The diversity of activities undertaken by workers under such an arrangement can be seen from the following list taken from the 1976 Annual Report of the Victims Assistance Project Multnomah County, Oregon, U.S.A.

- assistance with restitution problems
- assistance with property recovery
- advice on court proceedings
- providing of comfort, and counselling
- referral to appropriate agencies for:
 - emergency food, shelter and money
 - medical services
 - dental services
 - transportation
 - babysitting
 - services for aged
 - employment
 - interpreter
 - homemaker
 - housing relocation, etc.

6. We recommend the setting up of a number of small, local projects to provide these services to victims and to explore further, methods of victim support and offender restitution.

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PRESENTATION OF PAPER*John P. McAvoy*

I present this paper on behalf of Probation and Parole Officers' Association of New South Wales, and I would wish to make two more points. First, in regard to the suggestions we make in the paragraph two of our submission, i.e. outlining ways in which offenders might be more closely involved in making restitution to their victims. The suggestions are realistic in the sense that they have been tried or are being tried now in other parts of the world now with some success, notably in the United States.

Secondly, you will be aware from my paper that we have in mind the setting up of programmes which would make it possible at a local level, almost at a neighbourhood level, for support to be offered to victims in that neighbourhood. Quite simply this means making it possible for a volunteer to knock on the door of a victim to say "We are here, you have been in trouble. Is there anything we can do to help?". This contact is especially lacking where the elderly or the isolated have been victimised. To this end we have made informal approaches to the police in a Sydney suburb, and to other agencies in that suburb, and have received enthusiastic support for the setting up of such a project on a small basis.

We have also written to the Attorney-General asking that he take the initiative in setting up a committee of representatives of relevant government bodies and other interested parties in the State to set up an inquiry such as described by Mr Whitrod in his paper.

AN OBSERVATION

J. M. Proctor

Having read the papers relating to the seminar "Victims of Crime" set down for 17th September 1980, anything which I may contribute will be in the form of observation only, as I find that the papers very ably cover any ideas which were in my mind prior to reading.

The value of my submission, therefore, can only be as a description of the emotional trauma suffered as the mother of a murder victim and my later experience as a Probation and Parole Officer. As well as suffering the loss of my daughter, I have experienced minor burglaries on two occasions in my home and, during the years in business with my first husband, some half dozen burglaries on our business premises.

From a dichotomous position I am able to view with sympathy two cogent remarks within the papers. The Honourable Mr Justice M D Kirby on page 32 of his paper states:

The dependents of those who suffer death deserve more than the ephemeral sympathy of the community, a sensational headline and then neglect. Crime is an offence against the whole community of Australia and the community should shoulder its responsibility to the victims of crime.

On a visit to see her high school teacher during University holidays, my daughter was stabbed to death in a train at 4 pm, 20.1.72, by a complete stranger. Her loss finally ended my twenty-nine year long marriage, caused great suffering to her fiance, left her brother without a sibling, severely hurt the parents of the offender, who came to my family in tears. Apart from this, she was a loss to the community as she had just completed her first year University, gaining a distinction and two credits and intended to become a remedial teacher. She had been visiting her teacher to thank her for what she felt was her influence in gaining the distinction pass.

Friends and people generally were shocked at her death, but I see the value of the South Australian VOCS scheme as being highly commendable as my former husband, a very fine man despite the break-up of our marriage, and myself found that there was no real empathy, even from relatives, unless the sympathiser had had similar experience.

When our marriage dissolved, we were financially without need of help, especially as I (being half-way through University at my daughter's death) was able to find a position. This kind of difficulty for people less financially adequate would add nightmare to an experience that leaves one emotionally destitute and desperate to find a reason to go on living.

The other statement follows that by Professor Stephen Schafer on pages 58-59 of Mr Paul Johnson's paper;

In our eagerness to help the victims of crime we must not lose sight of the fact that in many cases, people who have broken the law are victims themselves — victims of a society in which they may have been denied a stable, happy family upbringing, denied educational and job opportunities. In many cases these people are victims of circumstances over which they had little or no control.

