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# COMPENSATING CRIME VICTIMS







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The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

**The Commissioners are:**

Right Honourable Sir Geoffrey Palmer – *President*

Dr Warren Young – *Deputy President*

Emeritus Professor John Burrows QC

George Tanner QC

Val Sim

The General Manager of the Law Commission is Brigid Corcoran

The office of the Law Commission is at Level 19, HP Tower, 171 Featherston Street, Wellington

Postal address: PO Box 2590, Wellington 6140, New Zealand

Document Exchange Number: sp 23534

Telephone: (04) 473-3453, Facsimile: (04) 471-0959

Email: [com@lawcom.govt.nz](mailto:com@lawcom.govt.nz)

Internet: [www.lawcom.govt.nz](http://www.lawcom.govt.nz)

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# Call for submissions

Submissions or comments on this Issues Paper should be sent by **24 December 2008** to **Brigid Corcoran**, General Manager

**Law Commission**  
**PO Box 2590**  
**Wellington 6140**

**email – [victims@lawcom.govt.nz](mailto:victims@lawcom.govt.nz)**

Any enquiries can be made to Law Commissioners **Val Sim** or **Dr Warren Young**.

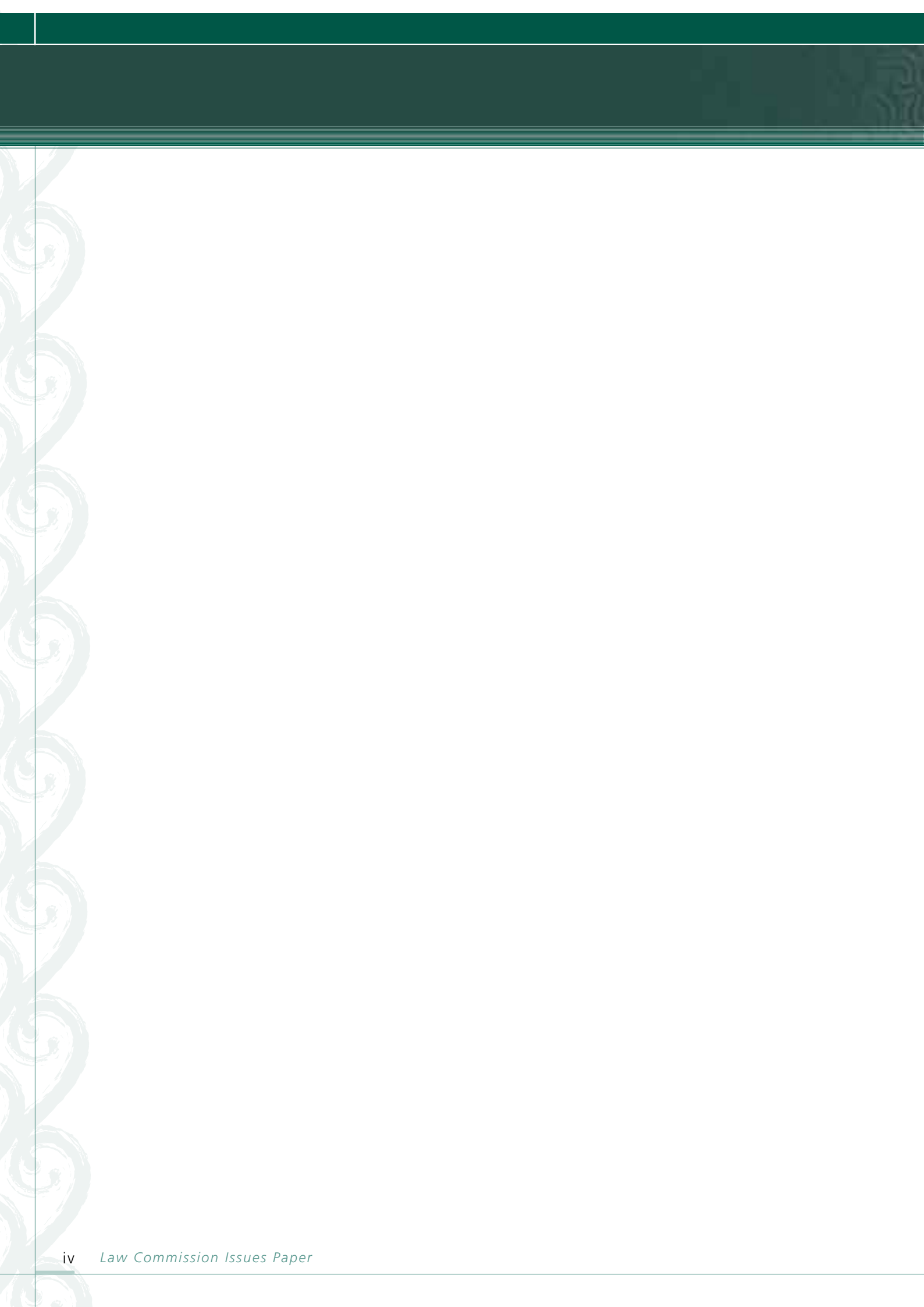
The options presented in this paper are designed as a range of possibilities not a single package and we welcome your comment on any aspect. Your submission can be set out in any format but it is helpful to specify the number of the question you are discussing.

