COMPENSATION FOR VICTIMS OF CRIME:
THE CRIMINAL OFFENCE VICTIMS BILL 1995

LEGISLATION BULLETIN NO 5/95

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CONTENTS

1. PURPOSE .................................................................................................................. 1

2. BACKGROUND ......................................................................................................... 2

3. VICTIMS OF CRIME IN QUEENSLAND .............................................................. 3

3.2 THE CRIMINAL COMPENSATION PROCESS .................................................. 3

4 MAIN PROVISIONS OF THE BILL ................................................................. 5

4.1 DEFINITION OF A VICTIM .............................................................................. 5

4.2 FUNDAMENTAL PRINCIPLES ......................................................................... 6

4.3 THE CRIMINAL COMPENSATION SCHEME ................................................... 8

4.4 METHOD OF DETERMINING COMPENSATION ............................................. 9

4.5 AMENDMENTS ..................................................................................................... 21

5. FURTHER COMMENTARY ..................................................................................... 21

5.2 IMPLICATIONS RESULTING FROM THE CRIMINAL CODE 1995 ...................... 22

5.3 ANOMALIES WITH COMPENSATION ............................................................ 22

5.4 NATIONAL LEGISLATION ................................................................................ 23

5.5 COSTS OF ADMINISTERING THE SCHEME ..................................................... 24

TABLE 1 CRIMINAL COMPENSATION LEGISLATION IN AUSTRALIAN AND NEW ZEALAND JURISDICTIONS .............................................. 25

BIBLIOGRAPHY ......................................................................................................... 26
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1. PURPOSE

Introducing the Criminal Offence Victims Bill 1995, Attorney-General, the Honourable Matt Foley, said:

The Government is responding to public concern over compelling issues such as the impact of crime on victims, the treatment of victims within the criminal justice system, and in particular the needs of victims for protection, support and compensation and crime prevention.¹

The Bill is the result of consultation beginning in 1990. It has two objectives:

1. To establish a statutory avenue for the provision of fundamental principles of justice for victims of crime. These principles will guide public officials in their dealings with victims of crime; and

2. To provide a system for determining the payment of criminal compensation to victims of crime.

The purpose of the Criminal Offence Victims Bill 1995 is to “refocus the criminal justice system upon the sometimes overlooked position and needs of victims of crime”. The Bill aims to change the “criminal justice system away from a purely adversarial model between State and defendant and back to basic concerns about those lives that have been shattered by violent crime”.

2. BACKGROUND

Victims of criminal offences are frequently the forgotten element in the criminal justice process. For many decades the criminal process has focused almost exclusively on the rights of offenders. While no one would deny this part of the criminal process is essential, the rights of victims have not been afforded the same formality.

Awarding compensation to victims of crime is not a new concept. Compensation was recoverable under Roman, Jewish, Greek and Babylonian and Anglo-Saxon law. Initially the victim was paid compensation. Due to the problems with blood feuds developing, the State eventually became the sole recipient of all fines imposed upon offenders. Punishment and retribution, rather than compensation, became important legal concepts. The distinction between criminal and civil law further eroded the role of the victim in the criminal justice process, with the victim’s role becoming limited to that of a witness for the prosecution.

The modern re-emergence of victims compensation began in the 1950’s. British magistrate and social reformer Margery Fry advocated for the incorporation of compensation as part of the criminal justice system. The debate that ensued from her writings resulted in the establishment of the English Criminal Compensation Board in 1964. New Zealand had enacted a criminal injuries compensation scheme a year earlier. In 1967, New South Wales became the first Australian jurisdiction to

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2 Hon M.J. Foley MLA, p.908.
3 Hon M.J. Foley MLA, p.909.
introduce a compensation program. Over the next decade, all the remaining states and territories followed.

The cause of victims throughout the world was advanced at the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders in 1985. The Congress produced a Declaration establishing principles for dealing with crime victims. These principles serve as a model for incorporation in law and practice by criminal justice agencies internationally. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power was formally approved by the United Nations General Assembly in December 1985. The South Australian Government was the first Australian Government to formally implement the United Nations Declaration in 1985.

In Australia, efforts to overcome the alienation of victims from the criminal justice system have seen the introduction of policies to facilitate victim participation in the process, beyond the traditional role of appearing as a witness for the Crown.

3. VICTIMS OF CRIME IN QUEENSLAND

3.1 STATISTICS

In October 1995, the Australian Bureau of Statistics released figures which showed 116,100 Queenslanders were victims of crimes such as robbery, assault or sexual assault last year. The number of victims of personal crime increased from 4.0 percent of the population in 1993 to 4.7 percent in 1995. The risk of victimisation decreases with increasing age. Unemployed Queenslanders were more than twice as likely to be victims of crime, while males were more likely to be victims than females.

3.2 THE CRIMINAL COMPENSATION PROCESS

In Queensland, the current provisions providing compensation to victims of crime are contained in the Criminal Code 1899. The Criminal Code 1995 does not contain any provisions relating to criminal compensation. It has been the government’s intention to incorporate these in separate legislation. Chapter 65A of

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the *Criminal Code 1899* is confined to indictable offences, and enables the Supreme and District courts to compensate for injuries. To obtain compensation where an offender has been convicted, a victim needs to provide information on amounts of actual and anticipated medical and other treatment expenses, inconvenience suffered, impairment to earning capacity and other expenses or loss resulting from the injuries. Compensation is available only to the direct victim. Secondary victims, such as the family of deceased victims or bystanders are not provided for under this legislation.

This information is then presented by the prosecutor to the sentencing court following conviction. Court cases can take some time to come to trial, so there may be time delays in obtaining a compensation order. The sentencing judge then decides on the amount to be paid as compensation. This is based on the Workers Compensation Table of Injuries and evidence presented. There is no appeal process enabling victims or offenders unhappy with the quantum of compensation to have the situation reviewed.

