Victimological Advances in Theory, Policy and Services

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To Pay or Not to Pay?

Revisiting the Rationale for State-Funded Compensation for Crime Victims — An Australian Perspective

By Sarah Fletcher and Michael O'Connell

Criminal Injuries Compensation

Victims of crime were for a significant period in history considered the “forgotten” actor in the criminal justice system (Shapland, Willmore & Duff, 1985, p. 1; Grabosky, 1987). More recently, however, there has “emerged a renewed recognition” of victims’ needs and interests along with concerted efforts to reinstate victims as active participants in criminal justice processes (Parsonage, 1979, p. 8). Herman (2010, p. 31) states that the development of state-funded compensation for victims of crime was “one of the most significant reform initiatives of the 1960s” and is the principle means by which society demonstrates, in an important and tangible way, its support for victims of crime.

Since then, state-funded criminal injuries compensation schemes have found favour with governments of various persuasions in most Western societies. Compensation is considered by many to significantly enhance victims’ ability to ameliorate the negative impact of victimisation (Herman, 2010, p. 118; Miers, 2013, p. 147). Freckleton (1994, p. 245) states that compensation systems should be “recognised as an important aspect of state care of the vulnerable and the wronged.” In this paper it is pointed out, however, few of the schemes were established on a sound assessment of victims’ needs; rather, governments tended to rely on largely anecdotal evidence.

At the same time, various governments have decided to revisit the rationale for state-funded criminal injuries compensation. Toward this end, this paper examines the history and rationale behind state funded criminal injuries compensation. For comparative purposes, a brief overview of criminal injuries compensation schemes in Australia is presented.
TO PAY OR NOT TO PAY?

Historical Development

Pre-Christ

The concept of state-funded compensation pre-dates Christ’s birth. The Babylonian Code of Hammurabi promulgated about 2250 BC (Elias, 1983), for example, required “territorial governors to replace a robbery victim’s lost property if the criminal was not captured,” or “in the case of a murder, the government to pay the heirs a specific sum in silver from the treasury” (Karmen, 1996, p. 324; also Childress, 1964; Mueller, 1965; Schmutz, 1971; Lamborn, 1973). The Code also provided for restoration of equity between the offender and the victim. Once restored, a victim was obliged to forgive the offender (Masters & Roberson, 1990; Gordon, 1960).

Discussion about Hammurabi, especially among victimologists, often overshadows its administrative reality. The state was only obliged to compensate property owners; local victims had to seek restitution by the criminal. Eligibility was limited by offence to murder or robbery and victim to primary victim or, in the case of murder, “his heirs” (Childress, 1964; Robins, 1990). Arguably, Hammurabi’s motive in promulgating a code that required a community to compensate certain classes of victims was to reinforce local crime prevention and at law enforcement (Childress, 1964; also Schmutz, 1971) since the community that failed to provide “visitors” had to pay compensation.

Ancient Hebrew law acknowledged a victim’s entitlement to restitution, but did not provide a state-funded compensation scheme. There was, however, an emphasis on restoring balance and appeasing God’s pleasure. It was held that a murderer, for example, in “shedding human blood,” had taken “what rightfully belonged to” God (Masters & Roberson, 1990, p. 53). Only the murderer’s death, hence the shedding of the guilty’s blood, could compensate. In cases where the murderer was not apprehended, the community had to sacrifice an animal as compensation. Under Hebrew law, individual compensation (i.e., restitution) was extended to cover harm such as loss of time in healing attributable to personal injury (Wolfgang, 1963; also Schafer, 1970; Schmutz, 1971).

Early urbanised Arabic societies also developed the practice of compensating for offences against the person. Likewise, ancient Greek law provided that the murderer was punishable by the murderer (the “death-fine,” Schafer, 1970, p. 55).

Post-Christ

In England, the 6th century laws of Ethelbert1 and the 9th century laws of Alfred provided for punishment by the payment of money, such as the “wergild” (price of man) in the case of murder, by the offender or the offender’s kin to

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1 Also spelt Æthelbert (c. 570 AD); see, for example, Wolfgang (1965).

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person injured by criminal.” Ferri (1917 in Schmertz, 1971, p. 91), who agreed with Garofalo, argued that “the State should take into account the rights of the victim, paying him an immediate satisfaction, especially when blood has been shed, looking to the offender to reimburse it for its expense.” Moreover, Ferri concluded that “the establishment of a fund to meet the indemnity formed by the interest of the fines and indemnities perhaps, refused by the victims, will be a step and complete recognition of this principle.” (The idea of a public compensation fund for victims of crime, funded from fines collected, was mooted in 1885 into an International Prison Conference held in Paris (Kirchhoff, 1994)).

Ferri had previously advanced restitution as being in the interest of not only the victim but also society as a whole. His premise, among other things, was discussed in several forums including in 1885 and again in 1890 at international congresses on crime. The agenda of the 1890 General Assembly of the International Criminalistic Society is indicative of the debate. The three main topics were (Kirchhoff, 1994) as follows:

- Should the criminal law take into account the interest of the “injured party”?
  - If so, how?
- Should the public prosecutor, who is not the injured party per se, seek a restitution order from a criminal court?
- Should [a] prisoner’s earnings be used to restore the injured party?

The Development of Statute Law

Statute laws requiring compensation and/or restitution can be traced back to the late 1700s (Karmen, 1996) and the 1800s (National Victim Assistance Agency, 1996). Laws that set aside “special funds” for victims existed in Tuscany in 1786, in Mexico in 1871 and in France in 1934 (Karmen, 1996; Silving, 1999).

The Irish Grand Jury Act (1836) provided that compensation be paid to witnesses, magistrates or police who suffered murder or serious injury while intervening in a breach of the peace.

In the 20th century, the 1921 draft Italian penal code stipulated that the state was to effectively protect victims of crime and, where the state failed in this duty, it had a responsibility to compensate victims. Noteworthy, the code, which was not realised as law, placed state-funded compensation in the realm of public law rather than civil law (Kirchhoff, 1994). The 1923 draft penal code for the Republic of Czechoslovakia required the state to compensate the injured party when the offender was unable to do so. It was proposed that funds would be derived from fines collected. Similarly, reparation, which could take the form of restitution, was proclaimed a criminal sanction in an amendment to the Mexican Code in 1929, which provided for reparation of damages to be made by the criminal (Almaraz, 1933, p. 271).