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# Compensating Crime Victims

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# Chapter 1

## Underlying Principles

- INTRODUCTION** 1.1 A great deal has been done over the past 40 years which assists victims of crime. The Criminal Injuries Compensation Act 1963 introduced the first state-funded scheme to compensate crime victims for personal injury. In 1975, this scheme was subsumed within the then new accident compensation regime, which provided much more comprehensive compensation. The processes for recovering compensation from offenders have also significantly improved the position of victims. Traditionally, a civil action in tort was the only means by which a crime victim could recover his or her losses from the offender. Now reparation is available through the criminal justice process. Victims also have a greater role in criminal proceedings than they had in the past, with their views being made known to the court during sentencing through victim impact statements.
- 1.2 However, with the exception of the accident compensation scheme, these changes have generally been ad hoc and pragmatic. They have been introduced in a piecemeal fashion without much regard to any underlying principles about where the burden of harm resulting from crime should fall.
- 1.3 Our task is to consider whether existing arrangements to compensate victims are adequate and, if not, what additional measures should be put in place. In our view, that task needs to be informed and guided by some underlying principles. In this chapter, we consider what those principles should be.
- 1.4 We should make clear at the outset that we do not question the obligation of the state to meet the needs of disadvantaged members of society, including the victims of crime, who are unable to meet those needs themselves. That is the hallmark of a civilised, compassionate society that cares for its members, and it is the principle that underpins welfare entitlements in liberal democratic states. Our task, however, is a narrower one: to consider, beyond minimum welfare entitlements, the extent to which there should be an obligation to compensate victims for the injury, loss or damage they have suffered, and where that obligation should fall.
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- TRADITIONAL POSITION** 1.5 Traditionally in common law, a clear distinction existed between crime and tort. Crimes were public wrongs against the community at large, resulting in punishment to express society's disapproval, to deter future offending, and to provide community protection. Accordingly, criminal proceedings and their outcome were not designed to be reparative or compensatory in nature. Instead, where an individual suffered injury, loss or damage through the



commission of an offence, the onus rested on him or her to recover compensation by suing the offender in tort. In short, criminal proceedings were between the state and the offender for the purpose of determining guilt beyond reasonable doubt and imposing sanctions for wrongdoing against the community. In contrast, proceedings in tort were between the offender and the victim to determine whether the burden of the loss should be shifted from the latter to the former.

## MORE RECENT DEVELOPMENTS

- 1.6 The relatively delineated processes that criminal law and tort law provided for addressing the consequences of crime have undergone significant changes over the last 40 years in three key respects:
- the accident compensation scheme has substantially replaced tort law as the means for compensating for personal injury;
  - victims' ability to obtain compensation from the offender through the criminal justice system has been enhanced;
  - there is greater participation by victims in the criminal justice process, both prior to trial and at time of sentence.