Often, the defendants who are ordered to pay compensation will not have the means to make the payment. In these cases, the Governor in Council can approve the making of an ex gratia payment to the victim. There is no compulsion on the Governor in Council to pay all or any of the amount ordered by the court.

The ex gratia process involves an application by the victim to the Attorney-General. All other avenues for obtaining the compensation from the offender must be demonstrated to have been exhausted. For the victim, this protracted method of obtaining compensation carries no guarantee of success even after a court order for compensation has been made. The Attorney-General’s Office is not obliged to make a decision within any time frame. The Attorney-General can alter the amount paid, if any is paid. In practice, the amount ordered is considered the maximum.

It is not widely publicly known that victims can seek compensation. Compensation orders are not usually made unless the victim applies to the court or the government for compensation. However, courts occasionally make compensation orders on their own initiative.

Where the offender is too sick or mentally ill to be tried, or is acquitted or dismissed or no offender is apprehended or convicted, a victim can apply directly to the Governor in Council for ex gratia compensation. Again an application is made to the Attorney-General. The same limitations raised above apply.

There are other legislative avenues of obtaining compensation in Queensland. The *Common Law Practice Act 1867* provides a statutory remedy for the dependants of a victim who dies as a result of criminally inflicted injuries. This course of action can be costly, lengthy and holds little guarantee of success. The *Penalties and
Sentences Act 1992\textsuperscript{10} provides for a court to order a convicted person to pay compensation to a person injured by an offence. In the Magistrates court, this would be limited to $40,000.

3.2.1 Common Law

The infliction of criminal injuries also constitutes intentional torts to the person.\textsuperscript{11} In other words, a victim is able to instigate civil action for damages against an offender. The civil right of action is only able to be used when an offender is identifiable. The process is costly for the victim. Also the offender may not have the means to meet any damages award made. The inadequacy of the civil remedy is the main reason schemes for the compensation of criminal injuries were introduced.\textsuperscript{12}

4 MAIN PROVISIONS OF THE BILL

This Legislative Bulletin discusses a number of major provisions contained in the Criminal Offence Victims Bill 1995. Major issues are compared with the legislative provisions enacted in other Australian jurisdictions. Comments from organisations involved in victims of crime issues are also incorporated.

4.1 Definition of a Victim

A victim is defined in Clause 5 as a person who has been subjected to a violation of the criminal law. This is further defined as a person subject to violence "in a direct way"; or who is the dependant or immediate family member of such a person; or a person who "suffered harm" while intervening to help the described victim.

Other Australian jurisdictions define victims differently. The terminology used in each scheme varies, but a number of phrases and terms are commonly used. The New South Wales scheme which began operation in 1988, defines a "primary victim" as a person who sustains injury as a direct result of violence.\textsuperscript{13} This category of person is recognised by all Australian schemes, but is usually called the

\textsuperscript{10} Section 35.


\textsuperscript{12} Davies, p.3.

\textsuperscript{13} s. 10, Victims Compensation Act 1987 (NSW).
“victim” or “aggrieved person”. The New South Wales legislation however, introduced the concept of a “secondary victim”. A “secondary victim” is defined as

\[
\text{a person who has sustained injury as a direct result of witnessing, or otherwise}
\]

\[
\text{becoming aware of, injury sustained by a primary victim, or injury or death}
\]

\[
\text{sustained by a deceased victim, of that act.}^{14}
\]

This definition widens the possible number of claimants.

South Australia, the Australian Capital Territory, Tasmania, Northern Territory and Victoria do not specifically define a secondary victim, but have provisions which encompass classes of persons defined as secondary victims in the New South Wales definition.\(^{15}\)

The Queensland Council for Civil Liberties believes compensation in Queensland should be extended to cover secondary victims, such as relatives of murder victims, as well as dependants of murder victims, and people who witness or suffer injury as a result of a crime.\(^{16}\)

### 4.2 Fundamental Principles

Clauses 6 to 18 detail the minimum standards which public officials should observe when dealing with victims of crime. It is intended that guidelines will be issued which will require officers to apply the principles.

Basically these principles provide that:

- A victim should be treated fairly and in a dignified manner: **Clause 6**;
- A victim has a right to access justice: **Clause 7**;
- Guidelines should be established to assist public officials respond to victims: **Clause 8**;
- Information is to be provided to victims about crime prevention methods: **Clause 9**;
- A victim’s privacy should be protected and property returned: **Clause 10**;
- A victim’s version of the circumstances of the offence should be reported as soon as practicable: **Clause 11**;

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\(^{14}\) s. 10 Victims Compensation Act 1987 (NSW).

\(^{15}\) s. 4 Criminal Injuries Compensation Act 1978 (SA); s. 3(1) Victims of Crime Act 1994 (ACT); ss. 2, 4(3) Criminal Injuries Compensation Act 1976 (Tas); s. 3 Crimes (Victims Assistance) Act (NT); and s. 3 Criminal Injuries Compensation Act 1983 (Vic).

• A victim must be protected from violence and intimidation by the accused: **Clause 12**;

• A victim’s welfare is to be considered during the investigation and prosecution of a crime: **Clause 13**;

• Sentencing procedures are to contain appropriate details of the harm caused to a victim by a crime, having regard to the victim’s wishes: **Clause 14**;

• A victim of crime should be provided with information about the progress of the case against the offender. This would include information on the charges laid, those proceeded upon, the outcome of appeals, escapes by the offender, eligibility for release into the community, parole or discharge of the sentence and transfer interstate or overseas. A victim could register with the Corrective Services Commission to receive this information. This section does not apply to offenders who are children: **Clause 15**;

• A victim required to be a witness is to be informed about the trial process: **Clause 16**;

• Access to information about services available to victims is to be provided: **Clause 17**;

• Information on compensation or restitution is to be provided to victims of crime: **Clause 18**.

