
Criminal Offence Victims Act

1995 (Qld) –

Some Observations

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Introduction

In 1995 the Queensland Parliament passed the *Criminal Offence Victims Act 1995 (COVA)* the purpose of which is twofold. Part 2 of the Act consists of a declaration of fundamental principles of justice for victims of crime. Part 3 provides a scheme for compensation for personal injuries resulting from indictable offences, and for death involving circumstances of murder or manslaughter.¹ This article will outline the declaration and the compensation scheme, and comment on their nature and significance and the inadequacies of the Act.

The Declaration — Part 2

The purpose of the declaration is to “advance the interests of victims of crime by stating some fundamental principles of justice that *should* [author’s emphasis] be observed in dealing with victims of crime” (s.4(2)). The principles outlined accord with some of the principles approved by the United National General Assembly in the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985).²

For purposes of the declaration, ‘victim’ is defined somewhat narrowly as “a person who has suffered harm from a violation of the State’s criminal laws — [and] violence committed against the person in a direct way”. The definition is extended to persons who are members of the immediate family or dependants of the victim, as well as persons who suffer harm while intervening to help a victim (s.5), but

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1 The *COVA* commenced operation on the 18th December 1995, and applies to all injuries or deaths occurring after that date.

2 A Blaustein (ed), R Clark (ed), and J Sigler (ed) *Human Rights Sourcebook* Paragon House Publisher New York 1984.

does not extend to other indirect victims, for example, those who witness a crime. It is immaterial for purposes of the declaration whether an offender has been identified, arrested, prosecuted or convicted (s.4(4)).

The fundamental principles which the declaration recommends 'should' be observed include, for example: consideration of the victim's welfare (s.13); advice, upon request by the victim, about the progress of the matter, and where the victim is a victim of personal violence or a crime of a sexual nature, advice upon request, of details of sentence and release³ of the offender (s.15); advice to victims on their role as a witness (s.16); access to information about compensation and restitution (s.18) and ancillary services eg. counselling and conferencing⁴ (s.17).

While the declaration is a positive step towards 'advancing the interests of victims', it represents nothing more than the legislative recognition of the principles endorsed. The Act merely recommends that the principles 'should' be observed. No penalties are imposed for the failure to implement and observe them, and any actions or failure to act, will not be subject to processes of review (s.4(5)). Accordingly, these principles may not be implemented and observed by relevant services within and ancillary to the criminal justice process, particularly where there is no additional funding to support implementation.

The declaration also endorses the use of victim impact information at sentencing: "at the sentencing of an offender for a crime, the prosecutor should inform the sentencing court of appropriate details of the harm caused to a victim by the crime" (s.14(1)). This provision should be read in conjunction with s.9(2)(c) of the *Penalties and Sentences Act 1992* (Qld) whereby "in sentencing an offender, a court must have regard to — the nature of the offence and how serious the offence was, including any physical or emotional harm done to the victim". The Prosecution retains discretion regarding what information is appropriate (s.14(2)). There is also scope for the use of victim impact information at a hearing for compensation whereby "the court may receive information in any form the court considers appropriate" (s.30(3)).

These provisions must be distinguished from the concept of victim impact statements (VIS) per se. The legislation makes no reference to VIS and there is no guarantee of the right for victims to read or present their own statement at either stage. The Prosecution and/or the Court ultimately determine what information is appropriate. At sentencing victim impact information may be presented to the court by the prosecution, or a statement may be read by the victim or tendered to the judge.⁵ On hearing an application for compensation, the court may allow victim impact information into evidence. A rationale for the nature of these provisions is that they prevent [ab]use of the process by using it as a means to vent views and feelings

3 The Corrective Services Commission (Qld) is responsible for the maintenance of a victim register.

4 For example, the Alternative Dispute Resolution Division of the Department of Justice and Attorney-General provide a victim/offender mediation service. Requests for mediation can come from either the offender or victim, however both must agree to take part. Mediation is recommended for summary offences only.

5 M Thrower, 'Victim Impact Statements: The Voice of Shattered Lives' (1996) June *Proctor* 16 at 17.

about the offender and the criminal justice process itself. However, a compelling rationale for the use of VIS is that they legitimise the role of the victim in the criminal justice process by allowing the victim to participate in, rather than be just part of the process itself. Historically, the part played by victims of crimes has been minimal, being generally restricted to that of complainant and witness for the prosecution. This has contributed to victim perceptions of alienation, loss of self worth, and in certain circumstances a perception of continued victimisation⁶ particularly for victims of sexual offences.

