Project No 46

Criminal Injuries Compensation

REPORT

OCTOBER 1975
The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

The Commissioners are -

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TO:    THE HON. N. McNEILL, M.L.C.
       MINISTER FOR JUSTICE

TERMS OF REFERENCE

1. The Commission was asked to conduct a review of the Criminal Injuries (Compensation) Act 1970.

2. The original terms of reference were confined to reporting on a proposal that the Act be amended for the purpose of increasing the maximum amounts of compensation payable thereunder, and of ensuring that the amounts are adjusted from time to time in line with the fall in the value of money. The Commission considered that it could not satisfactorily deal with these questions except as part of a general review of the Act, and accordingly sought and obtained a reference in terms of paragraph 1.

WORKING PAPER

3. The Commission issued a working paper on 3 June 1975. A list of those who commented on the working paper is contained in Appendix I to this report. The working paper itself is reproduced as Appendix II.

4. The working paper contains a synopsis of the present Act (paragraph 3), a table setting out particulars of claims made under the Act (Appendix II) and an outline of the law elsewhere (paragraphs 8 to 10 and Appendix III). In paragraphs 12 to 60 of the paper the Commission discussed the operation of the Act and set out its provisional views. Paragraph 61 lists the questions which the Commission regarded as the most important, and upon which it sought the views of those interested.

DISCUSSION AND RECOMMENDATIONS

Compensation orders

5. The Commission considers that the basic purpose of the Criminal Injuries (Compensation) Act is to provide a simple means whereby a victim of a crime of violence can
obtain some compensation for the injury suffered. From this point of view the structure of the present Act is defective and should be amended.

6. At present, a compensation order is made against the offender (s.4(1)), and the victim is required to approach the Government for the exercise of a discretionary power to make payment in his favour (s.7(3)). In paragraphs 12 to 16 of the working paper the Commission discussed the question whether the order should be made against the Consolidated Revenue Fund in the first instance, and concluded that it should because -

(a) the purpose of the legislation is to compensate the victim, not further punish the offender; and

(b) offenders rarely have the means to pay the amount of the award, and the victim almost invariably looks to the State for payment.

The Commission pointed out that to make the Consolidated Revenue Fund primarily liable would bring the form of the remedy into line with current practice and experience (paragraph 16).

7. All those who commented on this question, including the Law Society, the Crown Law Department and the Commissioner of Police, agreed that the order should be made against the Consolidated Revenue Fund (with the State possibly having some right of recourse against the offender: see paragraphs 31 to 34 below). This is the position in Victoria and the United Kingdom. It was also the position in New Zealand before compensation for criminal injuries was absorbed into the scheme created by the *Accident Compensation Act 1972*: see working paper, paragraph 10.

The Commission recommends that the Act be recast accordingly.

8. If the Act is to be amended so as to make the compensation payable directly out of Consolidated Revenue, it would appear to follow that it is not necessary to link, as at present, the determination of an award of compensation to the offender's criminal trial. The existing statutory scheme makes no provision for the case where the assailant is unknown or cannot be found, or is unfit to plead, or, probably, is acquitted on the ground of insanity: see paragraphs
38 to 40 of the working paper. There is at present a non-statutory ex gratia scheme (see paragraph 4 of the working paper) to provide some cover in this area, but it is seldom used, possibly because it is little known. However, it cannot, because of its very nature, be as satisfactory as a statutory scheme, which can lay down rights and liabilities and prescribe the procedure by which applications are to be determined.

9. It would also appear to follow that the final decision as to whether the State should pay compensation should not be made confidentially, as it is at present, after taking into account reports not disclosed to the applicant. It should be made by a body before which the applicant can argue his case and exercise the opportunity of rebutting any unfavourable evidence. Whether such a body should be the original trial court or an independent tribunal is an important matter, about which the Commission had no settled views at the time of the working paper. For reasons set out below (see paragraphs 11 to 26), however, the Commission is now firmly of the opinion that an independent tribunal, not involved in the criminal trial, is the appropriate body. Accordingly, in the Commission's view, the present approach, under which an application for compensation is decided partly by a court and partly by a Minister and which potentially accommodates certain deserving cases only by means of an ex gratia scheme, should be replaced by one whereby all questions are decided by an independent tribunal, as in Victoria and the United Kingdom.

10. The majority of commentators, including the Commissioner of Police, the Department for Community Welfare, Mr. Justice St. John of the Australian Industrial Court, and an officer of the Crown Law Department, favoured the tribunal approach. The Law Society, Mr. R.H. Burton, S.M., another officer of the Crown Law Department and the Australian Labor Party (W.A. Branch) considered that the function should remain with the trial court.

The tribunal approach

11. The question of what body should determine the question of compensation is discussed in paragraphs 45 to 47 of the working paper.

12. The Commission considers that generally, and with particular regard to the implementation of some of its other proposals, there are many positive advantages in setting
up a separate tribunal (to be called the Criminal Injuries Compensation Tribunal) to deal with such claims. These advantages include the following.

(a) A tribunal could determine claims in cases where there has been no criminal trial.

(b) A tribunal could, more readily than trial courts, evolve a consistency of approach.

(c) A tribunal could more conveniently apply a uniform limit of compensation in all cases, regardless of the jurisdiction in which the criminal charge was heard.

(d) A tribunal could, more appropriately and easily than trial courts, conduct its proceedings informally.

(e) The existence of a tribunal would ensure that the question of guilt or innocence was kept as separate as possible from the question of compensation.

(f) A tribunal could, more readily than trial courts, make interim orders for compensation where appropriate, and generally should be able to deal with claims more quickly.

These points are elaborated in paragraphs 14 to 26 below.

13. Against the foregoing it could be argued that a tribunal would need to hear de novo the material evidence which a trial court has already heard. This would be time-consuming and wasteful.

In most cases, however, the fact that the applicant had suffered injury as a result of a criminal offence would not be in dispute; a tribunal could ascertain this adequately by perusing the transcript of the criminal proceedings or examining the material parts of the police file. (In Victoria there is a standing administrative practice by which the Tribunal is accorded access to such files: see paragraph 30 below.) Moreover, the matters that normally might be in dispute in the compensation claim would usually not have been dealt with as such in the
criminal trial: for example, the precise extent of the victim's injury or whether his conduct contributed to his injury. A tribunal could hear fresh evidence upon such matters.

At present, the Supreme Court and the District Court are empowered to hear further evidence as to compensation at any time after the conclusion of the criminal trial: see the Criminal Practice Rules, Order XXC. But no comparable power exists with regard to courts of petty sessions. Moreover, it is questionable whether a court which has received and assessed certain evidence for one purpose - that of criminal guilt - is necessarily the best body to receive and assess further evidence bearing upon closely-related matters for another purpose - that of civil compensation. This is particularly so where a different standard of proof would, if the Commission's recommendation is adopted, be applicable: see paragraph 23 below.

(a) Cases where there has been no criminal trial

14. In paragraphs 38 to 40 of the working paper, the Commission discussed whether compensation should be able to be awarded in cases where the offender is not in fact brought to trial. From the victim's point of view it makes no difference whether the offender has or has not been brought to trial. The Commission asked for comment on the question "whether victims of offences by persons who are not brought to trial should be compensated."

All those who commented on this question, including the Crown Law Department, the Law Society, the Community Welfare Department, the Commissioner of Police and the Australian Labor Party (W.A. Branch), agreed that compensation should be available in such circumstances. The Commission agrees, and so recommends.

15. On that basis, a tribunal would be better able to deal with such claims than would the ordinary courts. The commission had tentatively suggested (see paragraph 47 of the working paper) that, if this amendment were to be made and yet jurisdiction were to be left with the ordinary courts, the application could be made to the court which, if there had been a trial, would have had jurisdiction. However, such a rule would be exceedingly difficult to apply in practice. Its application would be contingent upon the unknown and perhaps unknowable factor of what charge would be laid against the particular offender if he were identified and apprehended: see R. v. Grieve (1975) 10 S.A.S.R. 265 for some of the difficulties involved in applying such a rule.
The Law Society suggested that a District Court judge be nominated to determine applications for compensation where there was no trial. But if this suggestion were followed, it would seem reasonable to follow it with regard to all such cases: see paragraphs 27 and 28 below.

(b) Consistency of approach

16. Consistency becomes of increasing importance as the maximum limits of compensation are raised, particularly if the adjudicating body is empowered to have regard to any money payable to the victim in respect of the same injury from any other source: see paragraph 38 below, and note s.17 of the Criminal Injuries Compensation Act 1972 of Victoria.

A single tribunal would better be able to evolve a consistency of approach than would a multiplicity of courts. As pointed out in paragraphs 27 and 28 below, the particular form of tribunal the Commission recommends - consisting of a District Court judge - would be particularly well placed in this regard.

(c) Uniform limit of compensation

17. The present limits of compensation are $300 or $2,000, depending upon the status of the court which hears the criminal charge: see paragraphs 27 to 33 of the working paper. As the Commission pointed out, the nature of the charge is not invariably a reliable indication of the injury inflicted upon the victim. Indeed, since the issue of the working paper, at least two cases have occurred where very serious injuries arose out of offences which were tried summarily, thus limiting the victim's compensation to a maximum of $300: see Biasi v. O'Neil (Manjimup Court of Petty Sessions, No. 176 of 1974); Carey v. Williams (Perth Court of Petty Sessions, No. 1404 of 1974).

The Commission considers that it is unjust to victims to provide different limits of compensation according to the jurisdiction and status of the trial court. But to give a summary court the same powers to award compensation as a superior court obviously would be to cut across the general approach to jurisdictional matters. The Commission recommends that, whatever the upper limit of compensation be, it should be the same for all cases. This recommendation can most aptly be implemented within a tribunal approach.
(d) Informal procedure

18. The Commission regards it as particularly desirable that the procedure on an application for compensation should be kept as simple as possible in the hope that most cases can be disposed of without a formal hearing. Not only is this desirable as reducing costs but also it could encourage persons to make application on their own behalf. The Commission noted the comments of a Crown Law Department officer, who has been involved in most of the applications for compensation in this State. He said that in the few years since the Act had been in operation, he had seen "too many examples of victims being swamped by legalism required at times by courts and other times by solicitors, and too often the immediate and urgent needs of the victim have been forgotten." He went on to say that there seemed to him to be a distinct tendency of the courts to elevate the application into a full scale damages action.

19. In New Zealand, by a 1969 amendment to the Criminal Injuries Compensation Act 1963, the former Crimes Compensation Tribunal was empowered, unless the applicant objected, to "make such inquiries as it thinks fit as to the circumstances surrounding the injury or death…. and as to the nature and extent of any such injury….or as to any other matter to which the application relates" (s.12(1)). With the prior consent of the applicant, the Tribunal had power to make an award of compensation without a hearing (s.12(1A)).

The United Kingdom Criminal Injuries Compensation Board has adopted the same approach. It takes the initiative in seeking further information as to the circumstances of the injury and, where necessary, medical matters relating to it. If the applicant is dissatisfied with the initial decision of one member of the Board, he may seek a hearing before the full Board: see the Criminal Injuries Compensation Scheme, published by the Criminal Injuries Compensation Board.

In Victoria, the Tribunal is required to "expeditiously and informally hear and determine applications....having regard to the requirements of justice and without regard to legal forms and solemnities and [it] shall be free to act without regard to or to observe legal rules relating to evidence or procedure" (Criminal Injuries Compensation Act 1972, s.11(l)). The Tribunal there disposed of 774 cases in the year ending 30 June 1975, and made awards totalling
$611,828. By contrast, it should be noted that in the total period of its operation the Western Australian scheme has led to only 26 awards totalling $23,226.50.