These provisions are largely based on the United Nations *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*. Similar provisions occur in New Zealand, Western Australian and Australian Capital Territory legislation.\(^\text{17}\) The Australian Capital Territory and New Zealand legislation create organisations that are charged with promoting and implementing the fundamental principles for dealing with victims of crime. The Victims of Crime Association (Qld) advocates the creation of a similar organisation in Queensland.\(^\text{18}\)

The Queensland Law Society and the Queensland Bar Association are concerned that a legislative statement of principles for victims of crime has the potential to affect the rights of accused people.\(^\text{19}\) **Clause 4 (5)** of the Bill states the principles do not override the *Criminal Practice Rules 1900*. The Queensland Council for Civil

\(^{17}\) ss. 3-11, *Victims of Offences Act 1987* (NZ); s. 3 and Schedule 1, *Victims of Crime Act 1994* (WA); and s. 4, *Victims of Crime Act 1994* (ACT).


Liberties believes the provisions “strike a reasonable balance between the competing interest of the victim and the accused”. 20

4.3 THE CRIMINAL COMPENSATION SCHEME

Part 3 of the Bill contains the provisions detailing the method of determining criminal compensation for victims of crime.

Clause 19 provides for the continuation of the current practice in Queensland of providing compensation to victims of crime for injury as well as expenses resulting from an indictable offence. This clause also provides for compensation payments to be made to dependants of a deceased victim and for the payment of funeral and other expenses resulting from the death of a family member. People injured when assisting police officers in their duties are also eligible for compensation. Clause 19(2) excludes compensation for people who suffer injury as a result of taking part in an offence or an unlawful killing.

4.3.1 Injury

The concept of “injury” is common to all Australian schemes. 21 In most schemes it is described in terms similar to the Criminal Code 1899 (Qld):

“injury” means bodily harm and includes pregnancy, mental shock and nervous shock. 22

This definition is maintained in Clause 20 of the Bill, but also includes

any injury specified in the compensation table or prescribed under regulation.

The Australian Capital Territory definition includes “aggravation, acceleration or recurrence” of any physical or mental injury or disease. 23 It also includes damage to

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21 s. 3(1), Victims of Crime Act 1994 (ACT); s. 2, Criminal Injuries Compensation Act 1983 (ACT); s. 3, Victims Compensation Act 1987 (NSW); s. 2(2) Criminal Injuries Compensation Act 1976 (Tas); s. 4(1) Crimes (Victims Assistance) Act (NT); s. 4, Criminal Injuries Compensation Act 1978 (SA); s. 3, Criminal Injuries Compensation Act 1983 (Vic); and s.3, Criminal Injuries Compensation Act 1985 (WA).

22 s. 663A.

23 s. 2, Criminal Injuries Compensation Act 1983 (ACT).
personal property such as medical or surgical aids. This broader definition enlarges the application of the compensation scheme. Most other jurisdictions exclude damage to property.

Clause 22 describes the relationship of compensation available through this proposed legislation to other rights, such as common law. See Section 3.2.1 of this Bulletin for discussion of common law provisions. This clause provides that compensation available under this statute is additional to rights available under common law or otherwise. Clause 22(3) clarifies that compensation provided for under this scheme is solatium24 only, and not meant to reflect the amount of compensation to which the applicant may otherwise be entitled. This clause states that compensation provided “is intended to help the applicant”, without the delay, costs and formality of civil action for damages. Clause 22(4) provides that the maximum compensation available is reserved for “the most serious cases”. The quantum of compensation is required to be scaled according to the seriousness of the injury.

4.4 Method of Determining Compensation

As explained in section 3.2, currently in Queensland application for criminal compensation for victims is available through the courts or by application for an ex gratia payment. The Criminal Offence Victims Bill 1995 provides for these methods to continue, with modifications.

Clause 24 requires an application to the court for compensation where the offender is convicted of an indictable personal offence. The application for a compensation order has to be made before the court in which the offender was convicted. It is believed the sentencing judge is in the best position to determine appropriate compensation, thus avoiding the trauma of further hearings.25

The continuation of the requirement of victims of crime to apply for compensation to a sentencing court however has been criticised.26 The Queensland Council for Civil Liberties claims it is “impractical and unfair” for applications to be made at

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24 Solatium is defined by Black’s Law Dictionary, Fifth Edition, as compensation, damages allowed for injury to the feelings.


the time of sentencing.\(^{27}\) This is because personal injuries may not have stabilised at this time. Moreover, if a jury is involved there is no way of knowing the verdict ahead of time and plea bargaining may affect applications. **Clause 40** provides for a three year time limit for the lodging of applications, which may address some of the Council’s concerns.

### 4.4.1 Provisions in other States

Other states provide for compensation to be determined by tribunals or independent offices.

**Victoria and New South Wales**

New South Wales\(^{28}\) and Victoria\(^{29}\) have established tribunals for the determination of applications for compensation of criminal injuries. In New South Wales, the Tribunal is constituted by Magistrates.\(^{30}\) In Victoria, Magistrates are appointed along with solicitors and barristers with more than seven years standing.\(^{31}\) Compensation can also be sought through the court system in New South Wales.\(^{32}\)

**Tasmania**

In Tasmania, compensation proceedings are conducted by the Master of the Supreme Court.\(^{33}\) Section 10 of the Act provides that the Master’s decision is final, and the order is not subject to any further administrative discretion.

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\(^{27}\) Queensland Council for Civil Liberties, Submission to Queensland Government, 18 October 1995.