Before working as a Probation and Parole Officer I was of the opinion that the above was probably the rule. Working in that position has constantly confirmed that opinion. I have had nearly seven years experience in the Service, over two of which were worked within the Cessnock Corrective Centre, and approximately one year visiting the Tomago Corrective Centre for women, as a Probation and Parole Officer.

Prior to working at the Cessnock Corrective Centre I was being shown around the Centre and an opinion was expressed to me that it wasn't fair that "these fellows" were getting opportunities that others weren't. I asked whether it might be possible that such opportunities may lessen the possibility of further victims. I was complacently told that next year (1974) the victim "looked like being compensated anyway". Still smarting over the loss of my daughter, my heart went cold as I thought that there was no possible compensation for her loss.

Because crime is such an emotive issue in the public mind, answers become extremely difficult because of the political pressure that can be used where corrective services are concerned. The public mind is usually oriented towards revenge and punishment. My grief was so great that thought went beyond to prevention and, now I am concerned that in helping the victim, less thought may be given to the enormous task ahead of reorienting society in order to prevent the crimes which create the victim.

Changing society's thinking is a task that will only be achieved by education as to what makes the offender a victim. This will be a gradual and long task I feel. In the meantime, the implications are that to make an offender pay compensation which he cannot afford is to make him more bitter and lead to more victims. To contain him in the barbarous conditions of present maximum security prisons is to lead to further victims also, I feel. Those who should be contained for the safety of others, I feel, should be safely contained only. Not suffer added punishment which surely does not change attitude for the better.

Apart from the possibility of lessening the number of victims by greater help and understanding of the offender, I submit that the financial burden would be lighter if more alternatives to prison were established. Figures are available to support this contention, but it is not the compass of this paper to go into these. Such financial saving could very well be used towards aiming to cut down the number of victims who become offenders and the number of offenders who make victims.

To imprison the bulk of offenders seems to me to be a waste of labour and not inductive to change. Labour by detainees does not necessarily clash with union labour as a number of victims could not afford to pay for help. Week-end detention and community service orders would seem to me to be viable

alternatives in that the offender is directed to alleviate problems within the community and thus learn more about the difficulties of others. Hopefully, society will learn more about the problems of the offender, e.g. I know one probationer who was incorrigible until sent to week-end detention. Feedback from the aged people he had to help gave reports of kindness to them. Unfortunately I have not heard how he got along later. Certainly, at that time, he was being more productive than he would have been totally imprisoned.

On the other end of the continuum, those who have murdered while under stress often need help to cope with the difficulties, and for depression, that they encounter in a life very often made difficult by deprivation both material and emotional. Dr T Vinson (1973) found that deprived people have a higher proportion of all problems, including murder, suicide, illness, accidents, family problems, and in earlier research, even casualties in war. In my own experience, life prisoners can and do contribute to community well being by projects carried out while imprisoned and if allowed could do even more. Even life prisoners who could never be released may therefore be productive in the community. I have seen pride in heightened self-image create change in some of these men. Less stressful lives, even within a semi-security prison has enabled them to concentrate on interesting projects and so lessen the possibility of further victims.

One further concern which I would express is that while I feel that all victims should be compensated, including the victims of minor break, enter and steal offences, many may be uninterested, politically, in a Victims of Crime Service because of existing insurance cover. As break, enter and steal victims are by far the largest ratio and as those who are the victims are usually those who have something to be stolen and therefore insured, they are less likely to be concerned about other victims because they are in smaller numbers and mostly, therefore, outside the experience of the bulk of the population.

As knowledge of the offender is often in terms of scare headlines, particularly that of violent crime, (my own daughter's dead and bloodied body was shown three times on television before I was able to persuade the channel to destroy the film — fortunately I did not see it) the consequences, in the public mind, is usually thought of punishment and revenge rather than prevention.

Hopefully, my experience of both sides of the problem might in a small way reinforce the realisation that the victim needs all the help we the community can bestow and that we must not lose sight of the fact that in order to lower the number of offenders, we must keep firmly in mind that the offender is often the victim.