20. The Commission considers that similar procedural features could, with advantage, be incorporated into the criminal injuries legislation of this State, and could most readily be incorporated if proceedings were to be before a tribunal. It would be extremely difficult for ordinary criminal courts to relax their procedures to the extent required, or to initiate investigations where necessary.

The adoption of an informal approach to the mechanics of proof would, of course, be without prejudice to the standard of proof, which should be the balance of probabilities: see paragraph 23 below.

(e) Separation of criminal trial from compensation claim

21. The tribunal approach has what appears to be a crucial further advantage over the trial court approach. Mr Justice St. John pointed out in his comments one of the dangers of vesting the two functions in the one court. He referred to his experience as defence counsel in cases where the alleged victims, having been informed by the police of their potential rights to compensation, tended to firm up the evidence which they gave for the prosecution.

In his Honour's view, "the right to compensation should not be dependant on conviction because it gives an alleged victim an interest in the criminal proceedings which is likely to cause the victim to exaggerate the extent of injuries received and in some cases to fabricate evidence.....The reporting of and giving evidence about crime should remain a public duty uncontaminated by self-interest."

22. Although in Western Australia conviction does not automatically lead to compensation nor acquittal automatically bar it, there is nevertheless an association in that, most typically, compensation is awarded following a conviction. It seems to the Commission that Mr. Justice St. John's argument that the systems of criminal trial and of victim compensation should be quite separate is a strong one. It is vitally important for our system of justice that a witness should not appear to have, nor see himself as having, a pecuniary
interest in the outcome of a trial. This point is best met by a tribunal approach to criminal injuries compensation.

23. A further argument in favour of separation arises out of the Commission's view, already expressed in paragraphs 13 and 20 above, that the standard of proof in compensation claims should be the civil one, inasmuch as such claims are analogous to claims in tort. A court which has applied the criminal standard to a set of facts in criminal proceedings may find difficulty in applying the civil standard to closely related evidence for the purposes of a compensation claim.

(f) Interim orders; speed

24. The Victorian Crimes Compensation Tribunal has referred to the occasional need to make interim orders: see the 1974-75 report of the Tribunal, tabled in the Victorian Parliament, where reference is made to 38 cases in which advance payments were made to meet financial urgency. Although the Commission does not consider such a need would arise often (in Victoria, the 38 cases referred to amount to about five per cent of total applications), it would seem that such a power is desirable. It would be more appropriate for a tribunal, which would not become in anyway involved with the criminal trial, to make such orders than for the actual or potential trial court to do so.

25. Similarly, where an alleged offender has been apprehended and charged, the fact that jurisdiction is vested in a tribunal means that the matter can, if necessary, be dealt with before the trial itself takes place. The evidence in the compensation proceedings would, of course, on general principles be inadmissible in criminal proceedings. Where an alleged offender has not been identified or apprehended, but the police are still hopeful of doing so, there will similarly be no necessity for undue delay. The Commission understands that one reason why the existing ex gratia scheme available in such circumstances is so inactive is that the Crown is reluctant to resort to it while there is a chance that the statutory scheme may become applicable following the trial of the offender.

26. The Commission considers that a tribunal - which, if set up, must be given power to determine its own procedures - would be likely, in the sort of case where a criminal trial relating to the relevant incident is pending, to await its completion so that the evidence of that
trial would be available in transcript form. Usually this would be an efficient manner of familiarising itself with the basic facts and perhaps being alerted to others that may require further investigation. But the Commission also considers that, where appropriate, the tribunal should not await the criminal outcome. In Victoria, the Tribunal may in its discretion decide to exercise its jurisdiction in such circumstances whenever it is satisfied that, regardless of the outcome of the trial of the accused, there can only be one result in the claim for compensation, i.e. one in favour of the applicant.

**Implementation of the tribunal approach**

27. One of the supposed disadvantages of creating a special tribunal is the expense; it might be thought that it would be necessary to make a special appointment of a suitably qualified person as chairman of the tribunal, and to recruit a registrar and other administrative staff to service it. However, under the Commission's proposals no fresh appointment need be necessary at all. The tribunal could consist of a District Court judge nominated for that purpose by the Chairman of Judges: cf. the Hire Purchase Licensing Tribunal set up under the *Hire Purchase Act Amendment Act 1973*.

The Commission considers that it is highly desirable that the functions of the tribunal be carried out by a judge appointed for a fixed term of, say, two or three years. However, the Commission recognises that there may be exceptional circumstances in which it would be necessary for the Chairman of Judges to be empowered to appoint other judges to determine particular applications on an ad hoc basis.

The Registrar of the District Court could carry out the administrative functions connected with the tribunal's work. The hearings themselves could take place in the District Court premises, either in a courtroom or in chambers. The extra demands made on the particular judge's time would partially be compensated for by the general saving in the time of other judges and courts.

28. At present, the District Court deals with the vast majority of tort claims for personal injuries in this State and thus a great deal of experience in assessing damages. Typically, the assessment of damages will be the main function of a tribunal in claims for compensation for a criminal injury. In the view of the Commission, the basis of assessment should be
essentially as in tort (see paragraph 37 below), albeit with a maximum imposed as a cut-off point: see paragraphs 43 and 44 below.

The other main sort of problem which will face the tribunal is that of evaluating evidence - for example, as to the effect of the victim's conduct.

Both of these matters are appropriate for determination by a District Court judge.

**Standard and means of proof**

29. In recommending that the standard of proof be the civil one (see paragraph 23 above), the Commission is not unmindful of the possibility that fraudulent claims may be made in circumstances where no criminal trial eventuates. In the working paper, the question of safeguards against such claims was raised. The Crown Prosecutor submitted that in such cases corroboration should be required as a matter of law. The Commission does not consider that it is desirable to go this far, as this may mean that a meritorious claim could be defeated on a technicality.

30. In Victoria, there is a firm administrative arrangement by which the Crimes Compensation Tribunal is permitted access to the police file: see amendment No. 982 to the Standing Orders of the Victorian Police Force. Whilst this practice relates to all claims, it is particularly important in cases where there has not been a criminal trial. The Victorian Tribunal has informed the Commission that it considers it is appropriate for it to examine all relevant material in the police file, whether it is beneficial or prejudicial to the claimant. By this means the Tribunal has been able to obtain corroboration of the facts in ninety-five per cent of justifiable claims.

The Victorian Tribunal considers that, if such access were not available, it would be necessary for the Tribunal to be supported by an investigatory team, which would be expensive and wasteful. The Commission accordingly recommends that there should be a statutory right to such access, and that the Commissioner of Police and the tribunal, which it is recommended should be established in this State, should enter into a suitable administrative arrangement for its implementation.
If this recommendation were adopted, the ordinary processes by which the cogency of evidence is assessed in judicial proceedings would be able to apply in proceedings before a tribunal of the sort recommended. The experience of a District Court judge is such as to enable him to evaluate evidence in such cases and to apply the proper standard of proof to them.

**Right of recourse against offenders**

31. At present, if the Crown makes an award to a victim, the Under Secretary for Law takes over the victim's rights against the offender to the extent of the payments: s.9, and see paragraphs 48 and 49 of the working paper. Section 4(4) of the Act provides that an order against the offender may be enforced as a fine. The Crown has so far not attempted to use this method of enforcement. In point of fact most offenders cannot make more than a token repayment, particularly if they have been sentenced to imprisonment.

32. If the award is to be made out of Consolidated Revenue in the first instance, the question arises as to whether the Crown should have a right of recourse against the offender, and if so, what should be the procedure for its exercise. Most commentators agreed that there should be a right of recourse against the offender, but that it should be enforced in civil proceedings including bankruptcy, rather than in criminal proceedings. The Commission agrees, and so recommends.

33. As far as procedure is concerned, one possibility is for an order to be made against the offender in favour of the Crown at the same time as an award is made against the victim. However, this would tend to make those proceedings too formal. The better course, in the view of the Commission, is to adopt the Victorian approach under which the Crown may apply to the Tribunal for an order directing the offender to refund the whole or part of the amount of compensation; Vic. s.21. Any such order may be for the payment of a lump sum or periodical payments, or both: Vic. s.21(2). There does not appear to be a time limit in Victoria, but the Commission recommends that application should not be able to be made later than six years after the award was made in favour of the victim.

In Victoria, no application has been received for recovery from the offender since the Tribunal's inception two years ago. But in twenty-two cases the victim's application for
compensation was adjourned until he had taken steps to obtain compensation from the offender. The Commission understands that, typically, this occurs in cases where the claim, although not fraudulent, appears to arise out of an essentially personal dispute between parties known to each other and where there is no reason to believe that the alleged offender does not possess sufficient means to meet any claim which is established. The Commission recommends that a comparable power to adjourn be available to a tribunal in Western Australia. This would also have the advantage of protecting the Consolidated Revenue from unnecessary claims.

34. In accordance with general principles, the offender, if he wishes to defend the recourse proceedings, should be able to argue his case without being estopped by any decision of the tribunal in relation to the victim, or by the criminal proceedings in which the offender was convicted.

**Nature of the award**

35. The questions whether the basis of the award should be the same as in a tort action, and whether it should include pecuniary loss are discussed in paragraphs 17 to 20 of the working paper.

36. Most commentators were of the view that the basis of an award should be the same as in tort, although the Crown Law Department considered that hospital and medical expenses should not be recoverable, and that compensation should not be awarded for indignity or outrage: see paragraph 20 of the working paper.

37. The Commission considers that the general principle should be that compensation as for a tort action should be payable, excluding exemplary or aggravated damages, and subject to any maximum that might be imposed. Section 15(1) of the Victorian Act provides a satisfactory precedent for adoption in this State. The subsection is as follows -

"(1) Compensation may be awarded by the Tribunal under this Act in respect of any one or more of the following matters:-"
(a) Expenses actually and reasonably incurred as a result of the victim's injury or death;

(b) Pecuniary loss to the victim as a result of total or partial incapacity for work;

(c) Pecuniary loss to dependants as a result of the victim's death;

(d) Other pecuniary loss resulting from the victim's injury, and any expenses which, in the opinion of the Tribunal, it is reasonable to incur;

(e) Pain and suffering of the victim."

Insofar as the foregoing section addresses itself to the problem of compensation payable to the victim himself, the commission endorses it and recommends that it be adopted in Western Australia.

38. The tribunal should, however, take into account in fixing the amount of compensation, money paid or payable to the victim under any other benefit scheme - e.g. workers' compensation: see also Vic. s.17. In the case of criminal injuries inflicted by a motor vehicle, insofar as the Motor Vehicle Insurance Trust covers such cases there should be no recovery under the criminal injuries compensation scheme.

The Commission considers that the tribunal should have a discretion to take account of money payable to the victim from other sources as a consequence of his injury - e.g. private insurance which he himself has taken out. This departure from ordinary principles of damages in tort seems justified in view of the policy underlying victim compensation - to give some measure of remedy to persons who are victims of criminal injuries to the extent that they are thereby prejudiced. This approach has been taken by the Victorian Tribunal even though the Act (see s.17) would equally seem to entitle it to deal with the problem in the converse way.

39. In Victoria, compensation with regard to the loss of or damage to personal property is expressly excluded: see Vic. s.15 (2) (b). The Commission considers, however, that the replacement or repair cost of such items as dentures, spectacles, hearing-aids or clothing
damaged in an assault should be recoverable (cf. *Workers' Compensation Act*, 1st Schedule, c1.1), and it so recommends.

