THE BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW

CONFERENCE, CUMBERLAND LODGE, WINDSOR GREAT PARK

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The Hon. Mr. Justice M.D. Kirby

Chairman of the Australian Law Reform Commission

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PUTTING CRIME VICTIM COMPENSATION IN CONTEXT

Moves for publicly funded schemes for the compensation of crime victims should be seen as yet another illustration of the unsuitability of the current legal order to respond when members of society suffer personal injuries. Until now, in most countries of the Commonwealth of Nations, we have struggled along with the common law of tort and statutory extensions of liability in special circumstances. Thus, in Australia, workers' compensation legislation attaches absolute liability for injuries suffered by employees in defined work-related circumstances. Compulsory third-party insurance guarantees recovery for most of the victims of motor vehicle injuries. In two Australian States, Tasmania and Victoria, schemes for strict liability in respect of injuries arising out of the use of a motor vehicle replace the need to prove negligence.

Only in New Zealand, since the Accident Compensation Act 1972, has a conceptually coherent approach been taken to the problems of reforming the law to deal comprehensively with the victims of injury, whether at home or at work, whether in a motor car or in a sporting injury or arising out of a criminal assault. The New Zealand scheme addresses the problem from a comprehensive social welfare approach. A similar scheme proposed for universal compensation in Australia fell victim to the combined opposition of the trade union movement, the insurance industry, the legal profession, State bureaucracies and, eventally, the fall of the sponsoring government.[1]

Short of adopting a law providing for universal compensation, which would assure money payments to all injury victims including the victims of crime, Australian and other lawmakers have developed proposals for special schemes to cater for crime victims — a long-neglected category of the injured, disabled and maimed. The purpose of this paper is to sketch some of the Australian developments, both in being and in prospect, and to compare them with each other and with the current United Kingdom system by which crime victims are compensated. Although these comparisons may prove instructive, it should be emphasised that crime victim compensation schemes should be seen as mere staging posts on the way to a more coherent approach to the predicament of non-fault, non-employment and non-motorised injuries. Indeed, it is important that ad hoc attention to special categories should not obscure the need to deal with the underlying problem. A New Zealand author, describing the novel operation of the New Zealand accident compensation legislation, questioned 'whether the British will elect to limp into the sunset of tort with Lord Pearson's report as a stick to lean on'.[2] In the view of some commentators, efforts to stave up the present ramshackle and inequitable system of compensating injury victims merely postpones the day when fundamental law reform will be done.

In Australia, legislation over the past 13 years has introduced various schemes of victim compensation in the Australian States. The first scheme was introduced in New South Wales in 1967. Since then, program have been introduced in Queensland (1968), South Australia (1969), Western Australia (1970), Victoria (1972), the Northern Territory of Australia (1975) and Tasmania (1976). Only the victims of Commonwealth or Federal crime and crime in the Australian Capital Territory (A.C.T.) and Island Territories are not now provided with some form of publicly funded victim compensation law. To cure this defect, pending the preferred approach of a national compensation scheme, the Australian Law Reform Commission, in its fifteenth report, Sentencing of Federal Offenders[3], proposed a Federal crime victim compensation system which could also be extended to apply in those Territories in which the Federal Australian Parliament still exercises plenary powers.

Under the Australian Constitution, the criminal law is not, as such, assigned to the central Federal Parliament. Accordingly, the great bulk of the criminal law and its incidents, remain, in Australia, unlike Canada, a State responsibility. Nevertheless, the Federal Parliament has its own separate legitimate interests in a Federal criminal justice system. This is a fast-developing area of the law concerned with crimes relevant to those matters which are the Federal Parliament's constitutional responsibilities. Thus, to support the Federal power in respect of customs, criminal offences have been validly created by the Federal Parliament. A growing catalogue of criminal offences has been created to support wide-ranging Federal legislation. An Australian Federal Police Force has been established, specifically and exclusively to deal with federal crimes and federal criminals.

Though most federal crime is, of its nature, so-called 'white collar crime', cases of violent crime do exist, punishable under Federal or Territory law. For the victims of such violent crime, no present scheme exists for publicly-funded compensation.

The proposals of the Australian Law Reform Commission to cure this lacuna were laid before the Australian Parliament on 21 May 1980. They were contained in a report which was the first concerted national study of sentencing ever carried out in the Australian Commonwealth. Specifically, it was the first study of the punishment of Federal offenders. The terms of reference to the Law Reform Commission 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.