### Accident compensation scheme

- 1.7 Prior to 1974, the primary mechanisms for securing compensation for personal injury (whether caused by intentional or negligent conduct) were common law remedies in tort. However, in order to address some of the shortcomings of these remedies, they were supplemented by compulsory third party motor vehicle insurance in 1928, a workers' compensation scheme in 1954, a criminal injuries compensation scheme in 1963, and social security benefits for the sick or invalid and dependants in the case of death.
- 1.8 In its 1967 report, the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand ("the Royal Commission") asserted that "[t]he toll of personal injury is one of the disastrous incidents of social progress [...]".<sup>1</sup> It identified a number of weaknesses with the mechanisms available for dealing with personal injury, including particular problems with tort law. The problems with tort law in cases of personal injury included:
- the difficulty of establishing liability for loss and of attaching a monetary value to that loss, resulting in the law being seen as, at best, uncertain and in some cases arbitrary and capricious;
  - the unsatisfactory nature of lump sum awards in cases where the medical future of the victim was uncertain;
  - the cumbersome nature of the court process, which was "absorbing for administration and other costs as much as \$40 for every \$60 paid to successful claims";<sup>2</sup>

1 Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand Report (Government Printer, Wellington, 1967) para 1.

2 Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand, above n 1, para 485.

- the long delays inherent in the court process which could hinder the rehabilitation of injured persons;
  - the limited availability of compensation for accident victims through the tort system, since only those people who could prove wrongdoing could recover damages and then only if the tortfeasor had the means to pay.
- 1.9 As a result of these problems, and of the shortcomings of the specific purpose compensation schemes, the Royal Commission recommended an entirely different approach based on the principle of community responsibility. It was seen as being in the interests of the community as a whole that injured persons are rehabilitated and, accordingly, it should be responsible for ensuring that this occurs. On that basis, the accident compensation scheme replaced the traditional “loss-shifting” structure of the tort action (that is, the shifting of the burden of loss from victim to wrongdoer) with a comprehensive no-fault scheme that spreads the losses associated with personal injury by accident amongst the community as a whole through a system of compulsory levies and general taxation. In effect, the accident compensation scheme is a form of social insurance against all personal injury by accident. Its rationale is that the spreading of losses from accidents across all members of the community has overall social utility, that is, that the overall social and economic benefits of doing so outweigh the costs. This rationale applies regardless of the cause of the injury.

### Sentence of reparation

- 1.10 Since 1985, there have been a number of statutory changes designed to enable victims to be compensated through the criminal justice system for property loss or damage or emotional harm suffered in the context of crime and not covered by the accident compensation scheme. In particular:
- The sentence of reparation was introduced by the Criminal Justice Act 1985, replacing the little-used compensation order;
  - A presumption in favour of reparation was introduced by the Sentencing Act 2002, resulting in the sentence being used more frequently;
  - Procedures for determining quantum and means to pay reparation were established;
  - Enhanced mechanisms for enforcing sentences of reparation were introduced.
- 1.11 The rationale for the sentence of reparation is that it would be both unfair to the victim, and costly for the victim and the state, to require the victim to prove wrongdoing by the offender and establish the quantum of loss in separate civil proceedings when this can be done as part of the criminal proceedings.
- 1.12 However, the sentence of reparation is still a “loss-shifting” mechanism and is subject to essentially the same limitations as tort law. It is justified on the basis of being less expensive to the victim, who is not required to pay for bringing proceedings in tort, but its ability to compensate a victim is still dependent upon the attribution of fault to the offender and his or her means to pay. It is not in any sense a system that is designed to spread loss; it merely transfers the loss from victim to offender, as tort law does, and thus depends upon the ability of the offender to accept that transfer. The criminal justice system now more

explicitly incorporates a reparative element, but only in terms of the relationship between the offender and the victim; it does not alter the relationship between the victim and the state.