\(^{28}\) s. 4, *Victims Compensation Act 1987* (NSW).


\(^{30}\) s.4, *Victims Compensation Act 1987* (NSW).

\(^{31}\) Schedule 1, *Criminal Injuries Compensation Act 1983* (Vic).

\(^{32}\) Part 6, *Victims Compensation Act 1987* (NSW).

\(^{33}\) s. 5, *Criminal Injuries Compensation Act 1976* (Tas).
Western Australia

In Western Australia, the Office of the Assessor\textsuperscript{34} is constituted by a legal practitioner who determines applications in a similar way to the New South Wales and Victorian tribunals.

South Australia, Northern Territory and Australian Capital Territory

In these jurisdictions compensation proceedings have remained in the trial courts, similar to the current and proposed Queensland scheme.

In South Australia, the District Court makes compensation orders.\textsuperscript{35} The Attorney-General is required to pay the order within 28 days of it being lodged by the claimant or 28 days after an appeal has been processed.\textsuperscript{36} The Attorney-General has limited powers to alter the amount of compensation.\textsuperscript{37} Ex gratia payments of compensation can be made if the claimant needs the money and is likely to be awarded compensation or if the alleged offender is acquitted.\textsuperscript{38}

In the Northern Territory, any Stipendiary Magistrate or Judge of the Supreme Court is empowered to make an award.\textsuperscript{39} Payments are also required to be made in 28 days.\textsuperscript{40} In the Australian Capital Territory, compensation applications can be made to the Supreme or Magistrates courts,\textsuperscript{41} depending on the jurisdiction of the court in relation to the offence. The Registrar of the Supreme Court has the power to determine applications for compensation where criminal proceedings have not been instituted.\textsuperscript{42}

\textsuperscript{34} s. 5, \textit{Criminal Injuries Compensation Act 1985} (WA).
\textsuperscript{35} ss. 4 and 7, \textit{Criminal Injuries Compensation Act 1978} (SA).
\textsuperscript{36} s.11(1), \textit{Criminal Injuries Compensation Act 1978} (SA).
\textsuperscript{37} s.11(2), \textit{Criminal Injuries Compensation Act 1978} (SA).
\textsuperscript{38} s.11(3), \textit{Criminal Injuries Compensation Act 1978} (SA).
\textsuperscript{39} ss. 4,5 \textit{Crimes (Victims Assistance) Act} (NT).
\textsuperscript{40} s.20, \textit{Crimes (Victims Assistance) Act} (NT).
\textsuperscript{41} ss.11,12, \textit{Criminal Injuries Compensation Act 1983}, (ACT).
\textsuperscript{42} s. 11, \textit{Criminal Injuries Compensation Act 1983}, (ACT).
4.4.2 Ex Gratia Payments

The current situation in Queensland where payment of an unsatisfied compensation order or an application to the state is ex gratia, continues under Clause 23 of the Bill.

Currently, the Attorney-General must seek the approval of the Governor in Council for the payment of compensation. The Governor in Council is under no legal obligation to consider or approve the application either in whole or in part. If the Attorney-General refuses to make an award, the Supreme Court can review the decision pursuant to judicial review legislation.

The current Queensland scheme is mute on the time allowed for the consideration of payment by the Minister before submitting a report to the Governor in Council. Delays in the operation of the current compensation scheme was raised by Justice Demack in *R v Sainty*. After noting the deferment power had been used in the past, Justice Demack concluded:

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

The Tasmanian and Queensland schemes are the only ones which have retained absolute administrative discretion in relation to payment of compensation awards. Davies considers that such a discretion creates an “additional unjustifiable bureaucratic hurdle” for victims of crime.

Ex gratia award systems in other jurisdictions have been replaced by systems which provide a statutory basis for awards of compensation. For example, the English Criminal Injuries Compensation Scheme was put on a statutory footing in 1988.

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43 ss.663C and 663D, Criminal Code 1899 (Qld).
45 ss.663C(3) and 663D(3), Criminal Code 1899 (Qld).
47 Davies, p.8.
The Queensland Council for Civil Liberties states there should be a right to receive compensation, not just a right to make an application for an ex gratia payment.\textsuperscript{49}

\subsection*{4.4.3 Quantum of Compensation}

Schedule 1 comprises a \textbf{Compensation Table} which lists injuries and the percentage of the \textit{“scheme maximum”} allowable for that injury. In Queensland, the scheme maximum will be $75,000.\textsuperscript{50} This is a marginal increase from the current limit of $74,050.\textsuperscript{51} \textbf{Clause 25} requires the courts to limit the amount of compensation ordered to that specified in the Compensation Table. The maximum amount of compensation paid to a victim suffering \textit{“mental or nervous shock”} will be $25,500, compared with the current limit of $20,000.

Other jurisdictions also set the maximum amount of criminal compensation payable. In New South Wales, Victoria, Western Australia, South Australia and the Australian Capital Territory, the maximum is set at $50,000.\textsuperscript{52} In the Northern Territory, the maximum is $25,000\textsuperscript{53}, and in Tasmania it is $20,000.\textsuperscript{54}

The Queensland Council for Civil Liberties contends that the maximum of $75,000 will quickly become insufficient if a mechanism is not included in the Bill which will at least tie the \textit{scheme maximum} to the Consumer Price Index.\textsuperscript{55}