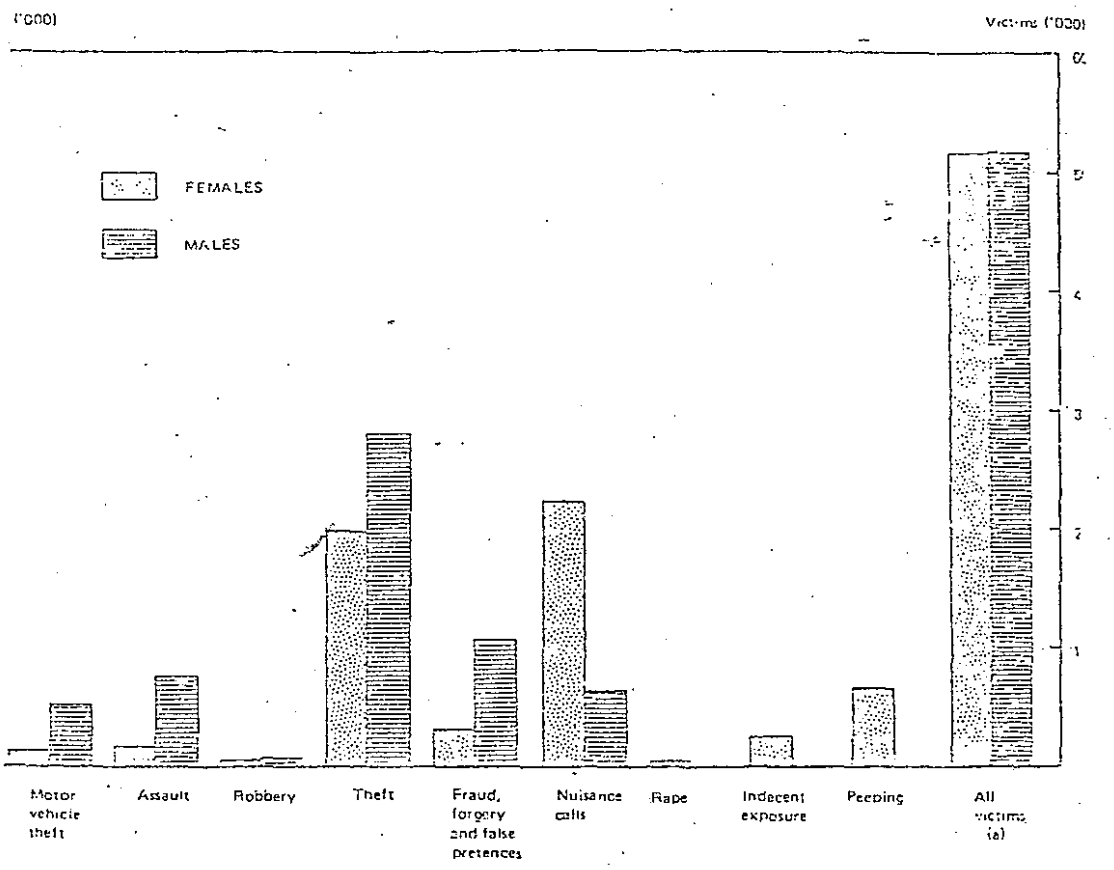
The report suggests a greater emphasis on compensation and restitution orders. It foreshadows possible further efforts to provide supportive services, advice, counselling and facilities for victims of Commonwealth crimes. Attached to the report is a draft Criminal Injuries Compensation Bill for an Act of the Australian Federal Parliament. This paper is confined to the main themes in the report and the Bill and is based on Chapter 12 of the report.

VICTIMS AND THE AUSTRALIAN 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 shows 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]

Figure 1

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: Australian Bureau of Statistics, General Social Survey of Crime Victims (1979)

New Developments Towards Sensitivity to Victims. In many 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]

. 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 propsed 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 contempory 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 Australian 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 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 from the Attorney-General 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 in Australia were outlined in the Law Reform Commission's 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.

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 non-existent, 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 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]

Having weighed these arguments, the Australian Law Reform Commission decided that it should proceed to recommend a federal criminal injuries compensation law in Australia. It did not agree to postpone such a recommendation, lest it impede consideration of the more comprehensive national compensation scheme proposed in the Woodhouse report.[17] Having reached this determination, it became necessary to examine the various models developed in the United Kingdom and elsewhere for publicly funded special schemes for the compensation of victims of crime. This paper now turns to a brief scrutiny of the models examined.

VICTIM COMPENSATION SCHEMES: UNITED KINGDOM MODEL

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.[18] 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.[19] The Board has also to be satisfied that the victim's character, way of life and conduct generally justify an award being made.[20] 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 permitted to exceed twice the average of gross industrial earnings at the time that the injury was sustained.[21]

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.[22] 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.[23] 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.[24] 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[25]

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 liablity 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.[26]

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.[27] 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.[28]

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. 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, in the Supreme Court of New South Wales, commented on the consequence of such maximum provisions[29]:

> [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.

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.[30] 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.[31] 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.