DISCUSSION

Doug Young, Probation and Parole Service, Newcastle

I want to comment briefly on two points made by Mr Johnson on page in relation to effecting the recovery of amounts paid out to victims of crime, and in relation to the cost of the recovery of those amounts.

I would like to submit that as a broad general principle the wrongdoer should bear the consequences of the damage that he has done wherever possible, and I would also submit that the question of compensation should not be seen in isolation. It should be linked up with the notion of deterrence to the offender in particular and deterrence to the community in general. I believe that it is a principle fairly widely held that the most effective deterrent, generally speaking, is the imposition of a monetary penalty. With that in mind I would submit that in looking at any reform of existing legislation that principle should not be forgotten and that the question of the difficulty in recovery should not outweigh the benefit that would flow to the community generally by the offender being required to pay in some measure for the damage that he or she had done.

Insofar as the small percentage of the money paid out that has been recovered I would suggest, with the greatest of respect, that may be so because of lack of diligence on the part of those persons charged with the recovery. Debt recovery is not a popular endeavour, and some people in the legal departments of our State and Commonwealth (for policy and political reasons) would not, unless they were obliged by statute to do so, pursue the recovery of those amounts with as much diligence as they could.

I personally could see no practical or legal or ethical problem in the police officer concerned with the prosecution supplying what information he may have in relation to the accused's assets or his way of earning his living. I could see no problem ethically or legally in officers of the New South Wales Sheriff's Department serving those process — the fees charged for the service and execution of process would surely only be a paper debt. I feel that if some more positive attempt is not made in implementing the existing legislation, and in including in any future amended legislation endeavours to see that the offender does pay as far as possible for the damages that he has done, then the community will suffer even more.

E B Tuckerman, Solicitor

I wish to pick up a point that Mr Whitrod made, and that is the question of the impact statement. It has worried me for some years in sentencing matters that the defending counsel or solicitor can indeed think of many a good reason why the penalty should be smaller — it will be a sad day if defending counsel and solicitors ever fail to do that.

Crown prosecutors and police prosecutors, as I understand it, by direction, never address on the penalty. In my view they should. The

prosecutor should be there to represent the community, and he contributes facts which may not have been said by defending counsel. Facts and figures could and should be produced by him at that time, so that the judge may be properly informed.

If it is thought strange that that is coming from a man who always does defend and never prosecutes, it is because I have seen that where an over enthusiastic plea is made the judge sometimes becomes irritated by it. The judge is then left with the job, whether he is irritated or not, of providing a balance by doing what, in my view, the prosecutor should be doing from the Bar table. From the accused's point of view it frequently sounds as though the judge has taken up the cudgels on the other side instead of being able to deliver the balanced view having heard both sides of an argument. As I understand it, it would take at very least a direction from the appropriate Minister to the prosecutors that they should do this. It would probably also require some conference from the Bar Council, in that they would have to decide that this was ethical before the prosecutors would so proceed. But, in my view, it would put forward a balanced statement of the facts and it would take from the judge the necessity of imagining what may have happened in the particular case to the victim. I believe that the more information put before the judge, particularly factual information the better sentencing process we are going to have.

Jim Swanson, Premier's Department

One problem which I think exists in relation to those victims who do receive some form of compensation is that they enjoy no appeal right against the figure which is determined. Mr Bartley has highlighted in his paper the lack of appeal against a determination under the Act, and the same thing applies to *ex gratia* payments. It appears that the same applies under both the English and the Victorian systems. Indeed the only situation where any appeal right is proposed is in Mr Justice Kirby's Tribunal.

The *ex gratia* payment system is probably the one where most criticism might be made, and I wonder whether Mr Johnson might wish to comment as to whether, in his knowledge, the victims of crime who have amounts awarded for them under the *ex gratia* scheme have any satisfactory form whereby they can have determinations reviewed.