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{49}] Queensland Council for Civil Liberties, Submission to Queensland Government, 18 October 1995.
\item[\textsuperscript{50}] Hon M.J. Foley MLA, p.909.
\item[\textsuperscript{51}] \textit{Workers Compensation Act 1990} (Qld).
\item[\textsuperscript{52}] s.16, Victims Compensation Act 1987 (NSW); s.18A, Criminal Injuries Compensation Act 1983 (Vic); s.7(8), Criminal Injuries Compensation Act 1978 (SA); s.7(1), Criminal Injuries Compensation Act 1983 (ACT); s.19(1), Criminal Injuries Compensation Act 1985 (WA), and s.121(B) Criminal Injuries Compensation Regulations 1985 (WA).
\item[\textsuperscript{53}] s.13, \textit{Crimes (Victims Assistance) Act}, (NT).
\item[\textsuperscript{54}] s.1B, Statutory Rule No. 188 1985 (Tas).
\item[\textsuperscript{55}] Queensland Council for Civil Liberties, Submission to Queensland Government, 18 October 1995.
\end{itemize}
\end{footnotesize}
4.4.4 Single or Multiple Compensation Orders

Clause 26 indicates whether single or multiple compensation orders are appropriate in relation to an injury or injuries. The test for whether a single order is appropriate is whether the injury resulted from a “substantially single injury or substantially single state of injury”.

Where there is more than one convicted person, the court may make a compensation order against each of the offenders. The Compensation Table and scheme maximum are to apply to the orders under this clause.

In the past, the judiciary had been able to circumvent the prescribed maximum amounts of compensation. Clause 26 is designed to prevent this happening in the future.

4.4.5 Evidence Rules

As current provisions of the Queensland Criminal Compensation scheme are contained in the Criminal Code 1899, they thereby form part of the criminal law of the state. Generally, criminal law requires evidentiary proof beyond reasonable doubt. It could be argued this is placing an onerous burden of proof upon the claimant of compensation. In practice, however, courts have applied the lesser evidentiary standard of balance of probabilities when considering compensation applications.

Clause 30 remedies the current situation by requiring that an application for a compensation order is a civil proceeding to be decided on the balance of probabilities. This clause will bring Queensland into line with other criminal compensation schemes operating in Australia.

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57 In R v Wraight and Dakin, ex parte Fullerton Justice Campbell awarded a sum of $13814.40 for damages to a rape victim even though the maximum amount of compensation at the time was $5000. Justice Campbell concluded compensation could be awarded in respect of each offence committed by each offender. Legislative changes to the Criminal Code 1899 in 1984 prevented similar circumvention of the statutory maximum. See the Criminal Code Amendment Act 1984 No. 28, (Qld).


60 s.8(1) Criminal Injuries Compensation Act 1978 (SA); s.7(3), Criminal Injuries Compensation Act 1985 (WA); s.30, Victims Compensation Act 1987 (NSW); s.20(2),
4.4.6 Costs

Clause 31 prevents the court from making an order for the payment of costs incurred in making an application. This would include medical and legal costs. Currently, the courts can award costs.\(^{61}\) Under the provisions in this Bill, private legal expenses could be avoided. In his second reading speech, the Minister stated:

Victims will not be disadvantaged. In fact they will be in a better position than they are under the current scheme...This Bill enables the prosecutor or officers within the Office of the Director of Public Prosecutions to be available to assist victims in making an applications for compensation.\(^{62}\)

This provision is contained in Clause 42 of the Bill.

Most other states provide avenues for the payment of costs incurred by victims of crime. For example, in New South Wales s. 18A of the Victims Compensation Act 1987 requires the Victims Compensation Fund to pay for any medical examinations required by an applicant. Also s. 19(4)(a) allows for an award to be made payable for compensation of expenses. Other jurisdictions such as the Australian Capital Territory, Victoria and South Australia have similar provisions.\(^{63}\) In South Australia, legal practitioners are prevented from charging more than a prescribed scale of costs.\(^{64}\)

The Victims of Crime Association believes as long as necessary support mechanisms are in place, there is no need for costs to form part of any award for compensation.\(^{65}\) On the other hand, the Queensland Law Society and Queensland Council for Civil Liberties believe costs incurred for claiming compensation should be recoverable.\(^{66}\)

\(^{61}\) Sweetapple, p.275.

\(^{62}\) Hon M.J. Foley MLA, p.909.

\(^{63}\) s.5, Criminal Injuries Compensation Act 1983 (ACT); s.15, Criminal Injuries Compensation Act 1976 (Tas); s.17, Crimes (Victims Assistance) Act, (NT); and s.8, Criminal Injuries Compensation Act 1983 (ACT).

\(^{64}\) s. 10, Criminal Injuries Compensation Act 1978 (SA).


4.4.7 Compensation Applications to Government

Clause 32 provides for the state government to pay an unsatisfied compensation order. Clause 33 provides for the payment of compensation to a victim where an offender has been charged but not found guilty because of unsound mind, or has not been identified or found. Clause 33(4) retains the state government’s right to pay all, part or none of the amount of compensation that would have been expected.

Compensation is available to a person who is injured when assisting a police officer to “make, or attempt to make, an arrest, or to prevent, or attempt to prevent, an offence or suspected offence”: Clause 34. This is a continuation of the current system in Queensland. Legislation in other states recognises people who have sustained injury in the course of law enforcement as victims.67

4.4.8 Payments to Dependants of Deceased Victims

Queensland’s current compensation scheme is the only one in Australia which has no provision for the compensation of the dependants or relatives of deceased victims.68 An action for damages for death caused by wrongful act under sections 12 and 13 of the Common Law Practice Act 1867 (Qld) is the only current avenue open to close relatives of deceased victims. Clause 35 remedies this situation by providing for the payment of compensation to a deceased victim’s dependants.

The New South Wales scheme contains the most comprehensive provisions in relation to payment of compensation where a victim of criminal injuries dies. “Close relatives” other than just dependants can claim. This includes the victim’s spouse or a person living with the victim as a spouse, a parent, guardian, step-parent or grandparent of the victim, or a child, step-child, or grandchild of the victim or child of whom the victim was guardian.69 Other relatives of deceased victims, such as siblings, can also claim if they fall within the category of secondary victims. Section 4.1 discusses this issue in more detail.