Interest in victim compensation has waxed and waned. The genesis of modern victim compensation schemes is usually attributed to Margaret Fry’s campaign, which began in the early 1950s. In a series of articles, she provoked a public that had largely forsaken the victims of crime and ignored their collective responsibility to afford benefits to those injured by crime. Her agitation stirred academic commentary and governments to act.

New Zealand introduced a criminal injuries compensation scheme in 1963 (Kamrun, 1963; Weeks, 1970; also Miller, 1996). Britain in 1964 (Miers, 1980, 1990, 1997; Report of an Independent Working Party, 1993; Walllake, 1989; also Steeland et al., 1985) and California and Wisconsin in 1965 (Rothstein, 1965) have state compensation schemes; see below). State compensation schemes now operate throughout most western liberal democracies (Miers, 2013). Each program has eligibility requirements, procedures and compensable costs. Some programs are limited to specific offences (e.g., Italy’s scheme only covers victims of terrorism), some programs do not cover foreigners and some programs offer benefits to nationals injured while overseas. China has developed a national Law of State Compensation, “which established the state’s responsibility for compensating victims of abuse of power by officials” (United Nations, 1997).

International and Multi-Nation Instruments

The United Nations adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power in 1985 (resolution 40/34, 1985). That Declaration places an emphasis (among other things) on restitution but also states:

- When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to—
  1. Victims who have sustained bodily injury or impairment of physical or mental health as a result of serious crime;
  2. The family, in particular dependants of persons who have died or become physically incapacitated as a result of such victimisation.

Members of the UN Assembly are also encouraged to establish, strengthen and expand funds for compensation to victims, as well as to co-operate in the seizure of offenders’ assets “to be used for restitution to the victims.”

The Council of Europe’s Convention on the Compensation of Victims of Violent Crimes took effect in 1988 (Office for Victims of Crime, 1997b; Haldane & Harvey, 1993). It provided a framework for victim-oriented improvements in the administration of criminal justice matters. With respect to state compensation to victims of crime, the Convention set minimum standards and, like the UN Declaration, promoted international co-operation to meet victims’ needs for restitution.
and or compensation. The Convention declared that it is “necessary” for governments to make provision for victim compensation (Haldane & Harvey, 1995: p. 57). More recently, the Council (2006) recommended that “States should adopt a compensation scheme for the victims of crimes committed on their territory, irrespective of the victim’s nationality.” Furthermore, that compensation should be “granted without undue delay, at a fair and appropriate level” and that compensation “should be provided for treatment and rehabilitation for physical and psychological injuries” but also considered for “loss of income, funeral expenses, and loss of maintenance for dependants. States may also consider compensation for pain and suffering.” The Council in addition urged states to consider compensation for damage resulting from property offences. This latter element of the Council’s recommendation is consistent with the new vision on state-funded victim compensation promoted by the U.S. based National Centre for Victim Crime in 2004. It is notable, however, that governments across the globe have shown no urgency in expanding state-funded compensation to cover damage resulting from property offences. Indeed, as explained below, in Australia the principle has been to limit entitlements for victims of violent offences.

As well, in the first decade of the 2000s, senior law officers approved a Statement of Basic Principles of Justice for Victims of Crime (2005) and later endorsed the Commonwealth Secretariat’s Best Practice Guidelines for the Treatment of Victims of Crime, which were first promulgated in 2003. The Guidelines stipulate that member-states should set up a statutory victim “relief/compensation fund” and use it to compensate victims of violent offences; however, the Guidelines do not preclude the use of such funds to help victims of property offences. Unlike the European Council’s recommendation that has a binding effect, the Commonwealth Guidelines are aspirational.

Rationales for Compensation by the State

There has been much debate about the pros and cons of state-funded compensation to victims of crime. Reasoned and unreasoned argument has covered an array of philosophical and theoretical rationales and political ideology, as well as legal and pragmatic issues (Miers, 1997; Karmen, 1996; Elias, 1983).

Citing Rock (1984), Miers (1997, p. 10) claims that the introduction of state compensation for victims cannot be attributed to any single event. Rather, the introduction of state compensation for victims in common law countries has tended to be associated with the commission of a serious violent crime resulting in a public campaign (see also Karmen, 1996, p. 325; Elias, 1983, pp. 27-29).

Members of the judiciary were among the first in recent history to provoke debate on victim compensation. During the 1950s, Margaret Fry (1959), an English magistrate, vented her frustration with court-ordered restitution. With reference to the vicious assault case, she graphically portrayed the futility of requiring the bulk of offenders (who were often “men of straw”) to compensate victims. Instead, she argued that all members of a society shared the risk of criminal victimisation. Furthermore, society was collectively responsible for the harm suffered by victims and hence ought to finance crime victim compensation. She contended that the state, which had limited victims’ right to self-defense, was liable for its failure to protect its citizens (see also Goldberg, 1964; Karmen, 1996; Miers, 1997).

A number of rationales or justifications for state victim compensation can be distilled from Fry’s and Goldberg’s commentaries and consequential debate, for example, breach of the “social contract” (Childres, 1964; Kutner, 1966; Schmutz, 1971; Miers, 1997); the “shared risk” rationale (Fry, 1959; also Wolfgang, 1965) or notions of “optimality of loss spreading” (Miers, 1997); “state” “government” responsibility (Fry, 1959; Goldberg, 1964; also Lamborn, 1973) or “negligence” (Wolfgang, 1965; Kutner, 1966; Miers, 1997); the “social obligation” approach (Wolfang, 1965; Schmutz, 1971; Lamborn, 1973; Elias, 1983; also Karmen, 1996), “social welfare” (Schafier, 1965, 1970; Elias, 1983) or the principle of “government paternalism” (Montrose, 1959); and “humanitarian” theory (Polish, 1973; Elias, 1983). The so-called moral argument has two aspects: (1) that the responsibility of the state exceeds that of the victim and (2) that given the promise that criminal violence is endemic to society, the only tolerable way to sustain damage is to share it in common” (Schmutz, 1971, p. 92). Notions of equity and social solidarity (Council of Europe, 1984; Haldane & Harvey, 1995) as well as social justice (Elias, 1983; Karmen, 1996; Miers, 1997), have also been used to justify state compensation for victims, and inadequacies in alternative remedies for victims of crime (e.g., not all offenders are apprehended so not all victims have access to court-ordered restitution and/or civil tort action!) have been highlighted as cases for such compensation (Lamborn, 1970).