Paul Johnson

As far as I am aware they do not. I think it is a determination by the Attorney-General on the recommendation of officers of the Department and it is not subject to review.

Mr Justice Kirby

Our scheme proposes review by the Administrative Appeals Tribunal which, of course, has jurisdiction under its Act to review "on the merits," and also review by the Federal Court on the question of law (Clause 28 of our Draft Bill).

Chairman

Are there any views held upon this question of the extent to which the personal liability to pay compensation should be imposed upon the wrongdoer? Experience suggests that the majority of those guilty of crimes are in no position to pay appropriate compensation, and, accepting the justice of requiring the wrong-doer to bear the civil liability, one wonders at times where the wrong-doer is going to get the money from to pay the compensation. Quite often, where compensation is a condition of a bond, there is an uneasy feeling that the money to pay the compensation will either come from another member of the family or even from the fruits of further crime carried out so as to avoid defaulting and being sent to gaol. Are there any comments upon the practical elements involved in imposing compensation liability on the wrongdoer regardless of his ability to pay and simply as a matter of a civil liability?

L K Downs, Department of Corrective Services, formerly Under-Secretary of Justice, N.S.W.

I would like to answer the criticism of Mr Young on the failure of departmental officers apparently to recover or attempt to recover this money from prisoners. Most of these people are in gaol for lengthy periods of time, and they are not earning any income. The Department has always been diligent in endeavouring to recover this money. At one stage we did attempt to persuade the Parole Board to write a condition into the parole order that compensation must be paid. The Parole Board took the view, rightly I believe, that that was not a factor in granting parole and they could not write such a condition into a parole order. We always attempted to enlist the aid of parole officers when they were supervising parolees in ascertaining where they worked and what income they had, but we had no success at all in that regard. It is almost a hopeless situation trying to recover money from, first of all, people who are in gaol, and secondly, once they are released on parole. It is not the responsibility of the police or the Sheriff's officer to chase up civil debts of this nature. That is outside the scope of their responsibilities. The only way you can recover, of course, is by legal process — i.e. to sue civilly. If victims were aware that offenders had substantial means they would not be interested in pursuing their remedies under the *Civil Injuries Compensation Act*, but would be taking their remedies civilly as some of them have in fact done. It is a pretty hopeless effort to try to recover the money that is paid out by the Treasury, and I think recovery of 5%, as the figures show, is a very creditable effort on the part of the Department.

M Kerr, Instructing Officer, Solicitor for Public Prosecutions, Clerk of the Peace Office

I would like to comment in relation to Mr Johnson's remarks as to the practice of making it a condition of recognizance to pay compensation. I do not think the system or the practice discriminates quite as starkly against poor offenders as against the more prosperous offenders as Mr Johnson might have indicated.

If the offender who has to pay compensation to the Clerk of the Peace in his capacity as Registrar of the District Court meets financial problems he is

able to write to the Clerk of the Peace who can then convey that to the judge who can direct that the offender not be called up and not regard the failure to pay compensation as a breach of the recognizance. If he does not do that and does come before the court the judge of course is not required to send him to gaol. He can further defer passing sentence and the offender can answer recognizance without the payment of compensation being a condition of recognizance, or the period for instalments can be lengthened as part of a new recognizance. Making it a condition of recognizance to pay compensation does give expression to the philosophy of the offender making restitution for his deeds while at the same time providing flexibility in dealing with the offender.

Chairman

Could I put forward for discussion a compromise scheme under which all compensation would be paid out of the Consolidated Revenue, but that the sentencing court could impose a special fine additional to other punishment? Such a fine could be computed by reference to the financial position of the accused person. That might well achieve an evenhanded measure of justice for the victim, so that his prospects of recovery would not be governed by the ability of the accused to pay. It could also result in a tailored financial liability being imposed upon the accused person, being a liability to pay a fine which would go back into Consolidated Revenue. I am not putting that forward as a suggestion that I would necessarily support, but I am putting it forward in a provocative sense to see whether it has any merits or demerits.