While the use of VIS can provide a vehicle for enhanced participation, there are those who advocate that VIS will not necessarily solve existing problems and may create additional ones. Chris Richards surmises that "class, gender and ethnic differences" would result in the "selective utilisation" of the process due mainly to financial resources, literacy difficulties and cultural differences, and that this would "exacerbate the frustration and powerlessness" experienced by some victims.⁷ The power of the prosecution to edit statements prepared by victims could also contribute to such feelings as would the lack of any consistency in allowing victims to present their own VIS to the court at appropriate stages. To some extent these problems may be avoided firstly, by appropriately funded and accessible services to advise victims of the function of victim impact information ie. informing the sentencing court of the harm suffered, and to assist victims with the preparation of statements; and secondly, by the legislative endorsement of a right to present VIS on the victim's own volition.⁸

Also needing further consideration are arguments against the use of VIS at sentencing. In this regard Chris Richards states:

defence lawyers criticise VIS as representing an inappropriate intervention into the criminal sentencing process. The type of information proposed for a victim impact statement is relevant to victims compensation entitlements, not the punishment that should be given to an offender — There should be conformity in the degrees of punishment that are imposed on offenders — The punishment should not increase or decrease because of the effect that the offence has on the victim.⁹

This type of argument may be appropriate if one were to take a strictly tariff view of sentencing. However, this is not the premise on which the *Penalties and Sentencing Act* 1992 (Qld) is founded. Perhaps a more compelling argument would be the possible effect on sentencing of the inconsistent use of VIS in sentencing, where VIS are presented or not presented to the court.

6 S Garkawe, 'The Role of the Victim During Criminal Court Proceedings' (1994) 17(2) *UNSWLJ* 595.

7 C Richards, 'Victim Impact Statements: Victims' rights wronged' (1992) 17(3) *Alternative Law Journal* 131 at 133.

8 This is presently the position under the *Sentencing (Victim Impact Statement) Act* 1994 (Vic).

9 C Richards, *supra* n.8.

The Compensation Scheme — Part 3

Part 3 of the *COVA* establishes a two tier scheme for compensation: Court orders (Division 2) and State awards (Division 3). Court proceedings are of a civil nature, to be determined on a balance of probabilities, and strict rules of evidence do not apply (s.30). The court is not able to make an order for payment of costs (s.31). Applications to the State are made to the Minister and decided by the Governor in Council. Payments are *ex gratia* (s.32)¹⁰ from consolidated revenue (s.37).

From the outset it is interesting to note that the terminology used in Part 3 of *COVA* differs from that of the title of Act, which refers to 'Victims', and the Part 2 definition of 'victim'. The term victim is nowhere to be found and those entitled to make a claim for compensation are referred to as 'applicants' (s.19).

Compensation for injuries arising from personal offences. Court Compensation Orders and State Awards.

Both the Court and State schemes provide compensation for injuries arising from personal offences. Personal offence is defined as "an indictable offence committed against the person of someone" (s.21). As such awards for compensation are restricted to primary victims, persons to whom the offence directly relates. Secondary victims, for example, persons suffering injury as a result of witnessing a crime or becoming aware of an injury sustained by a primary or deceased victim, are excluded. For purposes of both schemes, injury is broadly defined as "bodily injury, mental or nervous shock, and pregnancy" (s.20). Court orders and State awards for compensation for injury can be made up to a prescribed maximum of \$75 000.¹¹

A court order for compensation for injury can only be made when a person is convicted on indictment of a personal offence (s.24(1) and s.21 definition of 'personal offence').

The award is calculated in accordance with the Compensation Table in Schedule 1 to the Act. The table seeks to classify the nature and severity of various injuries and, depending on the classification of the actual injury, the court is limited to an order within a range of percentages of the scheme maximum, for example, the award for severe mental or nervous shock is 20% to 34% of the scheme maximum. The scheme maximum applies in relation to multiple offenders, for joint and separate liability, and a "single state of injury", having regard to a number of factors including the nature of the applicants injuries, the time over which the injuries were caused, and the event(s) that caused the injuries (s.26).