### Role of the victim in the criminal justice system

- 1.13 Victims of crime have also been given much more recognition as key participants in the criminal justice process. The Victims' Rights Act 2002 extended to victims a number of rights within the criminal justice process, including rights to information and the ability to have input into sentencing decisions through victim impact statements. The Sentencing Act 2002 also recognises the potential of restorative justice processes to make offenders more accountable to victims and enables a court to take both financial and non-financial offers of amends by an offender into account.
- 1.14 These initiatives have given the victim status, albeit in a fairly limited way, as a participant in proceedings that were previously confined to the state and the offender. However, again, they do not in any way change the nature of the relationship between state and victim.
- 1.15 In summary, under the current legal framework, crime victims, like other accident victims, are compensated for personal injury under the accident compensation scheme. As a result, losses from personal injury are shared by the community as a whole. In contrast, other losses, including property loss and damage and emotional harm, which are not covered by the accident compensation scheme, are not shared in this way. Victims may recover compensation from offenders who are convicted or sued (and can afford to pay). If they choose, potential victims may also distribute the risk of loss or damage as a result of offending through private insurance, leaving the insurer to shift the distributed loss to the offender to the extent that this is practicable. In this respect, the position of crime victims does not differ from any other person who suffers loss or damage to property, whether as a result of their own negligence or the actions of others.

### THE CASE FOR A CHANGE

- 1.16 Despite these relatively recent initiatives, the status and treatment of victims within the criminal justice system have remained a focus of political and public concern. So too has the extent to which, and the procedures by which, victims receive compensation for their injury or loss. For example, the Justice and Electoral Committee, whose 2007 Report led to this reference to the Law Commission,<sup>3</sup> concluded that existing systems did not compensate victims effectively, and recommended that the government should develop a compensation regime that prioritises victims' losses and adequately compensates them.
- 1.17 Any change to the existing arrangements in order to materially improve the position of crime victims would necessarily involve a move, to a greater or lesser extent, away from a loss-shifting framework to a framework that spreads the loss amongst the community at large, whether through an expanded social insurance arrangement or a requirement of compulsory insurance.

3 Justice and Electoral Committee "Inquiry Into Victims' Rights" (presented to the House of Representatives, December 2007).

- 1.18 It is difficult to identify good arguments in favour of a “loss-spreading” framework that would be confined to crime victims. Indeed, in the context of overseas criminal injuries compensation schemes, a number of legal commentators have argued that no coherent justification can be found at all, and that this calls into question whether such schemes should exist.<sup>4</sup> Peter Duff, writing about the criminal injuries compensation scheme in the United Kingdom, observed:<sup>5</sup>

The British Scheme is not alone in its theoretical incoherence. All criminal injuries compensation schemes suffer from this difficulty. The fundamental problem is that it is impossible to find any rationale which satisfactorily justifies singling out the victims of violent crime from other groups of unfortunates for special treatment by the state. [...] It is generally accepted that the various arguments traditionally put forward to justify the payment of criminal injuries compensation do not stand up to close scrutiny.

- 1.19 However, three arguments have been advanced from time to time in both the academic literature and in calls for reform: the obligations of the state arising from the “social contract”; social utility; and, the symbolic value of tangible community recognition of victims’ losses.

### The obligations of the state arising from the “social contract”

- 1.20 It is sometimes argued that when a crime is committed the state has failed in its responsibility to prevent that crime and is, therefore, obligated to provide full redress to the victim for the injury or loss that he or she has suffered. Proponents of this view appear to rely on social contract theory.<sup>6</sup> The argument runs that, under the implied contract between the state and its citizens that underpins the formation of societies, individuals have ceded to the state their freedom to live as they choose in furtherance of their own self interest; in return, all citizens are guaranteed certain fundamental rights and freedoms and receive protection from the state against the violation of those rights.
- 1.21 However, this rather crude notion of the relationship between the state and its citizens is a misrepresentation of social contract theory and distorts the nature of the protections that the state is obligated to provide. As Thomas Hobbes, one of the main early exponents of social contract theory, recognised, the notion of a social contract is a fiction – a useful, but ultimately limited, heuristic device for explaining the nature of the principles of justice and fairness that ought to characterise social arrangements. It does not signify what people who participate in a particular society have agreed to (since they are generally placed in a particular position in that society at birth rather than voluntarily entering it).