Mr Justice Kirby

The only problem I see in that is if we assume the act of the accused or the prisoner as being so gross, how would one calculate the fine? The scheme we have set forward is that the Commonwealth should pay the amount, but should have the right to recover the amount as a debt from the accused. Of course, "may recover" imports the question of discretion which would have regard to the practicalities of whether it is worth the effort. I would have reservations about the fine system because I see the fine as the amount paid to the community rather than recompense. I think the latter is a severable issue dealt with either by terms that are worked out at the time of sentence or by a publicly funded scheme.

Barry Finch, Probation and Parole Officer

I do not have any facts or figures to support this but, as a general observation, I would disagree with the notion that all offenders cannot pay compensation. I would tend to think that offenders on recognizance have quite a high percentage of payment of compensation. I think that that perhaps could be supported by an officer from the Clerk of the Peace. On the other hand I would agree that after a person has gone to gaol the chances of getting compensation is quite minimal.

Chairman

It would be interesting to know if any of the Parole Officers who are here this evening can cast light on the practical consequences of imposing liability to

pay compensation upon parolees or persons who are under supervision or on recognizance. First of all is there anyone from the Clerk of the Peace who can answer the first part of the question?

M. Kerr, Instructing Officer, Solicitor for Public Prosecutions, Clerk of the Peace Office

Unfortunately I did not come with facts and figures in relation to this. From observations over the past six years I would think the vast majority of offenders where they have means to do so, do pay. It will depend on whether they are employed, whether they are married, whether they have children to support. In fact the order for compensation is normally made by a judge who is armed with the knowledge of an offender's financial position at that time, and, of course, with legal aid the vast majority of offenders are now represented and their legal representatives have access to their financial position. So there is further financial information normally available to the judge at the time of imposing of the condition.

Joy Hush, Probation and Parole Service

It is my experience that of the people who are on recognizance and have been ordered to pay compensation those who can afford it do pay. I would also like to comment about people further offending to meet compensation payments. I think it is important that if an order for compensation is going to be put on a recognizance, then that person should be under supervision because often that helps to ensure the payment of compensation, and I have found most people on recognizance that I have supervised do seem able to pay.

I agree with the statement made earlier that it is easy to make an application for adjustment for payment. This works very well if the financial situation has changed and representation is made to the Clerk of the Peace. Obviously there are always some people who just cannot pay and will not but on the whole I find that most of my clients keep up their payments. In fact, I have one probationer who is settling a \$7,000 debt.

However, I think it would be far more difficult with parolees who have come from a long term in an institution — they just want to make a new start.

D Reynolds, Probation and Parole Service

On this matter I do not think there are any stereotypes, each person has to be dealt with on his own merits, but I support Mr Finch in saying that if a person goes to gaol forget about compensation. A psychological change occurs in gaol, and the parolee is convinced by going to gaol he had paid his price. In very rare instances a person will come out of gaol and pay his debts. I have a 60 year old parolee who is determined to redeem his name by paying back some enormous sum by working well past retirement age — that is the exception rather than the rule. Recently a colleague of mine received a letter from an insurance office recently asking her would she make the probationer aware of the fact that he owes them \$120,000. He will never pay that back and I think it is absurd that such a letter should be written. Very often in the Probation Service

we are approached by financial services for the address or workplace of our clients on the grounds that the client owes the company money. We respect the confidentiality of our clients but the financial services feel we are protecting people who have already defrauded them. How you solve this I do not know but it often does put a very real mental pressure on us.

Ray Proctor, Probation and Parole Service

I think most people at this seminar have a cheque account and this makes it very easy to make these repayments. The people we are talking about probably have not got cheque accounts, and to send money through the Post Office costs 60c for the money order plus the ordinary postage rate. At a meeting in Wollongong, Brian Shields, our officer in charge, said that he had approached the Clerk of Petty Sessions Office to see if these compensation amounts could be paid at that office. This would be a great step forward because such offices are on the spot, but unfortunately they cannot or will not accept these payments. It may be that our method of collecting this money does need to be reviewed so that it is made as easy as we can for these conscientious people who want to pay the money. We might then find that the 5% goes up.