Victim Participation in Crime Prevention and the Criminal Justice System

It has also been argued that state victim compensation acts as an “incentive to voluntary participation” (Schafier, 1970) in crime prevention (Chappell, 1970) and an aid in law enforcement (Chappell & Sutton, 1974; Miers, 1997). It is surmised that victims are more likely to report crime and help criminal justice practitioners if they have a hope of gaining compensation (Elias, 1983; Karmen, 1996).

This was reiterated in a discussion paper prepared by the UN Secretariat (1985) for the Seventh Congress on the Prevention of Crime and Treatment of Offenders, and confirmed in principle in the UN Declaration of Fundamental Principles of Justice for Victims of Crime and Abuse of Power (1985).
What research has been done into criminal injuries compensation tends, however, to show that there is no positive "spill-over" (Doerner & Lab, 1980) effect on other components of the criminal justice system. In Britain, Shapland et al. (1981) reported crime victims were generally satisfied with the operation of the Criminal Injuries Board, but their experience with the Board did not affect their attitudes toward other parts of the criminal justice system; yet, in the Netherlands, Calzada (1984 in Maguire & Shapland, 1997, p. 219) found that dissatisfaction with criminal injuries compensation compounds dissatisfaction with the criminal justice system. Also of concern, North American studies (Doerner, Kaudt, Kaudt, & Meade, 1976 (USA); Doerner, 1978; Silverman & Doerner, 1978 (Canada)) showed the availability of state-funded criminal injuries compensation has little, if any, links to "known crime rate" changes. In other words, there is no clear evidence to show that the economic incentive provided by the state for crime victims actually entices victims into the criminal justice system. In addition, Henig and Marx (1978) pointed out that there was no evidence to show criminal injuries compensation reduced fear of crime.

Two Australian studies and a Dutch study show criminal injuries compensation in a more positive light (Office of Crime Statistics, 1985; Mulder, 2003). Victim respondents in South Australia (Office of Crime Statistics 1985) generally agreed that "the most positive aspect was that compensation was available" (p. 23). Many victims surveyed in Victoria (Victorian Community Council Against Violence, 1994) were satisfied with the compensation process, which was seen as "an important part of the process of validation and victim rehabilitation" (p. 96). A Dutch study concluded that compensation is of great symbolic significance to victims with awards of compensation accepted as an "act of justice" (Mulder, 2012). These studies, however, do not deal with the satisfaction/dissatisfaction "spill-over" effect.

Moral Obligation for the State to Compensate Crime Victims

It has been suggested that state victim compensation might produce a "no risk hazard" (Miers, 1978; see also Inbau, 1959, and, for a contrary view, Childrens, 1964; Elias, 1983) insofar as people will be prepared to place themselves at greater risk of victimisation and reluctant to ensure against such risk in knowledge that, should they be victimised, compensation is available from the state. Sceptics have also raised the spectre that criminals, in the knowledge that victims will receive compensation, might become more violent (Cross, 1963; Childrens, 1964, p. 459), and the state will become the victim of fraudulent claims (Kamen, 1996).

The State's Monopolisation of Crime Control

One of the popular arguments for state-funded crime victim compensation during the 1960s and 1970s centred on the state's monopolisation of crime control. As Schafer (1960, p. 117) suggests, "if the victim of today cannot himself seek satisfaction, since the law of the state forbids him to take the law into his own hands," then the state that fails to protect its citizens has an obligation to make recompense. (In most jurisdictions, victims' needs are subordinate to the objectives of public prosecution.) If the state were so obliged, "all victims, regardless of their economic standing and the type of loss they have suffered" (Kamen, 1996, p. 326) would have a right to compensation, yet almost all state-funded schemes cover only victims of personal violence. Nearly every government has denied such an obligation maintaining instead their sovereign immunity, and law courts have been reluctant to bestow a concomitant "duty of care" upon government. Indeed, as Ashworth (1986) aptly explains, victims, like the public at large, gained more than they lost with the advent of modern policing and public prosecution. The police might, for instance, make mistakes, but it would be wrong to impose on them as agents of the government "the possibility of actions for negligence" (Miers, 1997, p. 5).

Social Contract Theory

The notion of a "social contract" is similarly defective. Arguably, the state has through the provision of free education, universal health care (e.g., Medicare in Australia) and other social services (e.g., disability pensions and unemployment benefits), as well as maintaining a viable criminal justice system, met its contractual obligation. It remains to be resolved whether the state owes victims of crime, in particular victims of violent crime, a greater obligation than victims of other accidents or events.

Shared Risk and Social Welfare Theory

General public welfare programs, however, do not adequately attend to the needs of victims of crime unless their needs are consistent with the program's

In Australia, as with many other places (e.g., the United States), secondary victims, for example, dependents of the victim, enjoy limited entitlements.

During debate in the Hawaiian Parliament on criminal injuries compensation, the then Attorney General stated that "providing for payment of compensation under the Criminal Injuries Compensation Act is not a benevolent grant of funds but is in recognition of the democratic fact that the prime duty of government is to protect its people from intentional physical harm" (Lamborn, 1973, p. 465).

goals. This is not to say that victims of crime do not benefit from public welfare programs. In fact, crime victims often draw on funds and/or services provided under such programs. It must be remembered, however, that some programs are so "overspecialised" that even the neediest victims are denied benefits.