A person entitled to be paid an amount under a court compensation order *may* make an application for the State to pay all or part of the amount (s.32). In addition,

¹⁰ This is reinforced throughout Part 3 of the Act by the use of the word 'may' which appears in connection with applications to the State for compensation.

¹¹ *Criminal Offence Victims Regulation* 1995 (Qld) (*COVRegs*) s.2.

the State *may* award compensation to a person who has suffered injury in relation to a 'personal offence' in the following circumstances: where the person causing injury is acquitted or considered not fit for trial by reason of insanity, or is not criminally responsible by reason of age; where the person causing injury cannot be identified or found (s.33); where the person is injured when helping a police officer (s.34). In these circumstances, the State may pay all of the amount requested, up to the amount that could have been awarded by way of a compensation order.

Financial dependants of a deceased victim may apply to the State for compensation, up to a prescribed amount, when someone dies in circumstances constituting murder or manslaughter (s.35). The prescribed amount is \$20 000¹² for a single death, regardless of the number of applicants (s.35 (6)). A financial dependant may also claim up to a prescribed amount for funeral expenses and for other expenses for damages caused in the course of the commission of the relevant crime. These are also claimable by a member(s) of the deceased person's family (s.35). The prescribed amount for funeral expenses is \$4000.¹³ Expenses are not defined by the Act, and in any event a limit of \$1000 applies.¹⁴

Time Limitation(s) on Applications

Applications to both the Court and State schemes must be made within three years from the end of the convicted persons trial or the occurrence of the relevant offence, and if the applicant is a child at the time, before the end of three years after the child becomes an adult (s.40). Extensions to the limitation period can be made in accordance with the *Limitation of Actions Act* 1975 (Qld) (s.41).

Appeal

The *COVA* makes no provision for appeals. Appeals from Court compensation orders are restricted to those avenues available under the *Supreme Court of Queensland Act* 1991 (Qld) s.69, and the *District Courts Act* 1967 (Qld) s.92.

There is no avenue for appeal from State applications.

Transitional Provisions

The Act is not retrospective (s.46). Injuries or death arising from offences that were committed before its commencement on the 18th December 1995, are dealt with in accordance with the provisions in Chapter 65A of the *Criminal Code* (Qld).

The Criminal Code (Qld)

Like the *COVA*, the compensation scheme under the *Criminal Code* (Qld) is two

12 *COVRegs* 1995 (Qld) s.3.

13 *COVRegs* 1995 (Qld) s.4.

14 *COVRegs* 1995 (Qld) s.5.

tiered. Where a person is convicted on indictment of any indictable offence, the court may make an order for compensation to aggrieved persons, for a sum not exceeding the prescribed amount, for compensation for injury suffered (s.663B). Although 'aggrieved persons' is capable of a wide interpretation to include secondary victims, the section has been construed narrowly to apply only to persons to whom the offence directly relates.¹⁵ The Governor in Council may approve an *ex gratia* payment in satisfaction of a court order for compensation (s.663C) and in a number of other specified circumstances similar to those under the *COVA* (s.663D).

For purposes of both schemes injury is defined as "bodily harm and include pregnancy, mental shock and nervous shock" (s.663A). In turn bodily harm is defined as "bodily injury which interferes with health or comfort" (s.1). The prescribed amount is the amount for the time being specified in s.14(1)(C)(a) of the *Workers' Compensation Act 1916-1983* (Qld), and in the case of mental or nervous shock \$20 000 (s.663AA).

Rationale of the Criminal Offence Victims Act?

Although compensation for victims of crime under the *COVA* represents, in some respects, an improvement on the scheme in the *Criminal Code* (Qld), for example, the Code does not provide compensation for dependants or funeral expenses, the scheme is markedly different in both form and substance to those in other Australian jurisdictions.