67 ss.3,10, Victims Compensation Act 1987 (NSW); s.4(1)(B), 4(2), Criminal Injuries Compensation Act 1976 (Tas); s.3, Criminal Injuries Compensation Act 1983 (Vic); and Police Assistance Compensation Act 1964 (WA).

68 ss.3,10,12,13, Victims Compensation Act 1987 (NSW); ss.3,17,22 Criminal Injuries Compensation Act 1983 (Vic); s. 4(3),4(5), Criminal Injuries Compensation Act 1976 (Tas); ss.2 and 5, Criminal Injuries Compensation Act 1983 (ACT); ss.4,7, Criminal Injuries Compensation Act 1978 (SA); ss.3,11, Criminal Injuries Compensation Act 1985 (WA); ss.4(1) and 5(2), Crimes (Victims Compensation) Act (NT).

69 s.3, Victims Compensation Act 1987 (NSW).
Victoria also allows claims by those other than dependants.\textsuperscript{70} Those that were financially dependent upon the deceased or who incurred expenses as a result of the victim’s death can claim compensation. Tasmania and the Australian Capital Territory have similar provisions. South Australia and the Northern Territory also allow claims by those who were financially dependent on the deceased victim.\textsuperscript{71} In the Northern Territory, traditional Aboriginal marriages and the relationships according to these marriages are recognised.\textsuperscript{72} The Western Australian scheme does not require financial dependency, but has a broad definition of “close relative”.\textsuperscript{73}

According to the Minister’s second reading speech, up to $20,000 compensation will be available to be paid to the dependants of a victims of murder or manslaughter.\textsuperscript{74} Other states do not limit the amount of compensation paid to the families of these victims within the scheme maximum. The maximum compensation of $50,000 is available in Victoria and New South Wales.

Although this is an improvement on the current situation, the Homicide Victims Support Group and the Queensland Council for Civil Liberties have criticised the limiting of the payment to $20,000.\textsuperscript{75} Up to $4000 will be paid to a victim’s family for funeral expenses or up to $1000 for other expenses incurred as a result of the murder or manslaughter: \textbf{Clauses 35 (2), 35, (3)}. Other states have comparable provisions.

\textbf{Clause 27} provides mechanisms for the making of a \textit{repayment order} requiring a person convicted of murder or manslaughter to repay compensation paid by the state under \textbf{Clause 35}. \textbf{Clause 28} provides for a convicted person to be notified of the compensation order. Assets belonging to the offender can be applied towards the compensation order. Compensation orders are in addition to a convicted person’s sentence: \textbf{Clause 29}.

\textsuperscript{70} ss.3,22 \textit{Criminal Injuries Compensation Act 1983 (Vic)}.

\textsuperscript{71} ss.4,7, \textit{Criminal Injuries Compensation Act 1978 (SA)} and ss.4(1) and 5(2), \textit{Crimes (Victims Assistance) Act (NT)}.

\textsuperscript{72} s.4(2), \textit{Crimes (Victims Assistance) Act (NT)}.

\textsuperscript{73} s.3, \textit{Criminal Injuries Compensation Act 1985 (WA)}.

\textsuperscript{74} Hon M.J. Foley MLA, p.909.

4.4.9 The Processing of Applications

Clause 36 details the method of processing applications. The matters Governor in Council must consider are listed. The power to defer a decision on an application is continued under the Bill: Clause 36(6). The state’s use of the deferment power has been criticised. As mentioned in Section 4.4.1, the Northern Territory and South Australian Ministers are required to pay the compensation ordered within 28 days.

The Queensland Law Society is concerned at the continuing discretion of the State to pay all or part of any compensation order. The Society is of the view that once an order has been made, it should be satisfied from moneys recovered by levies and fines. The State should then pursue recovery from the offender, pursuant to its statutory rights of subrogation. In reality, there are very few criminal compensation cases where the offender is able to satisfy the compensation order. In 1994, Legal Aid reported that only 2 out of 60 convicted criminals paid compensation to victims. The Queensland Law Society contends that the proposed system creates an unjustifiable burden on the victim to endeavor to enforce the order when there is little prospect for success. The Queensland Council for Civil Liberties holds similar views.

4.4.10 Payment of Compensation

According to Clause 37, compensation payments are to be paid from Consolidated Revenue, continuing the current situation in Queensland. This also occurs in the Australian Capital Territory and Victoria.

Other states have established criminal compensation funds. These funds have money appropriated to them. But in New South Wales, Tasmania, South Australia and the Northern Territory, compensation funds are also sustained by levies.


78 Giles, p.6.


80 s.27, Criminal Injuries Compensation Act 1983 (ACT); and s.30, Criminal Injuries Compensation Act 1983 (Vic).
imposed on offenders.81 Levies vary between $5 and $50. The fine is higher if the offence is indictable.82 Some states also use funds raised under confiscation of profits of crime.83

Queensland is proposing a rise in the monetary value of penalty units, although not specifically for the use of victims of crime. Moneys raised under this Bill will go into Consolidated Revenue, from where ex gratia payments are made. **Schedule 2** of the Criminal Offence Victims Bill 1995 contains an amendment to section 5(1) of the **Penalties and Sentences Act 1992** (Qld). This section provides a new definition of a penalty unit. Where a court orders a fine or penalty, the value of a penalty unit is to become $75. For minor offences prosecuted by an infringement notice, the value of a penalty unit remains at $60. The Explanatory Notes to the Bill state:

*The aim of increasing the value of a penalty unit for court ordered fines is to ensure that those committing offences contribute to partly offset the cost to the community of the compensation scheme.*84

### 4.4.11 Subrogation Rights

**Clause 38** maintains the State’s current right, after paying compensation to a victim, to have first claim over any amount of money the victim receives from the offender at a later date. This clause allows the state to recoup awards paid to victims where they have later obtained money from the offender. This in effect prevents “double-dipping” by some victims, whose circumstances provide two avenues of obtaining compensation. The provision is not designed to disadvantage applicants, but provide more equity in the system. Western Australia and the Northern Territory85 have similar provisions.