To the contrary, state victim compensation has been described as "creeping socialism" (Smidish, 1969). It has been condemned as unnecessary "government paternalism" (Inbau, 1959; contrast with Montrose, 1959; see also Caldeira, 1964), which potentially could "lead us into an abandonment of all notions of individual responsibility" and subsequent complete dependence on government (Inbau, 1959, p. 202). Opponents in a similar vein "considered any expansion of the welfare state and the growth of new, expensive, and remote bureaucracies to be greater evils than the neglect of crime victims" (Karmen, 1996, p. 327).

Optimality of loss spreading is also less persuasive if victims of crime are to derive greater benefits for their "injury" than others placed in a circumstance of disadvantage (Miers, 1997). In some jurisdictions, for instance, victims of industrial accidents can claim for pain and suffering and/or mental injury, whereas victims of crime can claim for pain and suffering and/or mental injury, whereas victims of industrial accidents cannot. Affording "special classes" of crime victims benefits denied to other crime victims, even other victims, on the basis of their "mixture," might further stigmatise those victims who fall within the "special class" (Haldane & Harvey, 1993) and alienate those who do not. Despite these fears, Starrs (1965, p. 306) postulates that pain and suffering in some crimes (e.g., murder, kidnapping and robbery) cannot go uncompensated. He posits that "the ultimate claim for compensation for pain and suffering is all that the victim generally has. Thus it would appear to mock the victim and play havoc with conscience to urge the compensation of a forcible rape victim... (then) to reject her claim for pain and suffering."

Following on from the concept of victim stigmatisation, Miers (1983, 1991) analyses the symbolism associated with criminal compensation. He suggests that there is an inherent problem in limiting state compensation to "specific" victims because, by definition, these victims are seen as somewhat more deserving than other victims. Crime victims who do match "the political stereotype of [being] innocent victim" (Shapland et al., 1985) are also frequently excluded from applying for compensation under these schemes. Determinations based on legalism do not necessarily equate with victims' perceptions of their status and worth, leaving some victims disillusioned. Furthermore, categorising victims as eligible or ineligible could lead to constructs that place particular individuals and groups on a scale of "deserving," "genuine" and so on (Corns, 1997, p. 35).

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Some proponents hasten to point out that victimisation is not evenly distributed and suggest victim compensation is a "way of equalising the burdens of victimisation" (Elia, 1983, p. 25; also Goldberg, 1964). Along similar lines, it has been argued that, as it is not possible to prevent all crime or investigate all crime, state compensation offsets inefficiencies in the criminal justice system (Thorow, 1978). Moreover, it is evident that those who are least able to afford becoming a victim stand the greater chance of suffering criminal victimisation. Criminal injuries compensation remedies the injustice of this situation generally and, if appropriate mechanisms exist, has the potential to alleviate the burden cast upon victims specifically (Chappell, 1967).

The Humanitarian Rationale

Unlike the earlier government liability or negligence theories, the humanitarian rationale does not rest on argument about legal responsibility of the state per se (Elia, 1983). Instead, it has been likened to "government charity" (Polish, 1973) or an "Act of Grace" (Office of Crime Statistics (South Australia), 1989). As stated by Justice Jacobs (Kingston-Lee v Hunt and Others and the State (1986) 42 SASR 136), criminal injuries compensation "is essentially humanitarian in motive; it recognises that many criminal offenders are without means and accordingly imposes the primary burden of compensation upon the State, but because the State has no liability in law to the victim, apart from the State, compensation is in the nature of an ex gratia payment" [Emphasis added].

Criminal Injuries Compensation in Australia

As outlined, there are many rationales for state-funded compensation including crime prevention, social contract, shared risk and social welfare, and the humanitarian rationale. A cursory examination of schemes in Britain, Canada and the United States suggest that no one rationale is dominant; rather, a combination of these is inherent in most state-funded compensation schemes (Miers, 2013, p. 155). It is also evident that each of these rationales has influenced the introduction of compensation in Australia to varying degrees.

By 1983, every Australian state and territory had introduced criminal injuries compensation as public recognition and acknowledgement of the harm suffered by the victim. The first scheme was incorporated in New South Wales in 1967; South Australia was the third state to do so when in 1969, to address a "social injustice," it enacted the Criminal Injuries Compensation Act. During Parliamentary debate (Hon. CM Hill in Hansard 1969, p. 2833) it was generally agreed that

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7 For example, in South Australia non-economic costs (including pain and suffering) are compensable only if a worker suffers a permanent disability (443, Workers' Compensation Rehabilitation Act). Like provisions prevail elsewhere in Australia.

8 Replaced by the Victims of Crime Act 2001
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the criminal law is directed at the protection of society and the reformation
of the offender and does not provide the innocent victim of criminal ac-

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tivity with any recompense for personal injury that has been unjustly inflicted
upon him. The principle of compensation for criminal acts is not wholly
unknown to our law... Because criminals usually have no assets, or their
assets are inaccessible, the Bill provides for the payment of compensation
up to amounts of one thousand dollars from the general revenue of the
State.

Since their introduction, these schemes have varied across jurisdiction,
primarily in terms of what are compensable, maximum awards and methods
of administration. Some jurisdictions, for instance, Victoria, have legislation
that provides specifically for a compensation scheme, whereas in others, for
instance South Australia, legislation provides for statutory compensation and
other measures to assist victims, such as enshrining a declaration of principles
governed their treatment by public officials, as well as giving the Governor authority
appoint a Commissioner for Victims' Rights.

The legislation in South Australia, like that of Victoria, Queensland and
Northern Territory, includes provisions that set out statutory purposes and
goals. In addition to establishing a compensation scheme (and other means
of the respective legislation, in various terms, incorporates aims such as to provide
assistance or support and rehabilitation to victims of crime; to assist vic-

Overview of Australian schemes

Offence Categories

The compensation or financial assistance schemes throughout Australia apply
to victims of violent offences, including sex offences, who suffer an injury as a
result of the offence. Injury includes physical injury, psychological injury, shock
and/or pregnancy if they result from the crime that the victim must prove to the
satisfaction of the court that the victim's injuries were caused by the offence
committed.