**Interim awards and periodical payments**

40. In paragraph 24 above, the Commission assumed that a need for interim awards may sometimes arise. Accordingly, it recommends that the tribunal be empowered to make such awards in circumstances where it seems appropriate to the tribunal to do so. In any such case, such award should not be able to be set aside, in subsequent proceedings, unless perhaps it was induced by fraud. Interim payments should, of course, be taken into account in final awards.

Periodical payments may also sometimes be appropriate, as in workers’ compensation. As with interim awards, such payments should be set off against the final compensation order. No harm is done, and some good may be achieved in particular cases, by empowering the tribunal to dispose of claims in as flexible a manner as possible.

**Power to re-open claims**

41. The Victorian Tribunal has power to re-open a claim: s.19(1). The Commission understands that this power is utilised so as to enable the Tribunal to compensate for injury to the extent then apparent without foreclosing the possibility of further compensation should the victim's condition deteriorate. A provision such as this seems desirable, and the Commission recommends that a comparable power be included in the Western Australian legislation.

**The maximum amount**

42. This question is discussed in paragraphs 21 to 33 of the working paper, and comments were invited.

All those who commented on this question considered that the present limits ($2,000 for offences tried on indictment and $300 for offences tried summarily) were too low and should
be raised. The Law Society suggested it should be raised at least to $10,000 and possibly to as high as $20,000. The Australian Labor Party (W.A. Branch) and one other individual commentator suggested it should be set at $10,000. The Community Welfare Department and Mr. Burton, S.M., considered that there should be no upper limit at all. The Crown Law Department suggested a maximum of $5,000.

43. The Commission considers that an overwhelming case can be made for a substantial increase in the amount that can be awarded. Simply to take account of inflation since the first enactment of the legislation the maximum would have to be raised to $4,000. In Victoria the limit, set in 1973, is $3,000, and in New South Wales it is $4,000, set in 1974.

The Commission considers, however, that it would not be enough merely to restore 1970 monetary relativities, i.e. by increasing the maximum to $4,000. When first introduced, the system was avowedly experimental and tentative: see 188 W.A. Parl. Deb. (1970) 1364-1371; 1588-1590. Its utility seems now to be established and accepted. Experience here and in other jurisdictions does not suggest that the average amount awarded approaches anywhere near the maximum: see, for example, Victoria where the average award during the past two years has been approximately $800 or just over twenty-five per cent of the maximum. Yet the Commission's researches revealed that there are occasional cases where the maximum does in fact operate as a cut-off point: see paragraph 24 of the working paper. It is in such cases that the worst hardships occur.

On the other hand, the Commission believes that it is too early, in the light of the relatively limited experience of criminal injuries compensation in this State, to recommend unlimited compensation to the extent of a full indemnity, as in an ordinary tort action. The Commission also believes that it is too early to go so far as in workers' compensation, where the maximum recovery is $32,490: see also the Police Assistance Compensation Act 1964, s.5, discussed in paragraph 6 of the working paper. It is necessary to arrive at a figure which is acceptable to the community at the present time. Having had regard to all the comments received on this matter, the Commission believes that the scheme should provide a level of compensation which would be reasonable in the majority of cases and yet which would not expose the Consolidated Revenue Fund to unlimited liabilities. On this basis, the Commission recommends that the maximum limit be raised to $7,500.
44. In recommending this maximum, the Commission wishes to re-affirm that it should, as now, be treated as a cut-off point, not the maximum in a scale: see working paper, paragraph 21. The Victorian Tribunal evidently found itself in a dilemma at first in this regard (see Practice Note, 47 Law Institute Journal of Victoria 358), but it subsequently has affirmed that the upper limit is to be treated as a cut-off point. The Commission recommends that, to avoid any ambiguity, legislation should make it explicit that the maximum figure is a cut-off point, damages being prima facie assessed on a tort basis with modifications, as set out in paragraphs 37 and 38 above.

45. With regard to methods of adjusting the maximum amount from time to time in line with the fall in the value of money, there seem to be three main alternatives -

(i) by amendment of the legislation itself from time to time;
(ii) by variation by the Governor-in-Council;
(iii) by indexation of some kind.

The Commission considers that, if its recommendation to increase the maximum to $7,500 is accepted, there would be a proper and continuing need to assess the scheme and its impact upon the Consolidated Revenue Fund. Accordingly, any provision for automatic increase, by way of indexation (as was suggested by the Australian Labor Party) or otherwise, would be inappropriate. On the other hand, the pressure of Parliamentary time is such that to provide that the maximum could only be increased by amendment of the principal Act would be to build in an element of inertia. In inflationary economic conditions, this is undesirable. Accordingly, the Commission recommends that the maximum should be adjustable by the Governor-in-Council, thus providing governmental control as well as flexibility.

46. The Commission also recommends that the Criminal Injuries Compensation Tribunal report annually to parliament through the appropriate Minister, as the Victorian Tribunal is required to do: see Vic. s.28. In this way, the information necessary for informed public debate upon the maximum level and all other aspects of the criminal injuries compensation scheme would become publicly available.
Who should be compensated?

47. At present it appears that only the immediate victim may claim compensation. In paragraphs 34 to 37 of the working paper the Commission discussed whether the estate of a deceased victim or persons other than the immediate victim (for example his dependants if he dies) could claim.

Estate of deceased victim

48. The majority of the commentators were of the view that the estate of a deceased victim should have no claim. However, the Commission considers that the estate should be put in the same position as regards pecuniary loss as it would have been but for the injury or death. If the victim dies, whether from a cause connected with the offence or otherwise, the estate should be able to claim for expenses and for loss of earnings during any period the victim was under a disability. This is the same principle as that adopted in s.4 of the *Law Reform (Miscellaneous Provisions) Act 1941*, which provides that a cause of action survives the death of a person, but that exemplary damages, and damages for pain and suffering or curtailment of expectation of life are not compensable.

Dependants of deceased victim

49. Most commentators considered that the dependants of a victim who was killed as a result of a criminal offence should be able to claim. The Crown Law Department and the Commissioner of Police, however, did not. The Commission considers that designated relatives of the victim who were financially dependant on him at the time of his death should be eligible for compensation. This is the position in Victoria (see paragraph 37 above), New Zealand and the United Kingdom.

Such a provision would cover compensation for loss of services: e.g. a wife's housekeeping services.

In accordance with the recommendation in paragraph 38 above, the adjudicating body would have a discretion not to make an award to dependants if they were entitled to receive adequate compensation from other sources, such as insurance.
Other Persons

50. In paragraph 35 of its working paper, the Commission also drew attention to the problem of whether, for example, an innocent bystander who suffers severe nervous shock at a brutal assault should be compensated. The Commission recommends that such a person should not be eligible. It seems beyond the basic purpose of the Act to compensate such persons. No commentator suggested that such third parties should be eligible.

Expenses incurred by persons other than the victim

51. Victoria permits a compensation claim for any expenses which in the opinion of the Tribunal it is reasonable to incur: see paragraph 37 above. Examples include funeral expenses, by whomsoever reasonably incurred. In practice the Victorian Tribunal adopts the view that expenses are reasonably incurred if there was a legal obligation to incur them or if the expenditure was otherwise warranted in the circumstances. The Commission considers that a comparable provision should be enacted in Western Australia, and it so recommends.

Contributing Conduct

52. It was pointed out in paragraph 52 of the working paper that it appears that, under s.4 of the present Act, if the victim contributed by his conduct to the injury suffered by him, he is not entitled to any award at all: see Re Hondros [1973] W.A.R. 1; see also Palfrey v. Patterson, District Court, No. 3 of 1974. All those who commented on this aspect said that contributing conduct should be a ground for reducing the amount of the award, rather than for barring it altogether. The Commission agrees, and so recommends. Reduction of compensation in proportion to a person's contributing conduct is a well established principle in tort actions.

Relationship of victim to offender

53. Under the present Act, in deciding whether to make an award, the court is to take into account whether the victim is or was a relative of the offender, or was, at the time of the
commission of the offence, living with the offender as wife or husband or as a member of the offender's household: see s.4(2); see also paragraphs 53 to 55 of the working paper.

54. All those who commented on this question considered that the victim should not be barred from recovery merely because of his or her relationship with the offender. The Law Society and the Crown Law Department said that such relationship should be a matter to be taken into account in assessing compensation.

55. The Commission confirms the tentative view expressed in paragraph 55 of the working paper that compensation should not be denied or reduced merely because the victim was related to the offender or living with him or in his household. In the Commission's view, the real questions are whether in such a case the victim contributed to his injury or whether the offender would benefit from a compensation order. The question of contributory conduct has already been discussed: see paragraph 52 above. The Commission recommends that where the adjudicating body is satisfied that to award compensation to the victim was really to award it to the offender, compensation should be denied. An award could, however, be made subject to conditions which would prevent the offender benefiting. For example, where the victim is a child of the offender, arrangements could be made to pay the award to the Public Trustee to be held in trust for the victim until he attained his majority, with provision for the Public Trustee to make payments for the child's education. The Commission recommends that provision for such arrangements should be included in the Act.

Multiple offenders, multiple orders

56. As the Commission pointed out in paragraph 56 of the working paper, several co-defendants may each be ordered to compensate a victim up to the maximum. This was held in the South Australian case of Re Poore (1973) 6 S.A.S.R. 308. The South Australian Act, under an order is made against the offender in the first instance, has since been amended to provide that in such a case only one order may be made (although each co-defendant could be made jointly and severally liable under it).

In Western Australia, since the issue of the Commission's working paper, a case has occurred where orders totalling $5,000 were made against several co-defendants in a multiple rape case: The applicant v. Larkin and Others, decision of Wickham J., 8 October 1975.
57. The Commission considers that if the Act is to be restructured so that compensation orders in favour of the victim are made against the Consolidated Revenue Fund and not, as now, against the offender (see paragraph 7 above), the legislation should provide that the limit of compensation should be related to the incident giving rise to the injury, and should not be dependant on the relatively fortuitous factor of the number of offenders. Most commentators agreed. The Commission recommends accordingly.

The Commission also recommends that, in cases where there are multiple offenders, the tribunal should, for the purposes of recourse proceedings, be required to determine the amount payable by each offender in accordance with his degree of responsibility for the injury.

Costs of application

58. The question whether the tribunal should have power to award costs is discussed in paragraph 51 of the working paper. All but one commentator considered that the adjudicating body should have power to award costs in favour of an applicant.

The Commission agrees with this view, but considers that the award should lie in the discretion of the tribunal. The Commission considers that its proposals, if implemented, should enable cases to be presented quite simply, not infrequently by the applicant himself. On the other hand, victims should not be deterred from seeking compensation because they feel that, whilst they can best do so in the particular case with the aid of a legal practitioner, the costs may be prohibitive. To permit the tribunal to award costs where it seems appropriate to do so would seem to be a proper compromise. Where costs are awarded, they should be on the District Court scale and in addition to compensation.

Where a recourse order is made against an offender, the amount of that order should normally include the amount of the costs forwarded to the victim as well as the amount of the compensation itself, and the Commission so recommends.

59. The corollary is that costs should also be able to be awarded against the applicant. The Commission considers, however, that this should not happen *ipso facto* if the claim is unsuccessful but only where in the opinion of the tribunal the claim, or the manner of
pursuing it, was in all the circumstances without merit. A fraudulent claim, for example could result in such an order.

**Rights of appeal**

60. The question of what the rights of appeal should be for the victim, the offender and the Crown are discussed in paragraph 50 of the working paper.

61. Most of those who commented on this question were not in favour of full rights of appeal. The Crown Law Department and the Australian Labor Party considered that to give any right of appeal would run counter to the basic purpose of the Act. The Law Society's submission was in similar terms, but it said it was possible that rights of appeal might be appropriate, depending upon how the Act was finally framed.