4 See, for example, PS Atiyah *Accidents, Compensation and the Law* (Weidenfeld & Nicolson, London, 1970) 317 – 326; David Miers *Responses to Victimisation: A Comparative Study of Compensation for Criminal Violence in Great Britain and Ontario* (Professional Books, Abingdon, Oxon, 1978) 75 – 81; Andrew Ashworth “Punishment and Compensation: Victims, Offenders and the State” (1986) 6 *Oxford Journal of Legal Studies* 86 – 122, 99 – 107.

5 Peter Duff “Measure of Criminal Injuries Compensation: Pragmatism or Dog’s Dinner” (1998) 18 *Oxford Journal of Legal Studies* 105 – 14, 106.

6 Social contract theory was first introduced by Hugh Grotius in the early 17<sup>th</sup> century and was refined by the Republican philosophers of the 18<sup>th</sup> century, notably Jean-Jacques Rousseau and John Locke.

Rather, as one of the most influential modern social contract theorists has put it, it sets out the principles “to which [people] would agree if they were free and equal persons whose relationships with one another were fair”.<sup>7</sup>

- 1.22 Looked at in this light, a principle of justice and fairness that required complete protection by the state from crime, and full redress in the event of a failure to provide that protection, would be untenable. In terms of the fictional development of a social contract underpinning the formation of a “state”, reasonable people simply would not agree to a contract under which the state guaranteed to its citizens that they would not be affected by crime, given that the state cannot control everything its citizens do, and cannot afford even to try. Moreover, such a principle would actually conflict with many of the other principles of justice which “free and equal persons” would see as essential to fair social arrangements. In particular, the fundamental freedoms that we all enjoy necessarily imply that there will be some crime, because the complete prevention of crime, or even the attempt to achieve that end, would entail unreasonable limits on those fundamental freedoms. It is for this reason that, while states now accept some responsibility for investigating crime and detecting and punishing offenders, they have generally been careful (for example, in the context of establishing criminal injury compensation schemes) not to accept responsibility for all of the consequences of the commission of crimes.<sup>8</sup>
- 1.23 The State may, of course, accept an obligation to take reasonable steps to prevent crime in specific situations, and may then be liable for a failure to take those steps.<sup>9</sup> But that cannot be translated into an obligation to provide full or even partial protection of all potential victims.

### Social utility

- 1.24 If the state has no duty to provide compensation to victims of crime founded on social contract, it may instead be argued that loss-spreading specifically for crime victims may be justified on the grounds of overall social utility.
- 1.25 As noted above (paragraph 1.8), this appears to have been the main justification for the decision to spread loss associated with personal injury across the community under the accident compensation scheme. There are obvious social benefits in assisting people who are injured back into the workforce as soon as is practicable and, where impracticable, at least ensuring that people can participate in society to the fullest extent possible. In this sense, the Commentary on the Royal Commission’s Report suggested that the establishment of the accident compensation scheme may be justifiable on the basis of the economic benefits that would accrue alone: “Even if the premise of ‘community responsibility’ is not accepted, it might be argued that every individual

<sup>7</sup> John Rawls *A Theory of Justice* (Harvard University Press, Cambridge, 1971).

<sup>8</sup> Andrew Ashworth, above n 4, 99; Peter Duff, above n 5, 112; David Miers “Criminal Injuries Compensation: The New Regime” (2001) 4 JPIL 371 – 395.