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81 s.65G, Victims Compensation Act 1987 (NSW); s.11, Criminal Injuries Compensation Act 1976 (Tas); s.12 Criminal Injuries Compensation Act 1978 (SA); and s.25A, Crimes (Victims Assistance) Act (NT).

82 s.65C, Victims Compensation Act 1987 (NSW), the fine varies between $20-$50; s.5(3), Criminal Injuries Compensation Act 1976 (Tas), fine varies between $20-$50; s.13 Criminal Injuries Compensation Act 1978 (SA), fine varies between $6-$40; and s.25B, Crimes (Victims Assistance) Act (NT), fine varies between $5-$30.

83 s.65G Victims Compensation Act 1987 (NSW); and s.11(2), Criminal Injuries Compensation Act 1976 (Tas).

84 Explanatory Notes, Criminal Offence Victims Bill 1995, p. 16.

85 s.39, Criminal Injuries Compensation Act 1985 (WA); s.22, Crimes (Victims Assistance) Act (NT).
4.4.12 Time-limits on Applications

Clause 40 establishes time-limits for the bringing of applications for compensation. Generally, this provision requires that compensation is sought within 3 years of the convicted person’s trial: Clause 40(1)(a). If the applicant is a child, the application can be made within three years of the child becoming an adult: Clause 40(1)(b).

Clause 41 provides for the extension of these time-limits. Other states have equivalent provisions.

4.4.13 The Compensation Table

The operation of the Compensation Table, contained in Schedule 1, is discussed in Section 4.4.3 of this Bulletin. It is intended that the level of compensation awarded is determined by reference to the range of percentages listed against the specific injury in the Table. The contents of the Compensation Table limits the amount of compensation to that specified in the Table. The aim is to ensure that there is some consistency in awards paid by comparing the injury incurred to a Table.

The use of a table to determine the amount of compensation awarded has been criticised in the past. The current scheme requires consideration of the injuries suffered in relation to the amounts specified for particular injuries under the Workers Compensation Act 1990, or where relevant the Workers Compensation Act 1916 (Qld). Where the injury is not specified, the court must compare the injury to those injuries specified which are considered comparable.  

The Compensation Table provided in the Bill remedies the situation of relying on injuries specified for workers compensation by creating a specific list of victim’s injuries. This initiative has been welcomed by the Victims of Crime Association. However, terms such as “minor”, “moderate” and “severe” are used, but not defined. So comparison may remain arbitrary. No justification of the percentages listed against specific injuries is provided.

The Queensland Law Society argues the lack of application of common law assessment, plus the use of percentage rates to calculate compensation will significantly diminish compensation entitlements to victims of crime. The Queensland Council for Civil Liberties has similar concerns. They believe the

86 ss.663AA, 663BA, Criminal Code 1899 (Qld).


structure of the Bill constrains the use of judicial discretion.\textsuperscript{89} The Council believes the provisions impose a

\begin{quote}
  bureaucratic and inflexible structure which takes little or no account of the individual circumstances of the victim, and focuses entirely on causes rather than outcomes.\textsuperscript{90}
\end{quote}

The Council contends that damages should continue to be assessed on the basis of principles used to assess common law principles for damages decided by the Court of Appeal in \textit{McClintock v Jones (1995)}. They claim the proposed structure does not consider that the same injury may have far more serious consequences for one person than for another.\textsuperscript{91}

4.5 AMENDMENTS

\textbf{Schedule 2} of the Criminal Offence Victims Bill 1995 contains amendments to a number of Queensland Acts. The \textit{Criminal Code 1899} and the \textit{Criminal Code 1995} are amended to protect victims of crime from violence and intimidation from the accused. New clauses allow courts to prohibit the publication of identifying information about the victim.

The \textit{Bail Act 1980} is amended to require the safety and welfare of the victim to be considered when assessing bail applications from the accused.

Amendments are made to the \textit{Juvenile Justice Act 1992}, to clarify that the provisions of the Criminal Offence Victims Bill 1995 will apply to an offence committed by a child.

5. FURTHER COMMENTARY

5.1 APPEALS

As mentioned in section 4.4.2, most payments in Queensland, have been and will continue, to be ex gratia at the Governor in Council’s discretion. Neither the

\textsuperscript{89} Queensland Council for Civil Liberties, Submission to Queensland Government, 18 October 1995.

\textsuperscript{90} Queensland Council for Civil Liberties, Submission to Queensland Government, 18 October 1995.

\textsuperscript{91} Queensland Council for Civil Liberties, Submission to Queensland Government, 18 October 1995.
current nor the proposed scheme provides for any appeal mechanism by the claimant or the offender. Therefore, in circumstances where awards of compensation are excessive or inadequate, both the victim and the offender are left with no avenue to have the decision reviewed. The only other jurisdictions which do not provide appeal mechanisms are the Northern Territory and Tasmania. But, in the Northern Territory, section 19 of the Act allows for the questioning of law arising from an application.

New South Wales, Victoria, South Australia, the Australian Capital Territory and Western Australia provide statutory rights of appeal to the courts. The Victims of Crime Association believes the Queensland compensation scheme should incorporate a right of appeal or review of compensation orders to a body delegated by the Attorney-General or to a Magistrate.