In Victoria, the applicant can appeal to the County Court in a case where the Tribunal refuses to make an award: see s.13(3).

62. Bearing in mind that the purpose of the Act is to provide a simple and expeditious means for the obtaining of compensation, it appears to the Commission that to grant a right of appeal to an applicant would not undermine this purpose. The Commission does not contemplate that many such appeals would be made, and it is likely that the appellate court (which should be the Full Court) would only concern itself with matters of principle. The Commission accordingly recommends that a right of appeal should be available, but limited to the applicant. The Commission also considers that the tribunal should be permitted, at any stage of proceedings, to state a case to the Full Court: cf. *Workers' Compensation Act*, s.29(9).

63. The Commission considers that, if the claimant is to be granted a right of appeal, it is important that the right should extend to an allegedly insufficient award as well as to a refusal to make an award. It could perhaps be argued that such appeals should be confined to matters of law. However, the Commission considers that the difficulty of maintaining the distinction between appeals on matters of law and appeals on other points is such that it would be preferable to permit the applicant a full right of appeal.
64. As far as the offender is concerned, if the Commission’s recommendation in paragraph 33 above is accepted, the occasions when it will be considered worthwhile to seek an order against the offender will probably be few. When such an order is made, however, the offender should have full rights of appeal (i.e. on fact, law and discretion), just as he would have if a civil action had been brought against him in the ordinary way.

Publicity

65. The Commission pointed out in paragraph 57 of the working paper that the present Act seemed little utilised, possibly because it was little known. Incidents which have received some publicity since the working paper was issued tend to confirm that members of the public are insufficiently informed of their existing rights to compensation, and no system exists by which they may be informed.

As at 10 October 1975, only 35 claims have been made since the Act came into force. By contrast in Victoria 835 applications were made for compensation during the period 1.7.74 to 30.6.75.

The Commission recommends that the Government consider the following ways of achieving adequate publicity for the scheme:

- distribution of pamphlets or application forms by the police;
- distribution of pamphlets or application forms to hospitals, legal aid officers, solicitors, welfare workers;
- advertisements in the press;
- the dissemination of public information by the Criminal Injuries Compensation Tribunal.

SUMMARY OF RECOMMENDATIONS

66. The Commission recommends that:

**Award against Consolidated Revenue**

(a) the Act should be restructured so that a compensation order is made against the Consolidated Revenue Fund in the first
Revenue

(b) (i) the function of determining the question of compensation should be given to a nominated District Court judge sitting as a separate tribunal to be called "The Criminal Injuries Compensation Tribunal";

(ii) the appointment of such judge should be for a fixed term, and in addition the Chairman of Judges should be empowered to appoint other judges on an ad hoc basis in exceptional cases;

Limit of compensation

(d) the limit of compensation should be raised to $7,500 (paragraph 43) which -

(i) should apply in all cases, irrespective of the status of the trial court, the nature of the offence or the number of the offenders;

and

(ii) should operate as a cut-off point, not as the maximum in a scale;

Right of recourse

(f) the Crown should have a right of recourse against the offender, by way of application to the Tribunal, and -

(i) any such order should be enforceable only in civil proceedings and not as a fine;

(ii) application should not be able to be made later than six
years after the award was made in favour of the victim;

(paragraph 33)

(iii) the offender should not be estopped by a previous decision of the Tribunal, or by any criminal proceedings;

(paragraph 34)

(iv) in the case of multiple offenders, the Tribunal should be required to determine the amount payable by each of them;

(paragraph 57)

(v) any costs that are awarded in favour of an applicant (see (1) (viii) below) should also be recoverable by the Crown;

(paragraph 58)

*Heads of Loss*  
(g) the compensation award should be as in a tort action for personal injury, including the cost of repair of certain personal items but excluding exemplary or aggravated damages and subject to the limit as in (d);

(paragraphs 37 and 39)

(h) in fixing the amount of compensation the Tribunal should -

(i) take into account money payable to the victim under any other benefit scheme, including, where applicable, that payable by the Motor Vehicle Insurance Trust; and

(ii) have a discretion to take into account any other money payable to the victim as the result of his injury;

(paragraph 38)

*Who may claim*  
(i) in addition to the immediate victim -

(i) the estate of a deceased victim, and the dependants of a deceased victim, should be able to claim compensation for financial loss, but the Tribunal should be able to take into account any money payable to dependants from other sources;
(paragraphs 48 and 49)

(ii) other persons should be able to claim for expenses reasonably incurred as a result of the injury or death;

(paragraph 51)

(j) a victim's contributing conduct should be a ground for reducing the amount of the award, rather than for barring it altogether;

(paragraph 52)

(k) (i) the relationship between the offender and the victim should not be a ground *per se* for reducing or barring an award; and

(ii) the Tribunal should be empowered to order that the award be paid to the Public Trustee for the benefit of a child victim;

(paragraph 55)

*Tribunal proceedings*

(1) as far as proceedings before the Criminal Injuries Compensation Tribunal are concerned -

(i) the procedure for determining compensation should be informal and the Tribunal should be able to make such enquiries as it thinks fit;

(paragraph 20)

(ii) the Tribunal should be empowered to examine the relevant material on police files relating to the offence, and the Tribunal and the Commissioner of Police should enter into suitable administrative arrangements to this end;

(paragraph 30)

(iii) the civil standard of proof should apply;

(paragraphs 20 and 23)

(iv) the Tribunal should be empowered to determine its own procedures, should be required to deal with claims expeditiously, and should not be bound to await the outcome of the criminal trial;

(paragraphs 20 and 26)
(v) the Tribunal should be empowered to make interim
awards and periodical payments, which should not be
able to be set aside, at least in the absence of fraud;

(paragraph 40)

(vi) the Tribunal should be empowered to re-open a claim;

(paragraph 41)

(vii) the Tribunal should be empowered to require the
applicant to seek recovery from the offender and to
adjourn the proceedings until this had been done;

(paragraph 33)

(viii) the Tribunal should be empowered to award costs on the
District Court scale in favour of an applicant, and, if the
application is without merit, against him;

(paragraphs 58 and 59)

(ix) the Tribunal should be empowered to state a case to the
Full Court;

(paragraph 62)

(m) the Tribunal should be required to report annually to Parliament
through the appropriate Minister on the operation of the scheme;

(paragraph 46)

Rights of appeal (n) the applicant for compensation and the offender against whom
an order has been made should have full rights of appeal to the
Full Court;

(paragraphs 62 and 64)

Publicity (o) the Government should consider various ways of achieving
adequate publicity for the scheme.

(paragraph 65)

(Signed) R.W. HARDING Chairman
ERIC FREEMAN Member
DAVID K. MALCOLM Member
28 October 1975
APPENDIX I

List of persons who commented on the working paper-

Australian Labor Party (W.A. Branch)
Mrs. M. Buckroyd
Mr. R.H. Burton, S.M.
Commissioner of Police
Crown Law Department
Department for Community Welfare
His Hon. Judge D.C. Heenan
Law Society of Western Australia
Parliamentary Commissioner for Administrative Investigations
The Hon. Mr. Justice St. John
Mr. B.G. Tennant
Professor W.T. Westling
INTRODUCTION

The Law Reform Commission has been asked to conduct a review of the Criminal Injuries (Compensation) Act 1970.

The Commission having completed its first consideration of the matter now issues this working paper. The paper does not necessarily represent the final views of the Commission.

Comments and criticisms on individual issues raised in the working paper, on the paper as a whole or on any other aspect coming within the terms of reference, are invited. The Commission requests that they be submitted by 15 August 1975.

Copies of the paper are being sent to the -

- Chief Justice and Judges of the Supreme Court
- Citizens Advice Bureau
- Commissioner of Police
- Community Welfare Department
- Crimes Compensation Tribunal of Victoria
- Department of Corrections
- Federal Minister for Repatriation and Compensation
- Institute of Legal Executives
- Judges of the District Court
- Law School of the University of W.A.
- Law Society of W.A.
- Magistrates' Institute
- Solicitor General
- State Treasurer
- Under Secretary for Law
- Law Reform Commissions and Committees with which this Commission is in correspondence.

The Commission may add to this list.

A notice has been placed in The West Australian inviting anyone interested to obtain a copy of the paper and to submit comments.

The research material on which the paper is based is at the offices of the Commission and will be made available there on request.
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TERMS OF REFERENCE

1. "To conduct a review of the Criminal Injuries (Compensation) Act 1970."

2. The original terms of reference were confined to reporting on a proposal that the Act be amended for the purpose of increasing the maximum amounts of compensation payable thereunder, and of ensuring that the amounts are adjusted from time to time in line with the fall in the value of money. The Commission considered that it could not satisfactorily deal with these questions except as part of a general review of the Act, and accordingly sought and obtained a reference in terms of paragraph 1.

LAW AND PRACTICE IN WESTERN AUSTRALIA

Synopsis of the Act

3. The Criminal Injuries (Compensation) Act provides a means whereby a person who suffers injury (defined in s.3 as meaning bodily harm and as including pregnancy, mental shock and nervous shock) as a result of the commission of a criminal offence can obtain compensation for the injury. The text of the Act is reproduced as Appendix I to this paper. Its most important provisions are as follows -

(a) Where a person is convicted of an the trial court may, on the application of a person who suffered injury in consequence of the commission of the offence, order that the offender pay the applicant a sum not exceeding $2,000 in the case of an indictable offence, or $300 in the case of a simple offence "by way of compensation for injury suffered" by him (s.4(1)).

(b) The court is required to have regard to any behaviour of the injured person that contributed to his injury and to other relevant circumstances, including his relationship to the offender (s.4(2)).

(c) An order under s.4(1) is enforceable as a fine (s.4(4)).
(d) Where a person has been awarded more than $100 compensation, he may apply to the Under Secretary for Law for payment out of the Consolidated Revenue Fund (s.5).

(e) The Under Secretary for Law is required to send to the State Treasurer a statement specifying -
   (i) the amount of the award; and
   (ii) any amounts which, in the Under Secretary's opinion, the applicant has received, or would have received if he had exhausted all his legal remedies (s.7(1)).

(f) The Treasurer may, if he considers that the circumstances of the case justify it, pay the applicant the difference between (i) and (ii) in (e) above (s.7(3)).

(g) Where the Treasurer makes a payment to a person, the Under Secretary for Law takes over that person's rights against the offender to the extent of the payment (s.9).

(h) Where a person is acquitted of an offence, the trial court may give the injured person a certificate stating the amount it would have awarded had the accused been convicted, provided the amount would have been not less than $100 (s.6(1)). No certificate can be given unless the court is satisfied that the applicant in fact suffered injury by reason of an offence committed by some other person (s.6(3)).

(Action on any certificate given under s.6 is in accordance with (d) to (g) above).

Ex gratia scheme

4. The Act does not cover the case where there is no criminal trial, for example, where the offender has not been caught or where charges have not been proceeded with. In 1970, in the course of the debate on the Bill, the then Government undertook to provide a scheme for ex gratia payments in such situations (187 W.A. Parl. Deb. 805). Subsequently, on 7 November 1973 the then Attorney General issued a press release stating that ex gratia
payments would be considered (see The West Australian of that date). The present Government has continued this scheme, although as far as the Commission is aware it has made no public announcement. The Under Secretary for Law has informed the Commission that only one person has been paid under this scheme so far ($300 for an assault).

Other legislation

5. In addition to the Criminal Injuries (Compensation) Act, power to award compensation is given to the Supreme and District Courts under s.674 of the Criminal Code (compensation for "loss of time" suffered by victim) and to Courts of Petty Sessions under s.145 of the Justices Act (victim may be awarded fine inflicted for assault). Under s.5 of the Criminal Injuries (Compensation) Act a person awarded an amount under either of these sections may apply for payment from the Consolidated Revenue Fund.