In so far as it provides a two tier structure, the *COVA* compensation scheme resembles that under the *Criminal Injuries Compensation Act 1978* (SA) (*CICA* (SA)), but differ from those under the *Victims Compensation Act 1987* (NSW) (*VCA* (NSW)), where the Victims Compensation Tribunal (VCT) determines compensation in addition to court(s), and the *Criminal Injuries Compensation Act 1983* (Vic) (*CICA* (Vic)), where the Crimes Compensation Tribunal (CCT) provides the only scheme for compensation. However, while the compensation scheme under the *CICA* (SA) resembles that under *COVA*, the assessment of injury and the scheme maximums are different. Under the *CICA* (SA), compensation for injury is calculated in accordance with a fifty point scale of severity of injury, each point being assigned an award value of \$1000 (s.7(8)(a)(ii)). As such the limit on a claim for any one injury will be \$50 000, and in any event the statutory limit for a court order for compensation is \$50 000 (s.7(8)(a)(iii)). The *CICA* (SA) scheme maximum is the same as that under the *VCA* (NSW) s.16 (1) and the *CICA* (Vic) s.18A.¹⁶

The form of compensation under the different schemes also provides a source of contrasts. For example, while the *COVA* and the *CICA* (SA) award compensation

15 *R v. Moors, ex parte Alex* [1994] 2 QdR 315.

16 This amount is specified in the *Criminal Injuries Compensation (Interim) Regulations 1995* (Vic) s.16. Although due to expire on the 31/10/95 (s.18), these Regulations were extended in operation to November, 1996.

for the actual injuries, the *VCA* (NSW) and *CICA* (Vic) tribunal schemes award compensation on a different basis. Under the *VCA* (NSW), VCT awards for compensation for injury are for pain and suffering; loss of enjoyment of life; expenses, including loss of actual and future earnings arising from injury sustained by the victim as a direct result of an act of violence; and, for purposes of applications by a close relative of a deceased victim, grief (s.10). Under the *CICA* (Vic), CCT awards for compensation for injury are for expenses reasonably incurred (s.15); pecuniary loss, for a period of up to two years, as a result of total or partial incapacity for work (s.16); and pain and suffering (s.18).

The differential treatment of dependants under the schemes provides yet another contrast. Under the *CICA* (SA), where a victim dies as a result of injuries and no previous order for compensation has been made, dependants may claim compensation for financial loss (s.7(2)) up to a limit of \$2000 plus three quarters of the excess claimed (s.7(8)(a)(i)). In addition, where a victim dies in circumstances of homicide, a spouse or putative spouse and parent(s) of the deceased victim can claim compensation for grief (s.7(2a)) up to a limit of \$4200 for the spouse and \$3000 for the parent(s) (s.7(8)(b)). Under the *CICA* (Vic), the CCT may award compensation to dependants of a deceased victim on the same basis awards are made to a primary victim ie. for expenses actually and reasonably incurred and pecuniary loss suffered as a result of the death (s.17). Under the *VCA* (NSW), close relatives of a deceased victim receives similar treatment to primary and secondary victims under the Act (ss. 11, 12 and 13).

There are many policy reasons which account for these and other variations in the criminal compensation schemes between jurisdictions. Priority on the political agenda and competing interests on consolidated revenue, out of which many of the compensation claims are eventually paid, has a considerable effect upon the nature of the legislation, as does the rationale for the existence of a criminal compensation scheme independent of the civil system. Views on the adequacy of existing schemes will depend upon consideration of this rationale.

Some consider that criminal compensation schemes should be just that, compensatory in nature ie. to make amends; and for various reasons, the State has an obligation to provide full compensation. Iyla Davies submits:

the rationale of awards should be compensatory for injuries actually received — [and] as compensation awards are generally the only practical avenue of redress available to victims of crime, no maximum limit should be imposed.¹⁷

Arguments in favour of the existence of an independent scheme for criminal compensation are also based on the belief that the aim of the criminal justice process should be to minimise intrusion into the life of a victim in order to facilitate the

17 Iyla Davies, 'Compensation for Criminal Injuries in Australia: A Proposal for Change in Queensland' (1991) 3 *BondLR* 1 at 19.

rehabilitative process.¹⁸ This means independent and expeditious determination and a guarantee of compensation, which is something that the civil courts and indeed, in certain circumstance, the criminal courts are not able to provide.