5.2 IMPLICATIONS RESULTING FROM THE CRIMINAL CODE 1995

The current and proposed criminal compensation schemes in Queensland only apply to offences which are indictable. When all of the provisions of the Criminal Code 1995 commence, a number of offences will no longer be indictable. This therefore limits the number of applicants entitled to compensation. The Queensland Council for Civil Liberties proposes that the compensation scheme should be extended to provide compensation for injuries as a result of offences that are not indictable, dealt with by Magistrates in the Magistrates and Children’s Court.

5.3 ANOMALIES WITH COMPENSATION

The issue of compensation is complex, and full of anomalies. As was recently pointed out when calling for one uniform compensation scheme for workers compensation, motor vehicle accidents and victims of crime:

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92 s.10, Criminal Injuries Compensation Act 1976 (Tas); Crimes (Victims Assistance) Act (NT).

93 s.29, Victims Compensation Act 1987 (NSW); ss.41-43 Criminal Injuries Compensation Act 1985 (WA); ss.26,27, Criminal Injuries Compensation Act 1983 (Vic); s.9a, Criminal Injuries Compensation Act 1978 (SA) and s.28, Criminal Injuries Compensation Act 1983 (ACT).


If one’s arm gets taken off in a car accident, the courts might eventually oblige with a small fortune, albeit a somewhat lesser small fortune when the legal profession has taken its cut. If one’s arm is taken off by a criminal, then the courts are limited to a much smaller payout. If one’s arm is taken off in an industrial accident, there is a good prospect that workers compensation will adequately but not especially handsomely assist. But recourse to solicitors and common law rights might lead to a payout at about car accident levels. But if one’s arm is taken off in a context that doesn’t involve industry, criminals, automobiles or insurance cover then one can be left whistling in the wind for compensation.97

A comprehensive, no-fault system of compensation is considered best. Commentators claim a standardised system would be quicker, cheaper and fairer than the multitude of systems currently available. The problem with the current scheme is that it depends on the outcome of a case rather than the effect of the injury to the victim.98

5.4 NATIONAL LEGISLATION

A national criminal compensation scheme, similar to compulsory third party insurance, has been suggested in the past.99 One attempt was made at the federal level to introduce an Australian scheme for the compensation of victims. A national Compensation Bill was in fact passed by the House of Representatives in 1974. However, it “foundered in the Senate” and was never passed.100 Recent events, such as mutual recognition legislation and the New Federalism process, mean the political climate for the creation of a national scheme may be more favourable than twenty years ago.

The president of the Australian Council for Civil Liberties, Mr. Terry O’Gorman, recently called on the States to “get their act together” and provide “adequate”

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97 Phil Dickie, ‘We need one, standardised compo system’, Sunday Mail, 8 October 1995, p.95.
99 New Zealand enacted a national no-fault accident compensation scheme in 1972. This scheme compensates victims based on the effect of the injury to them, rather than the arbitrary measures used in Australian jurisdictions. In 1974, the scheme was amended to provide state-funded compensation to victims of crime.
compensation with minimal variation between each State. Variations in the average amount of compensation awarded around Australia of between $3,574 in Queensland and $13,000 in the Australian Capital Territory emphasises anomalies between schemes.

5.5 **Costs of Administering the Scheme**

The Explanatory Notes accompanying the Bill suggests the cost of implementing provisions contained in the proposed scheme will be around $2.7 million per year. The 25 percent increase in fines for indictable offences under the *Penalties and Sentences Act 1992* is expected to generate an additional $5.4 million per year. Ex gratia payments in Queensland have totalled almost $12 million over the last four years.

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102 Harris, p.8.

103 Explanatory Notes, Criminal Offence Victims Bill 1995, p.3.


**TABLE 1 CRIMINAL COMPENSATION LEGISLATION IN AUSTRALIAN AND NEW ZEALAND JURISDICTIONS**

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Relevant Statute</th>
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<tbody>
<tr>
<td>Queensland</td>
<td>• Criminal Code 1899</td>
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<tr>
<td></td>
<td>• Penalties and Sentences Act 1992</td>
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<td></td>
<td>• Criminal Offence Victims Bill 1995</td>
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<tr>
<td>New South Wales</td>
<td>• Victims Compensation Act 1987</td>
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<td>Victoria</td>
<td>• Criminal Injuries Compensation Act 1983</td>
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<td>Tasmania</td>
<td>• Criminal Injuries Compensation Act 1976</td>
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<td></td>
<td>• Victims of Crime Compensation Act 1994</td>
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<tr>
<td>Western Australia</td>
<td>• Criminal Injuries Compensation Act 1985</td>
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<td></td>
<td>• Victims of Crime Act 1994</td>
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<td></td>
<td>• Police Assistance Compensation Act 1964</td>
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<tr>
<td>South Australia</td>
<td>• Criminal Injuries Compensation Act 1978</td>
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<tr>
<td>Northern Territory</td>
<td>• Crimes (Victims Assistance) Act&lt;sup&gt;106&lt;/sup&gt;</td>
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<td></td>
<td>Crimes Compensation Regulations 1982</td>
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<td>Crimes (Victims Assistance) Regulations 1990</td>
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<td>Crimes (Victims Assistance) (Notice of Payment) Regulations 1992</td>
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<tr>
<td>Australian Capital</td>
<td>• Criminal Injuries Compensation Act 1983</td>
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<tr>
<td>Territory</td>
<td>• Victims of Crime Act 1994</td>
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<tr>
<td>New Zealand</td>
<td>• Victims of Offences Act 1987</td>
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<td></td>
<td>• Accident Rehabilitation and Compensation Insurance Act 1992</td>
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</tbody>
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<sup>106</sup> This Act comprises the *Crimes Compensation Act 1982* (NT) as amended by other Acts.
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