6. The Police Assistance Compensation Act 1964 provides for the Crown to pay compensation to any person injured while assisting a police officer in the execution of his duty, and to dependants of that person (s.5(1)). Compensation is payable in accordance with the Workers’ Compensation Act 1912 as if the injured person were a worker employed by the Crown earning not less than the basic wage, and as if he suffered the injury by accident arising out of or in the course of employment (s.5(2)). Compensation is also payable, up to a prescribed amount, for damage to the injured person's property (s.5(3)). If any dispute arises the matter is determined by the Workers' Compensation Board (s.6).

Presumably if the circumstances were applicable, an injured person could obtain an award under the Police Assistance Compensation Act as well as an order under the Criminal Injuries (Compensation) Act, but the amount of the award under the former Act would presumably be deducted from any payment from the Consolidated Revenue Fund under the Criminal Injuries (Compensation) Act (see s.7).

Operation of the Criminal Injuries (Compensation) Act

7. As at 6 May 1975, twenty-one applications had been made to trial courts for orders under the Act. Eighteen of these were successful and three unsuccessful. In each of the eighteen cases where orders were made, payment was sought out of Consolidated Revenue;
and in eleven cases such payment was in fact made. Of the other seven applications, three are still under consideration and four have been refused. The total amount of compensation awarded by courts under the Act is $13,770. Of that amount, $11,620 has been paid from Consolidated Revenue, and the three claims still under consideration are for a total of $1,200. Claims totalling $950 were refused.

Appendix II sets out in tabulated form particulars of claims made under the Act.

THE LAW ELSEWHERE

Australia

8. Four other Australian States - New South Wales, Victoria, Queensland and South Australia - have legislation providing for payment of compensation for criminal injuries (see the Criminal Injuries Compensation Act 1967 and the Crimes Act 1900 (N.S.W.); the Criminal Injuries Compensation Act 1972 (Vic.); the Criminal Code Amendment Act 1968 (Qld.) and the Criminal Injuries Compensation Act 1969 (S.A.)).

The legislation in New South Wales, Queensland and South Australia is broadly of the same pattern as in Western Australia, except that in South Australia and Queensland the legislation also authorises ex gratia payments where the person who caused the injury is not brought to trial (cf. paragraph 4 above).

In Victoria, as in the United Kingdom and New Zealand (see paragraphs 9 and 10 below), applications for compensation are dealt with by a tribunal specially established for the purpose. Awards of the tribunal are directly payable out of Government Revenue.

United Kingdom

9. In the United Kingdom a non-statutory scheme for compensation for criminal injuries has been in existence since 1964. Application may be made under this scheme to a Criminal Injuries Compensation Board. If awarded, compensation is payable from Government Revenue. The offender himself cannot be ordered to reimburse the State for money paid to a victim by way of compensation. The Home Office is at present reviewing the scheme, and has
issued a "Consultative Document" which discusses possible ways to improve the scheme, with a view to putting it on a statutory basis (see Review of the Criminal Injuries Compensation Scheme C.I.C.S. (1974)).

New Zealand

10. New Zealand enacted legislation in 1963 for the setting up of a Criminal Injuries Compensation Tribunal to which application could be made for an award of compensation (see the Criminal Injuries Compensation Act 1963). Criminal injuries are now compensable under the Accidents Compensation Act 1972, which provides for State compensation for all accidental personal injuries, however caused.

Summary of legislation elsewhere

11. Appendix III sets out in tabulated form the salient features of the legislation referred to above.

DISCUSSION AND PROVISIONAL VIEWS

Purpose of the legislation

12. As has been pointed out in paragraph 3 above, the formal basis for compensation in Western Australia is that the primary liability rests upon the offender himself. There is provision for recourse to the Consolidated Revenue Fund to the extent that the offender himself has not paid. It is a matter for the discretion of the Treasurer whether or not any payment is made from the Fund. The State, through the Under Secretary for Law, has a right of subrogation against the offender.

13. This statutory arrangement provoked discussion, in the early Australian cases dealing with similar legislation, as to whether the compensation was to be properly regarded as a form of civil remedy or as a form of further punishment upon the offender.

In two early Queensland cases, the punishment view was adopted (see Re Daley [1970] Q.W.N.33; R. v. Wright [1971] Qd. R. 153). However, in the New South Wales case of R. v.
Bowen (1969) 90 W.N. (Pt. 1) (N.S.W.) 82, Reynolds J. expressed the view that the provision for an award was one of a "very summary nature," for "doing some measure of justice to the victim of a crime without the delay, expense and formality of a civil action." This view appears eventually to have prevailed in Queensland (R. v. Allsop [1972] Q.W.N.34).

14. The view that the primary purpose of the award is not punitive has also been adopted in this State by Jackson C.J. in Re Hondros [1973] W.A.R.1. The Chief Justice said -

"The main purpose of the Act appears to me to be to provide a modest sum of money, generally to be paid by the Treasury, to the innocent victim who suffers injuries as a result of a criminal offence" (p. 4).

15. The Commission agrees with this approach. Accordingly, it considers that the formal nature of the compensation remedy should match the substantial reality of the operation of the scheme. This is that, if compensation is to be actually received by the victim, it will as a rule be paid from Consolidated Revenue. Thus in the eleven cases in which the Treasury has paid a total of $11,620 to victims, the Crown in exercise of its rights of subrogation under s.9 of the Act (see paragraph 3(g) above) has recovered a mere $43 from offenders. It is not known whether, in those four cases where the Treasury refused payment of claims totalling $950 (see cases numbered 15 to 18 in Appendix II), any compensation was actually received by any of the victims.

In New South Wales, where the victim compensation scheme has been operating for a longer period in relation to a greater number of victims, experience has been similar to that of Western Australia. Thus since the scheme started in 1967, out of $252,000 paid in compensation by the Treasury, less than $12,000 has been recovered by the Treasury from the offenders in exercise of rights of subrogation.

16. The Commission considers that the Act should be recast so as to render the Consolidated Revenue primarily liable to pay any compensation ordered to be paid under the Act. This arrangement will bring the form of the remedy into line with current practice and experience - namely as a form of civil remedy intended to provide monetary compensation from the State for a victim who has suffered personal injury.
Assessment of compensation

Heads of loss

17. There is a difference of judicial opinion as to whether "compensation for injury" in s.4(1) of the Act includes compensation for pecuniary loss, such as loss of earnings and medical expenses, or is confined to compensation for pain and suffering, loss of enjoyment of life and loss of expectation of life.

18. On the one hand, in *Hill v. Shaw* (unreported Jackson C.J., 8 December 1972), the Chief Justice said that in assessing compensation under the Act it would have been relevant to have taken into consideration, had there been evidence of it, "the question of medical, hospital and similar expenses." Kelly A.J. in *R. v. Johnson. ex parte MaLeod* [1973] Qd. R. 208, in commenting on similar wording in the Queensland legislation, also indicated that regard could be had to the pecuniary loss caused by the injury, as well as its physical and mental consequences.

On the other hand, in *Maher v. Thomson* (unreported decision of Lavan J, 13 June 1974), the Judge considered that pecuniary loss was not a factor to be taken into account in assessing compensation. A similar view was taken by Judge Pidgeon in *Re Bellini* (District Court, No.1726 of 1972) and in *McCabe v. Gill & Hunter* (District Court, No.2 of 1974): see also, *R. v. Wright* [1971] Qd. R.153. In *Edwards v. Taylor and Hall* (unreported decision of Wallace J, 5 May 1975) the Judge held that the victim could not be compensated for the cost ($750) of repairing a specially designed dental plate which was damaged when he was hit on the mouth.

19. The Commission considers that the Act should be clarified by specifying expressly the heads of loss for which compensation may be awarded. If the Commission's view is accepted that the primary nature of the award is as a form of civil remedy, there is much to be said for adopting the heads of loss for which compensation may be awarded in tort actions, thus including both pecuniary and non-pecuniary loss.

20. It could, however, be argued that a scheme based on common law tort compensation does not necessarily provide for the most appropriate use of public money. It would seem that,
having regard to the source from which compensation would normally be paid, exemplary or punitive damages should be excluded. A more difficult question is whether there should be compensation for indignity or outrage suffered by the victim (cf. *Hill v. Shaw* (supra) and *R.J.R. v. Bandy and another* (unreported decision of Burt J, 31 May 1974) where it was held that injury to feelings, as distinct from nervous shock, was not compensable under the Act).

It could, of course, also be argued that the heads of loss for criminal injuries compensation should include items not provided for in tort, and that it would be appropriate, for example, to include an item in fatal cases for "bereavement", to be paid to certain close relatives, as suggested by the committee reviewing the United Kingdom scheme (see paragraph 9 above).

The Commission would welcome suggestions about what the heads of loss should be. The question about heads of loss is, of course, distinct from that of an upper statutory limit.

**Maximum amounts**

21. At present, the maximum amount that may be awarded is $2,000 in the case of an indictable offence and $300 in the case of a simple offence (s.4). The Act does not lay down expressly whether these amounts are to be regarded as the top of an artificial scale, being reserved for the worst cases, or whether they are to be regarded as cut-off points only.

The courts have, however, adopted the approach that the amounts are cut-off points only and that cases should not be scaled according to their gravity as crimes (see *R. v. Forsythe* [1972] 2 N.S.W.L.R. 951; *G.A.K. v. Francis and Ash* (unreported decision of Wickam J, 27 August 1974)). This approach conforms with the view that the making of an order is not to be regarded as a punishment of the offender but as a form of civil remedy.

22. It has been suggested that the maximum amounts of $2,000 and $300 are too low. Appendix III lists the maximum amounts in other jurisdictions. In the United Kingdom no maximum amount is prescribed, except that the rate for loss of earnings is limited to twice the average weekly industrial earnings. In New Zealand, where the criminal injuries compensation scheme has been absorbed into the accident compensation scheme (see paragraph 10 above), there is a maximum of $160 per week payable for loss of earnings, $7,000 for impairment of bodily function and $10,000 for pain and suffering and loss of
enjoyment of life. New South Wales in 1974 raised the maximum amounts from $2,000 to $4,000 for felonies and misdemeanours and from $300 to $600 for offences tried summarily.

23. The question of what upper limit would be appropriate is complicated by the fact that at present the formal nature of compensation is as an order against the offender. If the offender were the only source from which the compensation could be recovered, from the victim's point of view it would be an empty gesture to increase the limit, since offenders generally seem to be men of straw (see paragraph 15 above). In practice, of course, under the present law the victim can normally look to the State to pay the amount of the award, and the question of an increase should be considered in that light.

24. In this context, there appear to be good grounds for increasing the upper limit of compensation. There have been at least five cases where the court expressly held that adequate compensation for the injury would have amounted to more than the statutory limit (see *G.A.K. v. K.W. Francis and L. Ash* (supra, paragraph 21 above) a case where the injury was rape causing severe emotional disturbance; *W.A. McCabe v. Gill and Hunter* (supra, paragraph 18 above) which was a case of assault causing bodily harm; and the three court of petty sessions cases referred to in paragraph 28 below).

A substantial increase could also be justified merely on the grounds of the fall in the value of money since 1970, when the *Criminal Injuries (Compensation) Act* was passed.

25. The Commission's terms of reference specifically require the Commission to "consider and report on a proposal that the *Criminal Injuries (Compensation) Act* be amended for the purpose of increasing the maximum compensation payable thereunder, and for ensuring that such sum shall from time to time be adjusted to accommodate inflated money values." At this stage the Commission does not feel justified in suggesting what the upper limit should be, but would welcome submissions on this matter. However, it seems clear that there is a strong case for a fairly substantial increase.