Conversely, there are those who consider that criminal compensation schemes should be benevolent in nature ie. to provide assistance or relief. This is the view that some hold in relation to the Victorian scheme,¹⁹ a view which has been expressed by Anderson J in relation to the *Criminal Injuries Compensation Act 1972* (Vic), the predecessor of the *CICA* (Vic):

the purpose of the act, as I see it, is not to award damages of a kind comparable or analogous to damages which an injured party, as a plaintiff, might seek and recover from a tortious wrong done, but to give a victim of a criminal act or omission some solatium by way of compensation out of the public purse.²⁰

The rationale draws partially upon the existence of civil remedy and the availability of other statutory schemes for compensation for example, Workers Compensation.²¹ It has also been suggested that personal insurance is also available as a means of redress.²²

The rationale of the *COVA* compensation scheme is not explicitly stated. The nature of the legislation supports both a compensatory and a benevolent rationale. For example, the *COVA* states that payments are *ex gratia* (s.23), that there is no abrogation of civil remedies available to the victim (s.22), and the State retains rights of subrogation in respects of all the rights and remedies an injured person has against persons responsible (s.38), all of which support a benevolent rationale. At the same time the Act fails to support this rationale. The *COVA* contains no provision for interim payments of compensation to help victims when it is arguably needed the most, as soon as possible after the commission of a crime. It would make more sense to avoid assessment within the existing court structure, particularly in view of the length of time it potentially takes from commission of offence to a hearing for compensation. The alternative would be to establish an independent tribunal. It would also make more sense to prioritise expenses and pecuniary losses, which are in any event more easily and immediately calculable than injuries. This seems to be the emphasis of the scheme in Victoria, although the entitlement under the Victorian scheme for compensation for 'pain and suffering' is a little at odds with this. Awarding compensation for pain and suffering and injuries is more consistent with a compensatory rationale.

18 J Popovic, 'Tribunal Requirements at Hearing' in *Crimes Compensation Tribunal: Seminar Papers* Leo Cussen Institute Melbourne 1992. Paper 2 at 2.

19 *Ibid.*

20 *Fagan v. Criminal Compensation Tribunal* [1981] VR 887 at 889.

21 The New South Wales parliament recently introduced a Bill to amend the criminal compensation scheme under *VCA* (NSW) to exclude claims that could be made under the workers compensation scheme.

22 P Atiyah, *Accidents, Compensation and the Law* 3rd ed Weidenfeld and Nicholson London 1992 at 336.

In any event, a benevolent rationale is arguably self defeating. The need to provide assistance by way of an independent scheme is implicit recognition of the inadequacies of civil redress, for example, the time it takes to bring an action to fruition, the cost and possible fruitlessness of the action. To some extent this was recognised by Bray CJ in relation to the *Criminal Injuries Compensation Act 1969-1974* (SA), the predecessor of the *CICA* (SA):

The intent of the Act, it seems to me, is to come to the assistance, to a limited extent and at the expense of the State, of those for whom the action of civil damages for personal injured caused by the crime is an inadequate remedy because of impecuniosity of the wrongdoer.²³

Whatever the rationale of the *COVA* criminal compensation scheme, it needs to be made clear.

Some Criticisms of the Criminal Offence Victims Act.

Depending on individual views on the nature of criminal compensation schemes, and the 'rights' and 'needs' of victims of crime, a number of criticisms can be made about the *COVA* compensation scheme:

- (a) court orders for compensation are restricted to offences heard on indictment. Indictable offences tried in the Magistrate court or by the Childrens Court do not come within the scope of the Act (note however the *Juvenile Justice Act 1992* (Qld) contain its own provisions for compensation for injuries caused by juvenile offenders, s.192 (2)(c)). Contrast the position under the *CICA* (SA) which applies to all offences, whether indictable or not (s.4);
- (b) regarding compensation for injury, the limited category of 'victims' entitled to make a claim and the requirement for a conviction fails to give adequate consideration to those who suffer injury where they are not subject to a 'personal offence' committed against them, or where by quirk of fate an offence is not prosecuted in circumstances where the victim could otherwise be considered a primary victim. Contrast the position under the *VCA* (NSW), *CICA* (SA),²⁴ and the *CICA* (Vic)²⁵ which apply to secondary victims. In addition, under the *VCA* (NSW)²⁶ and the *CICA* (Vic)²⁷ a conviction is not required for purposes of a tribunal award;

23 *Battista v. Cooper* (1976) 14 SASR 225 at 229.