Contact of these offences is on the basis that citizens are able to

grounds for these offences it would not be financially sustainable to include them in any

Location of Offence

Victims must apply for compensation or financial assistance in the jurisdiction
where the crime happened. In South Australia, however, the Attorney General has
the discretion (s. 27(d) Victims of Crime Act 2001) to make a payment to a victim
who suffers a loss, financial loss or grief in consequence of an offence committed.
outside of that state. This has been used as a mechanism to compensate both Australian residents who become victims of terrorism whilst travelling overseas.

In the aftermath of the Bali bombings in 2002, Australia’s Government offered emergency financial assistance for travel to and from Bali, accommodation in Bali and financial assistance for funeral expenses and associated costs. It then government also promoted the fast tracking of applications for certain payments, including disability pensions. The federal government, however, ignored the call to compensate those injured in the Bali bombings and the families of those killed. The Government for South Australia via the Attorney General’s discretion did compensate its citizens (O’Connell, 2012). A decade on, the Australian Government introduced the first federal victim compensation scheme to compensate citizens injured in terrorist incidents overseas and for the immediate family of those killed in such incidents (see below on national approach).

Class of Victims

All jurisdictions stipulate categories or classes of victims, although variously defined, who are eligible to apply. All cover the actual or primary victim of violent crime. In homicide cases, all cover the immediate family such as spouse, children and siblings. The definition of spouse in such cases extends to both opposite and same-sex relationships in South Australia at least. Some schemes also cover good Samaritans, who are people that assist the victim in the immediate aftermath.

One of the most controversial issues surrounds police and other emergency service workers and whether they should be afforded the status of victim and thus entitled to victim compensation (O’Connell, 2014). Police and other emergency service workers, in the performance of their duties, are at times particularly vulnerable to victimisation (for example, containing a siege or providing medical care in such situations); while at other times, by ignoring work safety requirements, they might create opportunities to be victimised (O’Connell, 2014). Reserve Police (1991) concluded that these workers are not entitled to the status of victim they have, by entering a vocation that requires them to work in potentially dangerous situations, implicitly accepted the inherent risk of victimisation.

The Joint Select Committee on Victims Compensation (1997, cited in Reserve Police on Victims of Crime; see JSU, 2000) recommended “that all persons injured as a result of an offence that occurred during the course of their employment or work entitled to workers compensation be excluded from victims compensation.”

Although this argument appears logical, it has the potential to create injuries among victims as non-organic/psychological injuries are not compensable under workers compensation. Hence, an emergency service worker cannot receive compensation for a psychological injury but a good Samaritan can.

For this reason, no scheme has excluded police and emergency service workers from receiving payment. Indeed, in South Australia a former Attorney General stated in Parliament that in his opinion these people were deserving of the status of victims of crime (Atkinson, 2005).

Victim Obligations

Each scheme dictates that the victim must report the criminal incident to police and cooperate with the police investigation and any subsequent prosecution in order to be eligible for compensation and/or assistance. Miers (2013, p. 157) believes that the fullfillment of these requirements is associated with the notion of being a good citizen and thus a deserving victim. He explains that this is said to minimise the likelihood of fraudulent claims, however, it is at times an incomplete test of what constitutes a “deserving victim.” For this reason, South Australian legislation (s. 20(7) Victims of Crime Act 2001) recognises the complexity of relationships and power dynamics between victims and offenders allowing victims not excused from such obligations if they have a good reason not to report the offence and cooperate with the investigation and prosecution, for example, fear of retribution.

In accordance with the principle of compensating and/or assisting “blamless” and “deserving” victims, each scheme facilitates the reduction or refusal of claims of victims who are considered to have directly or indirectly contributed towards injury or death and/or have failed to mitigate the extent of their injuries.

Burden of Proof

Victims of violent crime in most jurisdictions need only prove a crime happened to the civil test namely on balance or probabilities. None of the schemes are reliant on the arrest or conviction of an offender. It’s estimated that in some jurisdictions as many as 50% of compensation claims are paid without identifying an accused. In South Australia, however, the onus is on the applicant to prove beyond reasonable doubt (or to a standard acceptable to the Crown that administers the scheme) that a crime happened. Where an offender is not apprehended, in order for compensation cannot be made unless the evidence of the victim is corroborated. Corroboration can include eyewitness accounts or evidence of an event consistent with the nature of the crime in issue. Once the offence is proved beyond reasonable doubt, the applicant must then demonstrate, on the balance of probabilities, that the injuries are a direct result of that crime.

Time Limitations

Applicants must lodge claims within specified time periods in each of the jurisdictions. In the Australian Capital Territory, the claims must be lodged within
12 months whilst applicants in New South Wales, Northern Territory and Victoria allow two years from the date of the offence in which to lodge an application. Claims in Queensland, South Australia and Tasmania must be lodged within three years, although where the applicant is a child in the 3-year period does not commence until the child’s 18th birthday.

It is widely acknowledged that victims of some types of offences, such as domestic violence or childhood sexual abuse might take considerable time to close their victimisation (Barrett Meyering, 2010). Each jurisdiction therefore has the discretion to extend or waive the time limitation in special circumstances where it is considered appropriate to do so. A number of judgments have granted this discretion. In the Australian Capital Territory, it was held in the Minister of the Territory case (1996) that the plaintiff’s lack of awareness of a right to claim compensation and the significance of the plaintiff’s cultural and educational background were relevant factors on whether time should be extended. In Costello v. South Australia (2003) 227 LSJS 336; [2003] SADC 23, an extension was granted where it had been an inordinate and unreasonable delay by the plaintiff but no prejudice to the defendant.

Minimum and Maximum Thresholds

There are significant variations in the minimum and maximum thresholds across the eight jurisdictions as outlined in Table 1.