26. As to the question of the adjustment of the upper limit to take account of the fall in the value of money, it could be said that if the limit is increased substantially in the first instance, it may be unnecessary to create special machinery for keeping it in line with inflation, the matter being left to the normal process of Parliamentary review. Alternatively, provision
could be made in the legislation for the amount to be increased by regulation following a periodical review by the Treasurer. This review could be carried out pursuant to a general discretion, or in accordance with specific statutory criteria, such as increases in the Consumer Price Index (see s. 46C of the Superannuation and Family Benefits Act 1938) or in the average weekly earnings (cf. the definition of “prescribed amount” in s.5 of the Workers’ Compensation Act 1912).

Differing statutory limits in different courts

27. The present approach of prescribing differing maximum amounts, depending on whether the offence causing the injury is an indictable offence or a simple offence, seems of doubtful justification. It is also unclear whether “simple offence” as used in the Criminal Injuries (Compensation) Act (where it is undefined) has the meaning it has in s.4 of the Justices Act, or as it has in the Criminal Code.

Section 4 of the Justices Act defines a simple offence as "any offence (indictable or not) punishable, on summary conviction, by fine, imprisonment or otherwise." Section 3 of the Code divides all offences into three kinds - crimes, misdemeanours and simple offences, and provides that a person guilty of a simple offence may be summarily convicted. The consequence of labelling an offence as a crime or misdemeanor is that it is an indictable offence, that is "an offence a complaint of which is, unless otherwise expressly stated by the Code, triable only by jury" (Code, s.1). It appears to follow that, as those words are used in the Code, an indictable offence triable summarily retains its character as a crime or misdemeanor, as the case may be, and does not become a simple offence.

28. It has been held in three Magistrates' court decisions - Harris v. Turpin (Midland Court No.728 of 1973); Chalmers v. Brady and Haine (Bunbury Court, No.21 of 1975); and Mason v. Payne (Bunbury Court, No. 22 of 1975) - that, for the purposes of the Criminal Injuries (Compensation) Act, "simple offence" bears its Justices Act meaning. Accordingly, the upper limit for indictable offences tried summarily was held to be $300, whereas it would have been $2,000 had the offenders been tried on indictment. In all three cases, the magistrate would have awarded more than statutory limit had he considered that he had power to do so.

The matter has not yet been settled by a decision of the Supreme Court.
29. Anomalies arise whichever of the two interpretations of "simple offence" is the correct one. If the phrase bears its Justices Act meaning then in the case of an indictable offence triable summarily the maximum amount of compensation payable will depend on whether the trial takes place in a Court of Petty Sessions, or in the Supreme or District Court. An example of such an offence which has given rise to claims for compensation is that of assault causing bodily harm (Code, s.317). In MaCabe v. Gill and J.C. Hunter (supra, paragraph 18) the was tried in the District Court and the Judge awarded $2,000. If the accused had been tried in the Court of Petty Sessions on his election, (see Code, s.324A) then on the above interpretation of "simple offence" only $300 could have been awarded.

30. Offences committed by children, except wilful murder, murder, manslaughter or treason, are generally dealt with by the Children's Court (Child Welfare Act, s.20). If the meaning of "simple offence" is as defined in the Justices Act, that court would be limited to awarding $300, no matter how grave the injury.

31. Anomalies also arise if the meaning of "simple offence" is as defined in the Criminal Code (see paragraph 27 above). Prosecutors exercise a wide discretion over the charge laid, the victim's injuries being only one factor. For example, in the case of a brawl, instead of laying a charge of assault causing bodily harm which is an indictable offence under s.317 of the Code, the police could decide to lay a charge of disorderly conduct under s.54 of the Police Act, which is not an indictable offence. A decision to lay a charge for a non-indictable offence could thus impose an arbitrary limitation on the amount of compensation payable. A similar criticism could also be made of the Justices Act interpretation of "simple offence", since the prosecution could decide to lay a charge for an indictable offence triable summarily, for example, assault causing bodily harm, rather than one triable only on indictment, for example, unlawful wounding.

32. New South Wales is the only other jurisdiction studied which has different limits. The upper limit of $4,000 applies to felonies and misdemeanours and the lower limit of $600 to offences tried summarily. In South Australia, Victoria, the United Kingdom and New Zealand the limit of compensation is the same whatever the offence and whatever court tries the offender (in the last three jurisdictions the question of compensation is not determined by the
trial court but by a tribunal). In Queensland the scheme applies only to indictable offences tried on indictment. (See Appendix III).

33. The Commission tentatively suggests that the limit to the amount of compensation payable should depend neither on the nature of the charge nor the court in which the trial takes place.

Who may be compensated

Estate of deceased victim

34. The question arises whether the personal representative of a deceased victim can claim compensation on behalf of the estate. In as in s.4(1) contemplates that the application shall be made by "a person who has suffered injury in consequence of the commission of the offence", it could be argued that the Act excludes such claims. There are no reported decisions on the point.

Under the general law a personal representative can sue the tortfeasor, both where the wrongful act caused the death of the victim, and where the victim died due to a cause unconnected with the tort (Law Reform (Miscellaneous Provisions) Act 1941, s.4). However, claims for the deceased's non-pecuniary losses are excluded (ibid). There would therefore be little point in specifically empowering the estate of a deceased person to claim against the offender under the Criminal Injuries (Compensation) Act unless that Act provided for compensation for pecuniary losses (see paragraph 19 above).

The Commission has no final view at this stage on the question whether the estate of a deceased person should be able to claim compensation out of public money, and would welcome comment.

Persons other than victim

35. The question also arises whether persons other than the actual victim can claim compensation under the Act, as for example a bystander who suffers nervous shock at an attack on another person, or a relative of the victim who suffers shock on hearing of the
injury. Section 4(1) of the Act enables an application for an order to be made by "a person who has suffered injury in consequence of the commission of an offence". "Injury" is defined as bodily harm and as including pregnancy, mental shock and nervous shock. The language of s.4(1) appears capable, standing alone, of including persons other than the actual victim. However it was held by Glass J, in *R. v. McCafferty (No.2)* [1974] 1 N.S.W.L.R. 475, that because the court is directed to have regard to any behaviour of the applicant which contributed to the injury suffered by him (cf. *W.A. Act* s.4(2)), the right to claim appears to be limited to the actual victim. Glass J, also stated that the fact that the Judge should inform himself from evidence given at the trial appeared to exclude other persons than the actual victim, since evidence of any injury suffered by them would hardly ever be admissible at the trial.

It remains to be seen whether this decision would be followed in this State. The Commission would welcome comment on whether a person other than the actual victim should be able to claim.

36. Under the *Fatal Accidents Act 1959*, designated relatives of a person who dies as the result of a wrongful act can sue the tortfeasor for the loss of their financial dependency. It seems clear that such relatives cannot claim under the *Criminal Injuries (Compensation) Act*, since only persons who suffer bodily harm, pregnancy, mental or nervous shock can claim (see paragraph 3 above).

Dependants can claim for the loss of their financial dependency under the schemes in Victoria, the United Kingdom and New Zealand; however they are excluded in Queensland and South Australia. They are also excluded in New South Wales, since although in that State pecuniary loss is an independent head of loss in relation to an order against the offender, only the actual victim can claim (see *R. v. McCafferty* (supra, paragraph 35)).

37. The Commission does not express a view on whether dependants should be able to claim and welcomes comment. The answer to the question depends in part on whether pecuniary loss should be compensable under the Act (see paragraph 19 above). If not, the question whether relatives should be able to claim for the loss of their financial dependency would not arise.
38. Although the Act permits the Treasurer to make an award of compensation to a victim where no conviction was obtained, he can only do so in the limited case where the accused was acquitted and the court is satisfied that the victim in fact suffered injury "by reason of an offence committed by some other person" (s.6, and see paragraph 3 above). The Act does not cover cases where no one is brought to trial because the offender is unknown or cannot be found, or cases where the person who caused the injury is unfit to plead. It may also not cover cases where the accused is acquitted on the ground of insanity, since under s.6 the court can grant a certificate only if it is satisfied that an offence has been committed. It could be argued that as the accused lacked mental capacity no "offence" had been committed. The ex gratia scheme in operation (see paragraph 4 above) is intended to provide for compensation where charges are not laid and would presumably not cover the last two examples (that is, those where the mental capacity of the alleged offender is in issue).

39. The schemes in Victoria, New Zealand, the United Kingdom, Queensland and South Australia specifically provide that the victim may be awarded compensation notwithstanding the person causing the injury was not brought to trial or lacked mental capacity.

In Victoria, New Zealand and the United Kingdom application for compensation is determined by a specially constituted tribunal, and the mental capacity of the person causing the injury is disregarded. In Queensland statutory provision is made for the making of an ex gratia payment in such cases. In South Australia statutory provision is made for an ex gratia payment where the offender has not been tried; however, as in this State, the case where the accused is acquitted on the grounds of insanity may not have been provided for.

40. From the victim's point of view it makes no difference whether the offender has or has not been brought to trial or was acquitted on the ground of insanity. However, in cases where no person is brought to trial it would be necessary to incorporate safeguards against fraudulent claims. In Queensland and the United Kingdom an attempt has been made to safeguard against such claims by providing that no award can be made where no trial takes place unless the circumstances of the injury were reported to the police without delay.
The Commission would welcome comment on the question whether victims of offences by persons who are not brought to trial should be compensated and if so what safeguards against fraudulent claims should be incorporated into the statutory scheme.

**Procedure**

*Evidence upon which order is made*

41. In *Re Hondros* [1973] W.A.R. 1 at p.3 the Chief Justice stated that the making of an order should normally take place forthwith on the conviction of the offender, although sometimes it might be desirable to defer the application until the extent of permanent harm arising from the injury became known. He added that, in considering an application, the Judge must act on his view of the testimony given at the trial, "for the Act does not contemplate that an issue such as this should be re-litigated when an applicant is seeking an award of compensation...".

42. Restriction on the admission of further evidence has the advantage that a decision can generally be made quickly. On the other hand, such a limitation on evidence is almost inevitably bound to result in some orders being refused which on a more complete view of the facts would have been granted, and some made which further evidence could show were unjustified; for example, evidence as to circumstances amounting to contributory conduct or as to the relationship between the victim and the offender (s.4(2)). The problem is highlighted if the offender pleads guilty, since all that will be before the court is a statement of the facts by the prosecution. Such a statement is primarily aimed at providing a basis for sentencing, rather than at providing a detailed statement of the facts of the case, and is not subject to cross examination.

43. The possibility of further evidence showing that an award was not justified is probably a reason why the Treasurer is given a discretion to refuse to make payment out of the Consolidated Revenue Fund (s.7(3)), since he is not limited to the facts placed before the trial court. However, there is no corresponding procedure whereby a person refused an order in the light of the facts as they appeared at the trial can adduce further evidence in support of his case. This seems a substantial defect in the legislation, particularly since the victim is not a
party to the criminal proceedings and is not legally represented there. His entitlement to compensation should not be dependent on proceedings where the guilt or innocence of the accused is the predominant issue.

44. Possibly a reason for the limitation on evidence is that the order is formally against the offender, the Crown being authorised to make payment should the offender not do so. It was suggested in paragraph 16 above that since, in fact, the Crown normally makes payment in all cases, the Act should be amended so as to make the Crown primarily liable, and to give the Crown the right to claim against the offender for the amount of the award.