<sup>9</sup> For example, in *Couch v Attorney-General* [2008] NZSC 48, the Supreme Court left open the possibility that the Department of Corrections could be liable for a failure to provide adequate supervision of a parolee who committed murder and other serious violent offences.



nevertheless has such a stake in the safety, rehabilitation, and maintenance of the work force as to justify the introduction of a comprehensive compensation scheme on those grounds.”<sup>10</sup>

- 1.26 That argument, of course, would not have been enough on its own, since it would not have explained why more than minimum welfare entitlements were justified and why personal injuries justified a different approach from illnesses. The crucial additional element of the argument, which fundamentally altered the calculation of costs and benefits in providing comprehensive cover for those injuries, was the expensive, unpredictable and unfair lottery of personal injury litigation.
- 1.27 The merits of social utility as a justification for spreading other types of loss (such as property loss or damage) across the community cannot be assessed as a matter of general principle. They can only be determined by consideration of the social and economic costs and benefits of specific policy proposals.
- 1.28 Whatever those merits might be, however, they will not generally attach only to a particular class of person (such as a crime victim) who suffers a specified type of loss. That is because the social utility of “loss-spreading” focuses upon the costs and benefits to the community as a whole, rather than the rights of the person who has experienced the loss or the reasons why the loss occurred.
- 1.29 Thus, while the social utility principle can be used to advance schemes with equitable coverage like accident compensation, it is unlikely to afford a coherent rationale for special provisions for crime victims alone.
- 1.30 There is one important qualification to this general proposition. There may be some costs and benefits to the community as a whole that can be seen as specific to a particular class of person or a specific kind of loss. For example, in the context of crime victims there may be some benefit in providing specific redress as a means of maintaining or restoring community confidence in the criminal justice system. However, a specific benefit of this sort really relates to the symbolism of victim redress. We therefore consider this type of benefit below.

### The symbolic value of tangible community recognition of victim losses

- 1.31 This then leads to the third possible argument in favour of an extension of loss-spreading arrangements specifically for crime victims: that it is a symbolic expression of the community’s concern and sympathy for them. It is on this basis, for example, that overseas criminal injuries compensation schemes have been justified:<sup>11</sup>

The faith which the public and crime victim have in society and its institutions is greatly damaged by violent crime. Criminal injuries compensation schemes are designed to

10 Department of Labour *Personal Injury: A Commentary on the Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand* [1969] AJHR H50 9.

11 Peter Duff “Criminal Injuries Compensation: The Symbolic Dimension” (1995) 40 *Juridical Review* 102 – 118, 107. See also Peter Duff, above n 5, 106 – 108, 113, and the justifications provided for the establishment of the Crimes Compensation Tribunal in New Zealand: Hon J R Hanan (13 August – 27 September 1963) 336 NZPD 1865 – 1868; (1 October – 31 October 1963) 337 NZPD 2631, 2632 – 2638.

help restore that faith by demonstrating, in a tangible form, public solidarity with the unfortunate victim. Society is seen to recognise and sympathise with the innocent victim's suffering and this serves to re-affirm that the victim's faith, and that of the general public, in society and its institutions has not been misplaced. In other words, criminal injuries compensation is a medium through which an attempt is made to repair – or, at least, mitigate – the social damage caused by crime.

- 1.32 The fact that criminal injuries compensation schemes have a purely symbolic function has also been put forward as the explanation for their restriction to victims of violent offences (which are the crimes most likely to damage the faith of people in society and its institutions) and for denying “unworthy” victims compensation.<sup>12</sup>
- 1.33 It may be doubted whether the symbolic value of victims' compensation is really a sufficient basis for changing our current arrangements. It is in essence an emotional rather than rational argument. The difficulty is that there are many victims of other misfortunes who are also deserving of society's recognition and compassion: people whose uninsured houses are damaged by flood; parents whose children suffer cancer; and so on. If more than the usual welfare entitlements are provided to crime victims, why are these other victims precluded? And where should we draw the line? Should there be additional entitlements for all crime victims or only some? These are difficult questions, and the answers to them are bound to produce illogical and anomalous distinctions.
- 1.34 If the symbolic aspect of victims' compensation is accepted as a sufficient basis for change, the extent of that change would need to be determined by a case-by-case consideration of a host of complex and sometimes competing factors. These include: (a) the amount of state resources that should appropriately be spent on victims' compensation initiatives when looked at against other social assistance priorities; (b) how to prioritise victims' needs for compensation; (c) the possible mechanisms for delivering compensation to victims; and (d) the effectiveness of any measure that may be implemented.
- 1.35 In summary, therefore, we conclude that the spreading of the losses of crime victims to the community at large cannot be justified on the basis of social contract theory. Nor is it likely to be justified on social utility grounds if the loss-spreading is confined to crime victims alone. There may be some room for a separate arrangement for victims based on the symbolic value to the community of singling them out for special recognition. However, that is arguable, and can only be considered case-by-case.
- 1.36 Against this background, we turn to consider the current law and practice, and possible options for reform.