New South Wales is the jurisdiction to most recently revamp its compensation scheme. The new scheme seeks to provide assistance rather than compensation and is grounded on the concept of a “package of care.” All victims of crime are entitled to information and referrals to crisis support; however, monetary assistance is limited to victims of violent crime. Although all victims of violent crime can apply for an initial 10 hours paid counselling (and a further 12 hours if required), only primary victims and family members of homicide victims are entitled to payments for immediate needs, such as emergency medical and legal expenses (capped at $5,000) and funeral expenses (capped at $8,000). Primary victims of violent crime, parents of a child victim and family members of homicide victims might also be eligible for financial assistance to aid their rehabilitation and recovery (capped at $50,000). A recognition payment might be paid to acknowledge the trauma suffered by primary victims with serious sexual assault capped at $10,000; less serious sexual assault, grievous bodily harm and personal child abuse capped at $5,000; and indecent assault, robbery and assault capped at $1,500. In addition, family members and parents of homicide victims might be entitled to a recognition payment if the applicant was financially dependent on the deceased victim of $15,000 or, if not financially dependent, then $7,500.

Although the new scheme in New South Wales is promoted as “victim-friendly” and better aligned with victims’ needs, it is ironic that Victims Services NSW stopped processing applications under the former compensation scheme (which was taking on average 31 months from lodging to settlement) while the bill to enact the new scheme was being debated in the New South Wales Parliament.

In Parliament debate, Paul Lynch MP, who for the Labor Opposition, described the new scheme should the Bill pass as “the triumph of unfeeling Treasury bureaucrats over the real and all too human needs of victims of crime.” Furthermore, in an appeal to the UN Special Rapporteur on Violence against Women, a petition led by Community Legal Centres (2013) criticised the new scheme as it operates retrospectively; in monetary terms, victims of violence are paid lesser amounts and the sum paid is tied to the offence rather than the injury suffered and the financial assistance is determined by actual loss, which means employed victims are paid more. As women are often in lower paid employment and men, the practice will have a “gendered impact,” especially on victims of domestic violence who are mostly women.

In Queensland and Victoria, the maximum paid in homicide cases is “limited” by incident rather than by the number of victims. In the former jurisdiction, the maximum paid to all related (immediate family) victims is $100,000, less any sum paid for funeral expenses, whereas in the latter the maximum is $100,000, and the Victims of Crime Assistance Tribunal has discretion to exceed that sum in exceptional cases. In such cases, an individual family victim should not be paid more than $50,000. All jurisdictions provide for payments to cover funeral expenses. In some, such as New South Wales and South Australia, funeral expenses are capped but also paid in addition to other payments. In others, such as Queensland, the sum paid as funeral expenses is taken into account when settling the total paid per homicide incident.

In contrast to the philosophical shift away from lump-sum payments that has gained momentum since the mid-1990s along Australia’s eastern states and two territories, Family First, a minority political party, introduced a bill (proposed law) in the Parliament of South Australia in 2013 to stimulate debate on the sums paid. The bill stated that compensation should be re-elected in the upcoming election. These include raising the maximum sum payable from $50,000 to $100,000, increasing payments for funerals from $7,000 to $14,000 and grief payments from $10,000 to $20,000.
$20,000. Grief payments will, for the first time, be available to children under the age of 18 years whose parent or parents are the victim of homicide.

Table 1. Minimum and Maximum Payable by Jurisdiction

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Minimum</th>
<th>Maximum</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACT</td>
<td>$100</td>
<td>$50,000 Financial Assistance</td>
</tr>
<tr>
<td></td>
<td></td>
<td>$30,000 Special Assistance, whether or not it be taken into account in determining the sum to be paid as financial assistance</td>
</tr>
<tr>
<td>NSW</td>
<td>$5,000 Emergency &amp; Dental; Rehabilitation; $30,000 Financial Assistance; $1,500-$15,000 Recognition; see loss</td>
<td></td>
</tr>
<tr>
<td>NT</td>
<td>Economic loss—nil</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Compensable injury—$7,500</td>
<td></td>
</tr>
<tr>
<td></td>
<td>$40,000</td>
<td></td>
</tr>
<tr>
<td></td>
<td>$10,000 for financial loss, which is taken into account in determining the total financial assistance paid</td>
<td></td>
</tr>
<tr>
<td>QLD</td>
<td>Nil</td>
<td>$75,000</td>
</tr>
<tr>
<td>SA</td>
<td>Economic loss—Nil</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Non-economic loss—&lt; $2,000</td>
<td></td>
</tr>
<tr>
<td></td>
<td>$50,000</td>
<td></td>
</tr>
<tr>
<td></td>
<td>$10,000 Grief, paid as a solatium in addition to compensation to parent of child victims (under 18 years) and spouse of a homicide victim</td>
<td></td>
</tr>
<tr>
<td>TAS</td>
<td>Nil</td>
<td>$30,000 (one offence)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>$50,000 (more than one offence)</td>
</tr>
<tr>
<td>VIC</td>
<td>Financial assistance—Nil</td>
<td></td>
</tr>
<tr>
<td></td>
<td>$50,000</td>
<td></td>
</tr>
<tr>
<td></td>
<td>$100,000 per homicide incident</td>
<td></td>
</tr>
<tr>
<td>WA</td>
<td>Nil</td>
<td>$75,000</td>
</tr>
</tbody>
</table>

Assisting Victims to Make Claims

The application process differs across jurisdictions. In most jurisdictions, victims are able to apply in writing directly to the relevant authority. The majority of jurisdictions have application forms that are available online to assist the victim in this process. The South Australian scheme, however, is a court-based civil scheme whereby the victim sues the state as the first defendant and the accused or offender (if known) as the second defendant. It is therefore standard practice for victims to make an application via a lawyer. Once the Crown accepts liability for the claim and the claim is resolved, the Crown pays the lawyer’s fee capped at $50,000, plus tax, reasonable costs and disbursements, as well as compensation to the victim. In Queensland, public-funded legal aid has often helped victims, but the current scheme does not require such intervention; instead, staff for Victim Assist Queensland help.

Victim-completed applications submitted directly to the relevant authority can be considered simpler, faster and more cost-effective in addition. It could be argued that this approach empowers the victim, who has direct control of the application process. Conversely, some victims might not have the capacity to initiate the process, especially in the midst of dealing with the effects of crime, such as grief, distress and physical injuries. Thus, a lawyer representing the victim is considered to alleviate some of the burden on such victims. No matter which approach, many victims find themselves tackling the compensation schemes whilst also bewildered by the daunting criminal justice process.