**Body which should determine compensation**

45. Whether or not the Act is amended as suggested in the previous paragraph, a question arises as to the appropriate body or tribunal to determine claims for compensation. It would seem desirable to introduce a procedure for enabling the parties to adduce further evidence in support of their case. This could be done by -

(a) empowering the trial court to receive further evidence on compensation; or

(b) providing for the question of compensation to be determined by a separate tribunal.

46. There are advantages and disadvantages in both these alternatives. An advantage of retaining the trial court as the body to determine the question of compensation is that it would not have to hear all the evidence de novo. In cases where the offender had pleaded not guilty the judge would have during the trial assessed the veracity of the witnesses and generally weighed the evidence before him. If the compensation proceedings were heard before a separate tribunal all the relevant evidence would have to be given afresh, unless the tribunal confined itself to reading the transcript of the trial evidence. However, if the tribunal were empowered to act informally and inform itself as it thought fit, these possible disadvantages could probably be overcome. It could be argued that it would not be appropriate to require the trial court to determine questions of compensation with the same degree of informality.
47. In considering what body should hear the application for compensation, regard should be had to the Commission's suggestion that the Act might be amended to provide for the cases where the offender is unknown or cannot be found or is unfit to plead. If the trial court remained the tribunal for determining claims for compensation arising in the normal way, claims in cases where there is no trial could be determined on application to the court which, if there had been a trial, would have had jurisdiction. This particular difficulty would not arise if all claims were to be determined by a separate tribunal.

**Rights of Crown against offender**

48. The present Act provides that where the Treasurer makes a payment to a victim, the Under Secretary for Law takes over that person's rights against the offender to the extent of the payment (s.9). This would give the Crown the right to enforce in its favour the order against the offender initially made in favour of the victim. It was suggested in paragraph 16 above that the award of compensation be made directly out of the Consolidated Revenue Fund. If this were done, the question would arise of what rights the Crown should have to recoup the money. Possibilities are -

(a) the Crown could be subrogated to the victim's common law rights against the offender: this would enable the Crown to sue, the offender in the civil court;

(b) the Crown could be given the right to obtain an order against the offender at the time the victim's application for an award of compensation was determined.

The Commission suggests that it would be preferable to adopt alternative (b); this would enable all issues relating to criminal injuries compensation to be dealt with in the same forum and usually at the same time. In cases where a victim was awarded compensation and the offender could not be found or was unknown the Crown's application for an order could be deferred until the offender was apprehended.

49. At present an order of compensation against the offender is enforceable as a fine (see paragraph 3 above). If such a rule were enforced (and the Commission understands that in fact it is not), it would seem unnecessarily harsh, especially if the award is regarded as a form of civil remedy rather than as a form of punishment: (see paragraph 14 above). If the
Commission's suggestion in paragraph 48 above is adopted, any order against the offender will be in favour of the Crown, and should be regarded as a judgment debt. It would then be enforceable in the civil courts by the ordinary civil processes. Only if the offender had the means to pay and refused to do so should he be imprisoned.

**Other matters**

*Appeals*

50. Under the present Act the offender may appeal against an order of compensation, but it is unclear whether the victim could appeal if an order were refused in the Supreme Court or District Court (see Code, s.688: *Justices Act 1902* ss.183, 197; *Supreme Court Act 1935*, s.58; *District Court of Western Australia Act 1969*, ss.43,79). If the trial was held in the Court of Petty Sessions the victim could appeal by way of order to review (*Justices Act*, s.197). It seems desirable that the offender should have full rights of appeal, whether the order against him is made in favour of the victim, as at present, or in favour of the Crown, as was suggested in paragraph 48 above. However, it may be thought undesirable, in the interests of reaching finality, to give the victim full appeal rights, either under the present system or under the Commission's proposal for making the award payable directly out of Consolidated Revenue. It may be desirable to give the victim a right of appeal on a question of law only. Similar considerations would seem to apply to the question of what appeal rights should be given to the Crown.

The Commission would welcome comment on the question of appeals.

*Costs*

51. Under the present Act it seems clear that, whether or not the trial court has power in making a compensation order also to order that the offender pay the costs of the applicant, the latter has no right to reimbursement of those costs out of the Consolidated Revenue Fund (see s.7 of the Act, which sets out the nature of that may be made from the Fund). In Victoria, New South Australia the applicant may be granted the costs of the application, but there is no provision for costs in New South Wales, Queensland and the United Kingdom.
It could be argued that it would be appropriate to give the adjudicating body the right to award costs in favour of the victim, in addition to any compensation for the injury, in the same way can award costs in a civil case. Costs could be included in the upper limit of compensation, or be in addition to it.

**Contributing conduct**

52. It has been held (see *Re Hondros* [1973] W.A.R. 1) that s.4(2) of the Act does not authorise reduction of compensation for contributing conduct, but that it provides a complete bar to recovery. This seems unduly restrictive.

The Commission suggests that the Act be amended so that the body determining the compensation should be empowered to reduce an award on the grounds of contributing conduct, and that such conduct should no longer be a bar to recovery.

**Relatives**

53. Section 4(2) of the Act provides that, in determining whether to make a compensation order, the court is to take into account whether the victim is or was a relative of the offender, or was, at the time of the commission of the offence, living with the offender as his wife or her husband or as a member of the offender's household. In *Re Hart* (District Court No.5 of 1974) the court held that, although the victim's behaviour did not disqualify him from receiving compensation, the fact that the assailant was his father-in-law and that his injuries arose out of a domestic argument in the course of which the offender lost his power of self-control, amounted to a bar to compensation.

54. Other jurisdictions with criminal injuries compensation schemes qualify the right to compensation in cases of family relationship. The United Kingdom and Victorian schemes expressly exclude compensation if the victim was, at the time of the injury, a member of the offender's household. The New Zealand *Criminal Injuries Compensation Act* excluded compensation for pain and suffering, but not pecuniary loss, in such cases; however, criminal injuries are now treated in the same way as other injuries under the *Accident Compensation Act* (see paragraph 10 above) and this limitation appears no longer to apply.
In New South Wales, South Australia and Queensland the position is the same as in this State (see paragraph 53), except that in Queensland the court may reduce the amount of the award, instead of barring recovery altogether.

55. It could be argued that to deny a victim compensation because of his or her relationship to the offender, or because he or she was a member of the offender's household could result in deserving cases being refused compensation. For example, a wife who separated from her husband because of his violent attack upon her could be denied compensation. It may be preferable to deny compensation only where the offender was likely to benefit from an award to a victim. On the other hand, it might be thought that in those cases where the relationship of the offender and the victim should be into account, there will often also have been contributing conduct of the sort referred to in paragraph 52 above, and that the need for a separate category covering relatives of the offender is unnecessary.

The Commission would welcome comment on this aspect.

Multiple offenders, multiple orders

56. It may be that under the present Act several co-defendants may each be ordered to compensate a victim up to the maximum, provided that the total of the amounts awarded does not exceed the damages that would have been awarded in a civil action. This has been held in a South Australian case (see Re Poore (1973) 6 S.A.S.R. 308). The South Australian Act has since been amended to provide that where an offence is committed by two or more persons acting in concert, only one order may be made in relation to that offence (S.A. s.4(lb)).

There is no Western Australian decision on the point. Even if several awards were possible against a number of offenders who were parties to the same offence, it would not follow under the present law that the Treasurer would in fact pay the total amount to the victim.

The Commission would welcome comment on whether the South Australian amendment should be enacted in this State.
Publicity

57. It appears to the Commission that not all victims of offences are aware of the Act, although possibly it is becoming better known. Since the Act came into force there have been about 800 reported serious assaults in this State (see annual reports of the Commissioner of Police for 1971, 72, 73 and 74). Yet only twenty-one have led to claims under the Criminal Injuries (Compensation) Act. A victim is not represented at the criminal trial, because he is not a party to the proceedings, nor does he always seek legal advice. Generally, there is at present no machinery whereby he can be made aware of his rights. The newspapers report the making of some awards, but not all.

The Commission suggests that a pamphlet be drafted for distribution setting out in simple terms the features of the legislation. Possibly the police could be entrusted with the task of giving a pamphlet to victims of offences. Such a procedure already operates in the American States of California, Illinois and Washington, which have criminal injury compensation schemes. Alternatively, the pamphlets could be distributed to clerks of courts, legal practitioners, hospitals and so on.

National Compensation Scheme

58. The National Compensation Bill, which was introduced into the Senate in 1974, and which is now before the Constitutional and Legal Affairs Committee of that body, provides for the setting up of a national scheme.

Under Cl.91(1) of the Bill the benefits payable thereunder are to be in substitution for any damages (which is defined as to include compensation) payable in respect of injury or death, whatever the cause of action or basis for liability. Subclause (3) of that clause provides that no action or other proceeding shall lie in respect of any damages.

59. If it is within the constitutional power of the Commonwealth Parliament to enact the Bill, its enactment would mean that a person criminally injured would not be able to apply for a compensation order under the Criminal Injuries (Compensation) Act of this State, or any variation of it proposed in this paper.
60. However the Commission does not think that a review of the *Criminal Injuries (Compensation) Act* should be deferred until the fate of the Commonwealth Bill is known.

**QUESTIONS AT ISSUE**

61. The Commission welcome views on any of the following questions, or on any other matter relating to the terms of reference -

(a) Should the award of compensation be made against the Consolidated Revenue Fund in the first instance?
   (paragraph 16)

(b) If so, what should the right of recourse be against the offender?
   (paragraphs 48 and 49)

(c) Should the award be the same as in a tort action? Should it include pecuniary loss?
   (paragraphs 19 and 20)

(d) Should the maximum amount(s) be -
   (i) raised? and, if so, to what level;
   (ii) abolished?
   (paragraph 25)

(e) Should a special procedure be introduced for adjusting the maximum amount(s) in line with inflation?
   (paragraph 26)

(f) Should there be differing maximum amounts depending on the nature of the offence, the status of the trial court or any other factor?
   (paragraph 33)

(g) Should -
   (i) the estate of a deceased victim,
(ii) persons other than the victim, in particular, the dependants of a deceased victim, be able to claim?  
(paragraphs 34 to 37)

(h) Should the statutory scheme cover cases where the offender is not brought to trial or lacks mental capacity?  
(paragraph 40)

(i) Should the adjudicating body be able to receive evidence in addition to that given at the trial?  
(paragraph 43)

(j) Should the trial court remain as the adjudicating authority, or should that function be given to a tribunal?  
(paragraph 46)

(k) What should the rights of appeal be for the -  
(a) victim?  
(b) offender?  
(c) Crown?  
(paragraph 50)

(l) Should the costs of an application for an award be payable out of Consolidated Revenue?  
(paragraph 51)

(m) Should contributing conduct be a ground for reducing the award, rather than barring recovery altogether?  
(paragraph 52)

(n) Should the victim be barred from recovery because of his relationship with the offender?  
(paragraph 55)
(o) Should the limit for compensation for multiple offenders be the same as for a single offender?

(paragraph 56)

(p) How should greater publicity be given to the Scheme?

(paragraph 57)
AN ACT to provide for the payment in certain circumstances of compensation to persons who suffer injury by reason of the commission of offences and for incidental and other purposes.

[Assented to 17th November, 1970]

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and the Legislative Assembly of Western Australia, in this present Parliament assembled, and by the authority of the same, as follows:-

1. This Act may be cited as the Criminal Injuries (Compensation) Act, 1970.

2. This Act shall come into operation on a date to be fixed by proclamation.

3. In this Act, unless the contrary intention appears -
   "injury" means bodily harm and includes pregnancy, mental shock and nervous shock;
   "offence" means a crime, misdemeanour or simple offence;
   "section" means of this Act;
   "Under Secretary" means the person holding the office of Under Secretary, Crown Law Department of the State and includes the person for the time being duly acting in the place of the Under Secretary.