24 *Battista v. Cooper* (1976) 14 SASR 225 followed in *Delaney v. Celon* [1980] 24 SASR 443.

25 The definition of victim in the *CICA* (Vic) s.3 has been held to cover secondary victims who suffer injury, *Savage v. CCT* [1990] VR 96 following a similar decision in relation to the predecessor to the *CICA*, the *Criminal Injuries Compensation Act 1972* (Vic), in *Fagan v. The Crimes Compensation Tribunal* (1982) 150 CLR 666.

26 See definition of Act of Violence s.3.

27 See definition of Criminal Act s.3 and s.21.

- (c) the *COVA* scheme maximum for compensation for injuries applies regardless of the number of offenders, offences and/or injuries arising out of the same course of conduct. The *COVA* has abolished the ability to order compensation up to the scheme maximum against each of any number of multiple offenders and in doing so comes into line with most other jurisdictions considered in this paper eg. s.9 *CICA* (SA). Under the *Criminal Code* (Qld) individual compensation orders against any number of multiple offenders provided a way around the scheme maximum;²⁸
- (d) the compensation maximum for dependants of deceased victims is inadequate (\$20 000), particularly in circumstances where there is a surviving spouse and where young children are involved. In addition, the restrictions on applications by children ie. they must wait until they become an adult, disregards the immediate need for compensation for dependant children;
- (e) the *COVA* gives no consideration to the needs for compensation to guardians of dependant children of deceased victims;
- (f) the *COVA* makes no provision for interim payments of compensation to victims. This totally disregards the immediate needs of victims who have to make their own arrangements to cover, for example, medical and funeral expenses. Under the *CICA* (Vic), the VCT is able to make interim payments in circumstances of financial hardship or other circumstances considered appropriate (s.23). Under the *CICA* (SA), the Attorney General can make interim payments to necessitous claimants (s.11(3)(a));
- (g) the limit for claims for expenses by dependant(s) or family member(s) is inadequate (\$1000). Primary victims cannot claim for expenses. This represents a change from the position under the *Criminal Code* (Qld) where a victim, claiming compensation for injury pursuant to s.663B, is able to claim compensation for monetary loss suffered by way of the injury;²⁹
- (h) the *COVA* makes no provision for compensation for 'pain and suffering';
- (i) an applicant is not entitled to an order for costs. The reason for this is that the Director of Public Prosecutions may make an application on the victims behalf (s.42(1)). This raises questions of impartiality and the desirability for separate representation;
- (j) the rationale for the Table of Compensation for injuries needs to be made clear. Among categories of injuries, there are marked jumps between awards for the severity of the particular injury, as well as within the classification of the severity itself. An example, is the jump from a fractured skull with minor/moderate brain damage, the award for which is 10 to 25% of the scheme maximum of \$75 000 (a range of \$7500 to \$18 750) and a fractured skull with severe brain damage, the award for which is 25 to 100% of the scheme maximum (\$18 750 to

28 Iyla Davies, *supra* n.18 at 19, referring to the decision *R v. Bridges and Madams; ex parte Larkins* [1989] 1 QdR 554.

29 *R v. Hurle, ex parte Anderson* [1991] 2 QdR 682.

\$75 000). In some instances there are overlaps in the classification of severity of injury, for example neck/back/chest injury: minor (2 to 7%, in terms of the scheme maximum \$1500 to \$5250); moderate (5 to 10%, in terms of the scheme maximum \$3750 to \$7500); and severe (8 to 40%, in terms of the scheme maximum \$6000 to \$30 000);

- (k) the emphasis on the Compensation Table is with visible injuries. The table fails to adequately address appropriate compensation for sexual offences where physical injuries may not be obvious. The limits placed on compensation for mental or nervous shock, which is the basis upon which compensation for sexual offences are often calculated, is inadequate (up to 34% of the scheme maximum — \$25 500).

Conclusion

Criticisms could continue. However, as stated previously this is subject to individual views on the nature of criminal compensation schemes, and the 'rights' and 'needs' of victims of crime. It also subject to an understanding of the rationale of existing schemes. In relation to the *COVA*, the rationale is not clear. Without one, any assessment of the adequacy of the scheme for compensation cannot be made nor any suggestions for improvement. The existing scheme could at best be described as tentative in nature.