Mr Justice Kirby

It could also be useful if the Attorneys-General were to speak to the Australian Bankers Association because with the computerisation of banking I do not think it would be very difficult to have a central account and for funds to be paid at any bank. I know in respect of one enquiry the Law Reform Commission had concerning repayment of debts generally, we discussed that with the bank. I gather that it does not create a big practical problem nowadays. It is something that could bear exploration with the relevant banks, and certainly with the Rural Bank as a State authority.

Kerry Heubel, Womens' Electoral Lobby

I would just like to strike another note for consideration. I see a dilemma posed in the restitution by the offenders of crime who can afford to pay because there is often a new victim and that is the spouse. The spouse would very often either be a joint owner of the assets or would be entitled generally under the Family Court to at least half of the assets. I see that this person is then as a non-offender party becoming a "victim" to the restitution of the victim. Largely these people are women because as we are aware the majority of the offenders, in this State, anyway, are male.

There is one second point I would like to make and that is I would like clarification from Mr Whitrod about his comment on the sexist overtones of the new Rape Crisis Centres. I personally take exception to that comment because rape again is largely a crime perpetrated on women.

Ray Whitrod

I am sorry — I thought I went to extreme lengths to go the other way in making a neutral statement. I apologize if I gave offence as I did not mean to give any.

Chairman

In relation to the smaller amounts of compensation that are often ordered, say when an accused person pleads guilty and compensation is claimed in the sum of \$450.00, the accused may feel diffident arguing whether it should be \$450.00 or \$370.00 in the apprehension that to argue about this might prejudice him in the eyes of the court on the highly important matter of sentence. It is not practicable on the other hand to call full evidence of value in respect of comparatively small monetary claims. Has anyone any experience of the reliability or otherwise of many of these assessments of compensation?

E B Tuckerman, Solicitor

I have had a number of these claims, very frequently concerning motor vehicle damage. Everybody is always appalled at the charges but with small amounts, say \$50 to \$200 I have not found any resentment or feeling of injustice.

John Crawford, Stipendiary Magistrate

For several years I was at the Public Solicitors representing accused persons and my experience is that most persons are quite happy to be out of gaol, although the amount on property offences may appear to have been inflated with a view to insurance. It may well be that after the defendant has not gone to gaol he feels a little bit more resentful, but at the time he is usually quite satisfied.

I would like to ask Mr Johnson whether legal aid is available to victims of crimes? From my limited experience I think it is most desirable that they are legally represented. It is very difficult for the court when a person who is unrepresented produces vague medical reports and a couple of statements about loss of earnings, and the court is then expected to arrive at a figure.

Secondly, during the interim period between the commission of the crime and the actual payment of the money the victim may experience financial difficulty. This situation does not arise with a workers compensation or third party victim, and I was wondering whether the *ex gratia* payment scheme could be utilised to meet these out of pocket expenses in the meantime, subject to those expenses being absorbed into any order made subsequently by the court.

Paul Johnson

I do not know the answer to the legal aid question. I assume (but I am not sure) that the offender, if he is entitled to legal aid in the first instance for the offence, will be entitled to be represented at the hearing for the compensation claim. I do not know if legal aid is available for applicants.

Glenn Bartley

In relation to aggrieved persons, I am presently briefed on legal aid to make an application on behalf of an assault victim at Parramatta District Court.

I would expect that other victims who qualify under the usual means test and other criteria would also be granted legal aid.

In relation to making payment of compensation a condition of a recognizance, I submit that the relevant questions are not whether an offender can pay but "How much?" and "How soon?". The problem is that the victim has waited long enough between the crime and the time of obtaining a direction for compensation. To then be expected to keep on waiting while the offender pays off substantial compensation by relatively small instalments over a prolonged period of time is a little unreasonable.

Ray Whitrod

Legal aid is available for victims in South Australia. But there are problems because it takes up to two years for the process to be completed. A client who recently successfully applied for compensation for abduction of his daughter five years ago dealt with five different solicitors in legal aid in that period, and felt rather unhappy about the process.