4. (1) Where a person is convicted of an offence, the court by which, or the judge before whom, the person was tried may, at any time after his conviction on the application of a person who has suffered injury in consequence of the commission of the offence, order that a sum, not exceeding two thousand dollars if the offence is an indictable offence, or not exceeding three hundred dollars if the offence is a simple offence, be paid by the person convicted out of his property to such other person, by way of compensation for injury suffered by that other person by reason of the commission of the offence.

   (2) In determining whether or not to make an order pursuant to subsection (1) of this section, the court or judge shall have regard to any behaviour of the other person that contributed, directly or indirectly, to the injury suffered by him, and to such other circumstances as it or he considers relevant (including whether that other person is or was a
relative of the person against whom the order is sought, or was, at the time of the commission of the offence" living with such person as his wife or her husband or as a member of the household of such person) and shall also have regard to the provisions of this Act.

(3) This section shall be construed as being in to, and not in derogation of, the provisions of any other Act.

(4) An order of a court or judge under subsection (1) of this section may be enforced in the same manner as an order of that court for the payment of a fine.

5. Where an order for the payment of a sum in excess of one hundred dollars by way of compensation for injury suffered by reason of the commission of an offence has been made pursuant to section 4 or pursuant to a provision of another Act in the course of proceedings for the trial of a person for an offence, the person in whose favour the order has been made may make application in writing to the Under Secretary for payment to him of the sum, or so much thereof as is payable pursuant to this Act, out of the Consolidated Revenue Fund.

6. (1) On the acquittal of a person accused of an offence or the dismissal of a complaint or information against him, the court before which that person was, or would have been tried, may on application by a person claiming to be aggrieved by reason of the commission of the offence, grant a certificate stating the sum to which he would have been entitled pursuant to an order under section 4 if the accused person had been convicted of the offence and an order had been made under that section.

(2) A certificate shall not be granted under subsection (1) of this section if the sum referred to in that subsection would amount to less than one hundred dollars.

(3) The court shall not grant a certificate under this section, unless it is satisfied that the person claiming to be aggrieved has in fact suffered injury by reason of an offence committed by some other person.

(4) A person to whom a certificate has been granted under this section may make application in writing to the Under Secretary for payment to him of the sum specified in the certificate out of the Consolidated Revenue Fund.
7. (1) Subject to section 8, the Under Secretary shall, as soon as practicable after receiving an application under section 5 or subsection (4) of section 6, send to the Treasurer of the State a statement signed by the Under Secretary setting forth the particulars of the application and specifying -

(a) the sum ordered to be paid to the applicant as referred to in section 5 or the sum specified in the certificate granted to the applicant under subsection (1) of section 6, as the case may be; and

(b) any amounts that, in the opinion of the Under Secretary, the applicant has received, or would, if he had exhausted all relevant rights of action and other legal remedies available to him, receive, independently of this Act, by reason of the injury to which the application relates.

(2) The Under Secretary shall make such inquiry as may be necessary for the effectual operation of this section.

(3) Where the Treasurer of the State, after receiving the statement of the Under Secretary relating to such an application as is referred to in subsection (1) of this section, considers that in the circumstances of the case the making under this subsection of a payment to the applicant is justified, the Treasurer of the State may pay to the applicant out of the Consolidated Revenue Fund an amount equal to the difference between the appropriate amount referred to in paragraph (a) of subsection (1) of this section, and the amounts referred to in paragraph (b) of that subsection, as specified in that statement.

(4) Any payments under subsection (3) of this section may be made without further appropriation than this Act.

8. The Under Secretary may defer sending to the Treasurer of the State any statement under subsection (1) of section 7, for as long as he considers it necessary to do so, to enable him to specify in the statement the amounts referred to in paragraph (b) of that subsection.

9. (1) Where any payment is made under section 7 in pursuance of an application made under section 5, or a certificate granted under section 6, the Under Secretary has and may
exercise, to the extent of the payment, the rights of the person for whose benefit the payment was made against the person convicted of the offence or the person who committed the offence in respect of which the payment was made, and the rights of the first mentioned person shall be to that extent divested from that person and vested in the Under Secretary.

(2) All money paid to the Under Secretary in full or partial satisfaction of his rights under subsection (1) of this section, shall be paid by him into the Consolidated Revenue Fund.
## WORKING PAPER APPENDIX II
### SUCCESSFUL APPLICATIONS TO THE COURT

<table>
<thead>
<tr>
<th>CASE NO.</th>
<th>CHARGE</th>
<th>FACTS</th>
<th>INJURIES</th>
<th>DECISION OF COURT</th>
<th>RESULTS OF APPLICATION FOR PAYMENT OUT OF CONSOLIDATED REVENUE FUND</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Unlawful assault</td>
<td>Offender asked applicant for a loan in hotel. On refusal, offender struck applicant who was holding a glass to his face</td>
<td>Laceration of lip, swelling to nose and cheek, depression of cheek bone</td>
<td>Offender convicted in Court of Petty Sessions. Ordered to pay $250 compensation in Sept 1972</td>
<td>Applied for payment Nov. 1972. Payment approved May 1973</td>
</tr>
<tr>
<td>2.</td>
<td>Two counts of rape, stealing with violence and escaping legal custody</td>
<td>Offender, an escaped prisoner, went to applicant’s home, threatened her with a knife, raped her and stole money and clothes</td>
<td>Mental and nervous shock</td>
<td>Offender convicted in Supreme Court on each count. Ordered to pay $750 compensation in Dec. 1972</td>
<td>Applied for payment Jan. 1973. Payment approved Feb. 1973</td>
</tr>
<tr>
<td>3.</td>
<td>Assault occasioning bodily harm</td>
<td>Applicant was verbally provoked by four youths and went onto footpath outside his home where he was assaulted with pickets by them</td>
<td>Fractured skull, perforated ear drum, total loss of hearing in one ear, tinnitus and vertigo</td>
<td>All offenders convicted in District Court. Ringleader ordered to pay $2,000 compensation in Dec. 1972</td>
<td>Applied for payment Jan. 1973. Payment approved Feb 1973</td>
</tr>
<tr>
<td>Case Number</td>
<td>Type of Injury</td>
<td>Description</td>
<td>Treatment</td>
<td>Offender Information</td>
<td>Payment Information</td>
</tr>
<tr>
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<tr>
<td>5.</td>
<td>Assault and robbery</td>
<td>Applicant, a nightclub employee, was carrying the night’s takings and was assaulted and robbed</td>
<td>Lacerations to arms and face resulting in permanent scars</td>
<td>Offender convicted in District Court. Ordered to pay $600 compensation in Sept. 1973</td>
<td>Applied for payment July 1974. Payment approved Sept. 1974</td>
</tr>
<tr>
<td>7.</td>
<td>Rape</td>
<td>Offender broke into applicant’s flat and raped her</td>
<td>Scratches and cut hand, mental and nervous shock</td>
<td>Offender convicted in Supreme Court. Ordered to pay $1,250 compensation in May 1974</td>
<td>Applied for payment May 1974. Payment approved Sept. 1974</td>
</tr>
<tr>
<td>8.</td>
<td>Assault occasioning bodily harm</td>
<td>Applicant, who was with his family at a picnic, remonstrated with the two offenders who were creating a nuisance and was assaulted</td>
<td>Injuries to neck, broken leg, superficial bruising and abrasions, mental and nervous shock</td>
<td>Offenders convicted in District Court. Ordered to pay $2,000 compensation jointly and severally in June 1974</td>
<td>Applied for payment May 1974. Payment approved Sept. 1974</td>
</tr>
<tr>
<td>9.</td>
<td>Rape and attempted rape</td>
<td>Applicant who was 14 years old was abducted and raped several times by two men</td>
<td>Facial bruising, scratches and bruises. Rape resulting in pregnancy which was terminated. Mental and nervous shock</td>
<td>Offenders convicted in Supreme Court. Ordered to pay $2,000 compensation jointly and severally in Aug. 1974</td>
<td>Applied for payment May 1974. Payment approved Oct 1974</td>
</tr>
<tr>
<td>10.</td>
<td>Unlawful assault</td>
<td>Applicant intervened in scuffle between offender and nightclub</td>
<td>Laceration extending from eye to behind</td>
<td>Offender convicted in District Court. Ordered to pay $1,000 compensation in Aug. 1974</td>
<td>Applied for payment Oct. 1974 Payment approved Nov. 1974</td>
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<td>11.</td>
<td>Armed robbery – disabling in order to commit an indictable offence.</td>
<td>Applicant, a private security officer, was shot in stomach during robbery of a retail store manager and was struck with bottle</td>
<td>ear. Further laceration below eye. Serious laceration and damage to stomach muscles</td>
<td>pay $1,000 compensation in Oct. 1974</td>
<td></td>
</tr>
<tr>
<td>12.</td>
<td>Assault causing actual bodily harm</td>
<td>Unprovoked attack in street by two men</td>
<td>Cuts, bruising, teeth damaged, broken nose</td>
<td>Two offenders convicted in Supreme Court. Ordered to pay $1,500 compensation jointly and severally in Dec. 1974</td>
<td></td>
</tr>
<tr>
<td>13.</td>
<td>Assault causing actual bodily harm</td>
<td>Unprovoked attack in street</td>
<td>Cuts, bruising, extensive damage to teeth</td>
<td>Offenders convicted in Court of Petty Sessions. Ordered to pay $300 compensation jointly and severally in Jan 1975</td>
<td></td>
</tr>
<tr>
<td>14.</td>
<td>Assault and robbery</td>
<td>Applicant was attacked and robbed</td>
<td>Black eyes, swollen lips and substantial damage to precision dental plate</td>
<td>Offender convicted in Supreme Court. Ordered to pay $600 compensation in May 1975</td>
<td></td>
</tr>
</tbody>
</table>

**Where payment refused by Treasurer**

| 15.  | Unlawful assault | Applicant was stabbed during street altercation | Stab wounds to shoulder | Charge dismissed in Sept. 1972 by Court of Petty Sessions under s.669 of Code. Certificate granted under s.6 of Act for $250 |


Applied for payment in April 1975. Application under consideration

Applied for payment April 1975 Application under consideration

Applied for payment May 1975. Application under consideration

<table>
<thead>
<tr>
<th>No.</th>
<th>Offense Description</th>
<th>Description of Injury</th>
<th>Offender Convicted/Ordered to Pay</th>
<th>Application Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>18.</td>
<td>Assault occasioning bodily harm</td>
<td>Applicant assaulted as he was returning to his hotel room</td>
<td>Offender convicted in Court of Petty Sessions. Ordered to pay $300 compensation in Mar. 1974</td>
<td>Applied for payment June 1974. Application refused Sept. 1974</td>
</tr>
<tr>
<td>19.</td>
<td>Intentionally causing grievous bodily harm</td>
<td>Offender came home unexpectedly and found applicant and offender’s wife in circumstances suggesting adultery. Offender stabbed applicant</td>
<td>Application dismissed in Supreme Court in April 1972 on grounds that applicant contributed to his injuries.</td>
<td></td>
</tr>
<tr>
<td>20.</td>
<td>Unlawful wounding</td>
<td>Drunken spree in which applicant was stabbed</td>
<td>Application dismissed in Court of Petty Sessions in July 1972 on grounds that applicant contributed to his injuries.</td>
<td></td>
</tr>
<tr>
<td>21.</td>
<td>Unlawful wounding</td>
<td>Domestic altercation. Offender slashed applicant with broken bottle</td>
<td>Application dismissed in District Court in April 1975 on grounds that applicant was related to offender and injuries arose out of a domestic argument.</td>
<td></td>
</tr>
</tbody>
</table>