Emergency Payments and Other Payments

Each of the jurisdictions provides for interim or emergency payments in one form or another for victims who are experiencing financial hardship and/or are in necessitous circumstances. Some view “necessitous circumstances” as a relative term having regard to a person’s lack of financial resources. The Australian Taxation Office has defined “necessitous circumstances” as relating to a person who has insufficient funds to obtain all that is necessary for a modest standard of living in the Australian community. Furthermore, Taxation Ruling 1999/D17 states that the death of a family member does not necessarily place a person in necessitous circumstances.

The approaches employed across Australia to assist victims of violent crime have waxed and waned between benevolence, on one hand, and strict legalism on the other. Most jurisdictions dictate that if a victim’s claim for compensation is ultimately denied the victim can be required to repay any interim assistance provided to him/her.

Under the South Australian legislation victims who do not have a legal basis of claim can apply to the Attorney General, who has “absolute discretion” to make ex gratia payments in limited circumstances. These payments might be applicable where a prosecution cannot proceed (e.g., due to a lack of evidence, or a change or mental capacity of the defendant), or where a prosecution fails for reasons that are not attributable to the victim. The victim must still demonstrate that the injury and/or loss incurred, is a direct result of a crime. This provision might also be utilised when the time frame for making a compensation claim has expired, but where it is evident that a victim has sustained significant emotional and
psychological, physical and/or financial injury. For example, payments to victims of historical sexual abuse and victims of terrorism as previously discussed.

The Victims of Crime Act 2001 also gives the Attorney General absolute discretion to make other payments from the Victims of Crime Fund to victims, benefit of victims of crime that will, in the Attorney General's opinion, help them to recover from the effects of crime or advance their interests in other ways.

In other words, the Attorney General has an absolute discretion to make payment to a victim so long as he is satisfied that the payment will benefit him or her by helping his or her recovery or advancing his or her interests in some way. Furthermore, his decision whether to make a payment cannot be challenged even before a court.

While the Attorney has an absolute discretion, he is guided by the intent of the Act. When introducing the Victims of Crime Bill the then Attorney General, Hon. Trevor Griffin, stated that discretionary payments are intended for those who had not suffered any injury at all, but who required financial assistance to overcome the effects of a crime. He explained that a “person who is frightened by a serious criminal trespass but is not physically hurt and does not suffer mental illness or disability, might apply for financial assistance towards expenses of home security measures.” The scheme does not provide for lawyer's fees in relation to applications for discretionary payments, thus these applications are administered by the Commissioner for Victims’ Rights.

Offender Accountability/Debt Recovery

As previously outlined, compensation schemes are, at least in part, underpinned by the philosophy that where a state has failed in its duty to protect citizens it has a moral obligation to provide compensation or redress (see, for example, Barrett Meyering, 2010, p. 11). Some critics, however, view state-funded compensation as a mechanism to alleviate offenders of their personal responsibility for the harm caused (Barrett Meyering, 2010).

In reality, most schemes throughout Australia seek to “strike a balance between government responsibility and perpetrator accountability” (Barrett Meyering, 2010, p. 11). With this in mind, most of the jurisdictions facilitate the recovery of monies from offenders. Although debt recovery is a financial impact for governments, it is viewed by victims as an additional means by which to make perpetrators accountable. This could be particularly pertinent where victims receive the court-imposed sentence as lenient, although officially such compensation is not to be considered a “second punishment.”

The importance to victims is illustrated in two surveys in South Australia. In both, about 8 in 10 victim-respondents identified “making the offender accountable” as the primary rationale for state-funded compensation (Office of Crime Statistics, 1989; JSU, 2000).

Although proactive debt recovery is a feature of most Australian compensation and financial assistance schemes, these schemes do, however, provide offenders with the opportunity to dispute liability, to ask for recovery to be set aside on the basis of financial hardship or to negotiate to pay a lesser sum.

Although the concept of accountability is attractive to victims and policy-makers alike, Barrett Meyering (2010) urges that recovery be undertaken with caution. The potential negative impact of recovery on victims, such as increased fear and anxiety or likely threats to personal safety, must be carefully considered alongside any proposed benefits. South Australia legislation incorporates flexibility with regard to recovery so as to reduce any negative impact on a victim. For example, the Crown can settle a matter with the victim, then take separate action against the offender and in some circumstances waive their right of recovery. The latter happens mostly in cases where the victim is at risk of further violence (e.g., domestic violence or sexual assault matters). It is worth noting that only a small percentage of claims are contested (Office of Crime Statistics, 1989).

Recent Developments

Australian Citizens as Victims of Terrorism Overseas

In the aftermath of the Bali bombings in 2002, Australia’s governments were confronted by requests for compensation. The federal government set up a scheme to recover medical expenses and assist with travel expenses for those affected seeking to return to Australia and those seeking to travel to Bali to search for missing loved ones, deceased persons and the injured. South Australia stood out because it offered to compensate primary victims and the immediate family of those killed.

Since then, the debate that began in 1980 for a federal victim compensation scheme has continued. In 2012, both the Federal Labor Government and the Federal Liberal Opposition announced their intention to introduce a state-funded compensation scheme to assist Australian citizens who become victims of declared terrorist incidents overseas. The scheme that commenced in 2013 provides not for compensation but rather “acknowledgment payments” of up to $5,000 for primary victims and $75,000 shared among the immediate family of a primary victim killed in a terrorist incident. Initially, the scheme applied only to future incidents; however, on being elected to govern in late 2013 the Liberal Prime Minister announced that the scheme would apply retrospectively. The scheme is based on the former New South Wales compensation scheme insofar as payments are made in accordance with a “mains table” that specifies the injury and the sum to be paid. It also follows the South Australia law on ex gratia
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Reth thin, Hankivsky and Greaves (2000) state that victims expect the process of claim compensation will enhance the recovery of their emotional well-being. Indeed, Valente (1996, p. 287) states that financial compensation can assist victims to free themselves from their abusive past. To date, however, there is little empirical sound evidence as to how redress in Australia has been received by victims and whether their expectations are fulfilled.