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.[32] 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.[33] 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 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'.[34] 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.[35] 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.[36] 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.[37] 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.[38]

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.[39]

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.).[40] 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.[41]

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 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.[42]

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 FEDERAL VICTIM COMPENSATION SCHEME

The Basic Model. Of the three basic models for victim compensation programs decribed 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 in Australia. 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.[43] 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. Instead, claims should be made to a tribunal, constituted by a person who for the time being constitutes a Commonwealth Employees' Compensation Tribunal.[44] A right of review of the decisions of the Tribunal in the Administrative Appeals Tribunal was also recommended.[45] An appeal to the Federal Court of Australia

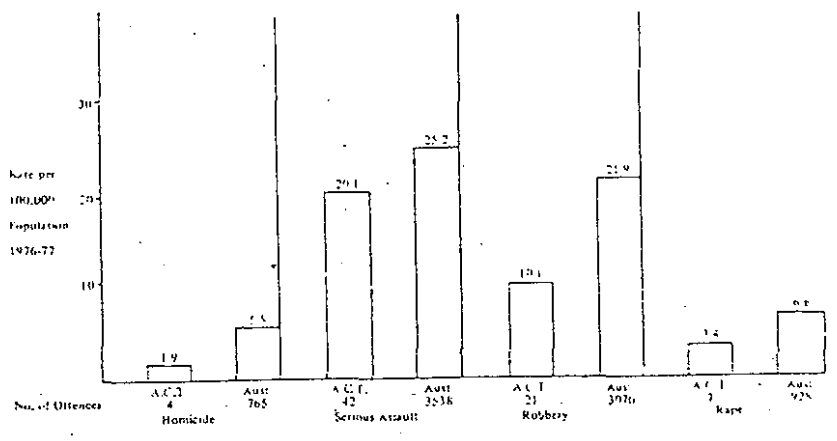
on questions of law was proposed.[46] Following the making of an order for compensation, a successful applicant should be entitled to payment of the sum ordered as a debt due and payable by the Commonwealth to the applicant.[47]

The Number of Claims. Claims under the proposed new Australian 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.[48] 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.[49] 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.[50] 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.[51] 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, notably 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.

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 Discussion Paper 10, 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 Federal 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

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.[51] 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 artifical ceilings which are at present placed on Australian schemes would not, if omitted from the new Australian Federal 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 quadraplegic 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 quadraplegic. 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.

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 Federal, 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 Australian 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 Federal Government in Australia, 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 Australian Federal Parliament 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 Federal 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. Major national initiatives are needed to reverse centuries of neglect. Such initiatives should not be blinkered by the approach which, until now, has been taken to this problem. 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.

FOOTNOTES

1. G. Palmer, 'Compensation for Incapacity: A Study of Law and Social Change in New Zealand and Australia', O.U.P., 1979.

2. ibid, 407.

3. ALRC 15, Australian Government Publishing Service, Canberra 1980

4. ALRC 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. id., Tables 39, 41.

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 LJ 305; Part 2 [1978] 2 Crim LJ 115.

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. ALRC DP 10 (1979) para.104f.

15. ibid, para.106.

16. See ALRC DP 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. 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 the Accident Compensation Act 1972 (N.Z.) implementing a universal compensation program akin to that also proposed for adoption in Australia in the Woodhouse Report in 1974, but not yet implemented.

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

20. See, in general, Parliamentary Debates (House of Commons) (U.K.) 23 July 1979, 17-25. Also Criminal Injuries Board Fifteenth Report Cmnd. 7752 (1979) 45-6.

21. Fifteenth Report 47.

22. id., 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.

23. id., 25.

24. ibid.

25. 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. id., 8.

26. Report of the Royal Commission on Civil Liability and Compensation for Personal Injury (Pearson Report), Cmnd. 7954, 1978, ch. 29.

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

28. 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.

29. (1969) 90 WN (N.S.W.) (Part 1) 85, 90.

30. See, for example, Chappell, '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.

31. Sydney Morning Herald, 20 November 1978.

32. There is little regularly published, statistical or other, material describing the activities of individual victim compensation schemes in Australia or the amounts expended.

33. 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.

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

35. 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.

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

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

38. Waller, 438.

39. id.

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

41. Criminal Injuries Compensation Act 1972 (Vic.) s.1.

42. Crimes Compensation Tribunal (Vic.) Report (1978), 3.

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

44. id., cl.7(2).

45. id., cl.28.

46. Draft Bill, cl.29.

47. Draft Bill, cf.37(4)

48. Draft Bill, cl.5.

49. See ALRC 15, Tables 7, 10 and para.79.

50. See ALRC 15, para.89f for comments on the deficiencies in Australian criminal justice statistics, particularly as they relate to Federal criminal matters.

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