Priscilla Adey, Public Solicitors Office

I can perhaps clarify the legal aid situation. Through our civil section we definitely do grant legal aid for the victims of indictable offences. That is the most common type. The only problem is with the Public Solicitor we have often appeared for the offender, so there is a conflict, and in those cases we assign it to independent lawyers.

Penelope Woodhouse, Ethnic Affairs Commission

I work at the Community and Interpreter and Information Service and we provide free interpreter service for defendants, presumably for witnesses in police matters, which could include victims. In private matters we do not provide a free service which means that if a person wanted to sue if they had been unjustly treated they would have to pay interpreter's fees. Do you have any comments to make about this?

Mr Justice Kirby

I think that the point really is that in many ways our society and its laws have not yet adapted to its multicultural nature. We assume people know their rights. We do not do enough to inform people of their rights or to help those who are not of an English speaking background. We are overconfident that people will know and pursue their rights. If that is a general point being made it is one that goes across the whole legal system. But I think things are improving. I would have thought that if legal aid were granted for the purpose of bringing proceedings either under the New South Wales Act or under the proposed Commonwealth Act, the provision of legal assistance for the victim would be part and parcel of the costs. I may be wrong, but certainly it is integral to the proper understanding by Counsel of the case that interpreters should be available if people are not fluent in English. Likewise it is often vital to a fair determination of a hearing whether in a court or before a tribunal.

Doug Young, Probation and Parole Service, Newcastle

My remarks in relation to lack of diligence of officers in the Department have been perceived as criticism of officers engaged in that particular type of work. Possibly I should have expressed myself differently but I referred more to an attitude, rather than some deliberate attempt to avoid doing their job.

In regard to the comments about cooperation from Probation and Parole officers I should explain that within the service there are differences of opinion on what role Probation and Parole officers should play in this very function. My feeling is that Probation and Parole officers should play a role to ensure that the offender does contribute what he conceivably can for two reasons: firstly, that there should be the notion that the offender is being deterred and the community is seeing some general deterrence in the wrongdoer paying, and secondly, the purely financial considerations to relieve the community of that burden. I do want to stress that in using the terms "lack of diligence" it was meant to describe an attitude. Such attitudes are also to be found within the Probation and Parole services where some officers for their own very good reasons take the view that if they were persistent in urging a probationer or parolee to do what they saw as somebody else's job to enforce, that they would lose that magic rapport with the client.

Mr Justice Kirby

Mr Whitrod suggested that I had said that the Collie case was unique. What I said in the paper was that it was not typical. I went on to say it was not typical in the sense that the amount of money at stake in that case, where the man was grievously injured, was above the mean. The mean is shown by the Victorian figures. These indicate that the mean is not a very high amount. They give the lie to those who fear that the result of schemes, such as advocated at this seminar, would be prohibitively costly to the community.

As far as Mr Bartley's submissions are concerned: first, in respect of temporary relief. The Draft Bill Clause 12(3) provides that the Tribunal should be able to make interim orders but that interim payments should then be offset against any amount subsequently awarded in the proceedings. I realise that that means you must make an application. But it seems to us that you have to initiate the process first before monies could be justifiably paid from Consolidated Revenue.

Secondly, in respect of time limits, Mr Bartley complained about the New South Wales legislation. We suggest that proceedings should be brought within one year of the criminal act, or the discovery of the criminal act, or within any such further time as the Tribunal permits for reasons shown (Clause 11 (2) (6), Draft Bill). Mr Bartley's main point, of course, was that in New South Wales the period of self congratulation was over following the increase in the amount in the New South Wales legislation. The period of self congratulation in the Commonwealth sphere has not even begun because there is no Commonwealth legislation for publicly funded schemes in this area.

Mr McAvoy talked of the back up services, and I think that this is the principal point to come out of the other two principal papers and the discussion.