VICTIMS OF ABUSE IN STATE CARE

Over the last three decades, we have seen an expanding evidence base that reveals the extent of childhood sexual abuse and its devastating, lifelong effects. In the last two decades, it has come to light that many children were exposed to childhood sexual abuse whilst in the care of state institutions and church-based organisations. There have been various approaches to redressing the harm these individuals suffered including a number of state inquiries. In South Australia, victims were given the opportunity to tell their stories to the Children in State Care Commission of Inquiry, which commenced in November 2004. In many instances, it was the first time victims had discussed sexual abuse that continued to affect them as adults (Children in State Care Commission of Inquiry, 2008). The Commission recommended that the government “acknowledge and apologise for the pain and hurt” endured by those who were sexually abused whilst in state care. On 17 June, 2008 the then Premier, Rann, apologised on behalf of the current and past parliaments, stating that there is nothing to change the fact that people stood by and failed to act to prevent tragedies from happening, but to say to the survivors of sexual abuse in their words, that we believe you, that we understand the hurt done to you, that we regret past failings and that we are sorry is a powerful step forward.” Furthermore, the Commission argued that the importance of an apology to survivors of abuse in state care must not be over-stated (Rann, 2008).

In responding to and supporting adult victims of childhood sexual abuse whilst in state care, the Commission also recommended the establishment of government-funded free specialist service to adult victims of child sexual abuse whilst in state care and examination of various redress schemes operating in different jurisdictions. South Australia subsequently established a redress scheme and introduced legislation which allows victims to apply for ex gratia payments. The maximum redress available differed across the jurisdictions from $30,000 to $80,000.

Governments throughout Australia recognised that the financial payments were unlikely to adequately compensate victims for the pain and suffering they endured, but rather were intended to provide acknowledgment of the pain and offer some sense of justice (Senate Community Reference Committee, 2002, p. 225). Daly (2013) identified this as the “money paradox” stating the reality of the obvious inadequacies of financial payments, victims and victim advocacy groups almost universally call for “compensation.”

NATIONAL APPROACH

As illustrated, there are variations across the eight state-funded victim compensation schemes operating throughout Australia. Despite commonalities, there is a lack of uniformity and the variations in awards across the jurisdictions, which is not surprising. Frolke and Frolke (1994, p. 245) to assert that it is “fundamentally unfair upon the victim of a crime of violence that she or he receive different entitlements” depending on the state in which the crime occurs. Mindful of such inequity, Garkawe and O’Connell (2007) have argued the need for a federal, Australia-wide approach to
issues concerning victims of crime. In this context, the need to ensure continuing service provision to all victims of crime irrespective of where the crime occurred or where they reside is acknowledged. Toward this end, the Commonwealth and territory governments have worked collaboratively to develop the National Framework on Victims’ Rights and Victim Assistance (the Framework). It helps to improve coordination of services to victims of crime against the person to assist their recovery from the impact of crime and minimise re-victimisation in involving the criminal justice system. In April 2013, the Standing Council on Law and Justice endorsed the Framework and tasked a National Working Group of Victims of Crime to develop an implementation plan and monitor the operation of the Framework and plan. It is unlikely, however, that compensation or financial assistance schemes will be consistent throughout Australia for many years to come.

Despite the apprehensions and the apparent lack of a sustainable agenda in favour of criminal injuries compensation, such compensation remains an essential impact of crime and engaging support for the criminal justice system.

Reasons for state victim compensation are many and varied, but include: the Historical precedent, however, shows that “there is strong public sympathy for those innocent victims of crime, who are unlikely to obtain redress against the offender” (Home Office 1986, para. 4.2). Victim advocates, in spite of these misconceptions, argue compensation is at least of symbolic benefit. It acts as “an expression of populist values about crime” (Miers 1997). It is “right for this federal responsibility for and sympathy with the innocent victim” to be given practical expression by the provision of a monetary award on behalf of the community (Home Office, 1993, para. 4). As is the case in South Australia, criminal injuries compensation is an Act of Grace by the state (Report of the Committee of Inquiry on Victims of Crime, 1981, p. 104), which has the potential to induce victims to cooperate with police and other criminal justice practitioners, including giving evidence in court. For victims, state compensation is more than a salutary gesture, “it is a public acknowledgment of the victim’s suffering” (Freddericks in Joint Select Committee on Victims Compensation, 1997; see also Freddericks 1997). The alternatives to compensation such as charity, insurance and an ordered restitution have, according to the literature, proven largely ineffective.

Various inquiries and academic investigation have concluded that there is no constitutional or social principle to justify state victim compensation (for Great Britain, see Astbury 1991; Haldane & Harvey 1993; Miers 1990, 1997; Ashworth 1985; for United States, see (in addition to papers cited elsewhere in this paper) President’s Commission on Law Enforcement & Administration of Justice 1987; Lamborn 1979, Greer 1995, Karmen 1996; for Australia, see Chappell 1997, Report of the Committee of Inquiry on Victims of Crime (1985, pp. 102–104), Office of Crime Statistics, South Australia (1989).
to be introduced in jurisdictions in an endeavour to contain costs associated with compensating victims but often promoted as being more consistent with victim needs. All jurisdictions have explored alternatives to drawing on consolidated revenue; for example, the imposition of a levy on offenders, taxing private earnings and widening confiscation of assets and proceeds of crime legislation. South Australia has the most extensive sources of revenue for its Victims Crime Fund.

Overall, at best it can be said that all criminal injuries compensation schemes “hold promise for “making victims whole”” (Smith & Hillenbrand, 1997, p.29). Not enough is known, however, as to whether that promise is met, which is true in Australia in spite of proclamations that reforms have been driven by victim needs rather than political imperatives.

Cases

Alexander v Oxford [1993] 4 All ER 328
Hill v Chief Constable of West Yorkshire [1989] AC 35
Home Office v Dorset Yacht Co Ltd. [1970] AC 1004
Kingston-Lee v Hunt and Others and the State [1986] 42 SASR 388
Milosovic [1996] 134 FLR 429; 90 A Crim R 312; BC9604292

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