Money compensation is not going to be enough. What we require are sensitive services that will give instantaneous and ongoing support to people who need it. In the Commonwealth's sphere the plain fact of the matter is that we are unable to provide such services in a continent with places as distant as Broome and Geelong and Goodawindi. The Commonwealth must therefore look to such State services as exist. It is therefore important that the reform of the law here should march hand in hand both at the Commonwealth and the State level.

May I say that though Mrs Proctor did not make an additional statement I am sure everybody in the audience would want me to say how courageous and humane we found her paper. The way in which she approached the problem with a humanity that I doubt that I could have summoned, commanded my admiration and I am sure the admiration of everyone who read it.

Mr Young's suggestion that the wrongdoer should bear the cost ran into the problem that often the wrongdoer is just not in a position to "foot the bill". If we were to adopt the suggestion of the Law Reform Commission and, as it were, levy the whole of the class of wrongdoers, although one does not get a one for one compensation the proposal at least, does have the merit of instilling the principle of equity: that those who offend against society's laws will underwrite the cost or at least contribute to the cost of those who are the victims of crime. So far as the lack of diligence in recovery is concerned I cannot comment on that. But in our Draft Bill, Clause 35 we said that the Commonwealth *may* recover. That would leave it to the discretion of those who would be considering the practicalities of the matter to judge whether recovery was worthwhile.

Mr Tuckerman's comment was interesting. Some of you may know that one of the most unique features of the Report of the Law Reform Commission was that we conducted a survey of all judges and magistrates in Australia concerned with sentencing. Seventy four per cent of them responded. One of the questions related to whether the Crown Prosecutor ought to be able to address the court on sentencing. The national figures were 71% of judicial officers believed that they ought to be able to in *all* circumstances, 28% believed only by leave of the court and 1% believed never. There was a strong support from the judicial officers survey for the proposition which Mr Tuckerman put forward. In New South Wales it was even stronger. As against the national 71%, 76% of judicial officers in New South Wales believed that Crown Prosecutors ought always at the behest be able to address the court on sentence. Only 23% in New South Wales (against the national 28%) thought that they should require the leave of the court.

The point on appeal was made by Mr Swanson. There is no appeal in New South Wales. We recommend appeal to the Administrative Appeals Tribunal, (Clause 28 (1), Draft Bill). That Tribunal has the unique power to review on the merits decisions of Commonwealth officers under Commonwealth laws, including under the *Migration Act* reviewing on the merits the decision of the Minister to deport a person who has been convicted of certain crimes. We also proposed under Clause 29, appeal to the Federal Court of Australia on questions of law.

Mr Finch's point about the difficulty of recovery has I think been sufficiently dealt with. I think Mr Reynolds point was a good one concerning

the lack of stereotypes. If I can say so, the letter from an insurer was almost certainly a letter of demand for the purpose of re-insurance. Probably he will find letters of this kind are put forward simply to establish that other avenues of recovery have been tried and failed.

Mr Proctor made the point about the difficulty of depositing sums. I do believe from the experience that we have had on the question of debt recovery law reform that an approach to the Australian Bankers' Association would possibly permit a scheme whereby amounts could be paid in at local banks. Apparently with computerisation it does not create a tremendous difficulty. Certainly in this State the Rural Bank could probably (by negotiation between the Governors and the government) set up a scheme whereby such ease of repayment could quite readily be instituted.

Miss Heubel's point about the spouse having to pay is a valid one. But it covers the whole of the criminal justice area. When a man who is married and supporting dependants is sent to gaol, or even if he is not married and he is living with dependants and is sent to gaol, other people pay. Other people suffer. But unfortunately no ready solution is found to that problem. I do not see that the case of compensation payments is special.

Ray Whitrod

I was encouraged by some sympathetic suggestions from speakers, from Mr Tuckerman and from the Probation and Parole Officers' Association, that there is a need for a similar service in New South Wales to the one that we have started in South Australia. Perhaps later when we have the benefit of Mr Justice Kirby's back up papers there might be another occasion when we could look at the possibility of getting one started in this State.