<sup>12</sup> Peter Duff, above n 11, 107.



# Chapter 2

## Compensation for Victims of Crime in New Zealand

### IN THIS CHAPTER WE CONSIDER:

The ways in which victims of crime in New Zealand may receive compensation for the harm or loss they have suffered as a result of the commission of an offence.

#### INTRODUCTION 2.1

As we have seen in Chapter One, the existing statutory arrangements provide for two mechanisms through which victims of crime may secure compensation for the harm, loss or damage suffered by them as a result of the commission of a crime. Under the Sentencing Act 2002, the offender is accountable to the victim for harm or loss, which is not personal injury, suffered as a consequence of the crime through the sentence of reparation. Personal injury resulting from crime is compensated through the accident compensation scheme.

- 2.2 There are also a small number of special purpose state-funded schemes which provide financial assistance to victims of crime where compensation is unavailable or inadequate. In addition, in limited circumstances it remains possible for victims to bring civil proceedings, although the costs and complexities associated with doing so do not make it a likely course of action for many.
- 2.3 We discuss each of these mechanisms and their interrelationships in more detail below.

- 2.4 Since 2002, the Sentencing Act has included a strong statutory presumption in favour of reparation, which is designed to ensure reparation is ordered more frequently than it was under earlier legislation.<sup>13</sup> There is also a systematic procedure for ascertaining the means of the offender and determining the quantum of the reparation.
- 2.5 Section 12 of the Sentencing Act 2002 provides that if a court can lawfully impose a sentence of reparation, it must do so, unless it is satisfied that the sentence would “result in undue hardship for the offender or the dependents of the offender, or any other special circumstances would make it inappropriate.”<sup>14</sup> On this basis, a reparation sentence will not be made if its payment is beyond the foreseeable means of the offender.<sup>15</sup> An offender’s lack of means will also be relevant to the amount of reparation and the manner and time in which it should be paid.<sup>16</sup> For example, the court may order the offender to make reparation for a lesser amount than the loss suffered, and it may also order payment in instalments.<sup>17</sup>
- 2.6 Under section 32, a sentence of reparation can be imposed if any offender has, through or by means of an offence of which the offender was convicted, caused a person to suffer:
- Loss of or damage to property;
  - Emotional harm; or
  - Loss or damage consequential on any emotional or physical harm or loss of, or damage to, property.

13 See also *R v Pender* [2007] NZCA 465, para 12; *R v Creek* (17 August 2006) CA 199/06, para 12; *R v O’Rourke* [1990] 1 NZLR 155 (CA), 158. Compare the Criminal Justice Act 1985, s 11. For the provisions of the Sentencing Act 2002 pertaining to the sentence of reparation generally, see ss 14, 32 – 43, 145, 145A – 145D, and ss 106, 108, 110; Children, Young Persons, and Their Families Act 1989, ss 84, 283(f); Fair Trading Act 1986, s 43. Note that consistent with the presumption, the court must order reparation at the expense of imposing a fine in a situation where an offender does not have the means to pay a fine and reparation, and if a court imposes on an offender a sentence of reparation and a fine, any payments received from the offender must be applied first in satisfaction of the amount due under the sentence of reparation. See Sentencing Act 2002, ss 14(2), 35(2).

14 *Hunt v Police* (29 September 1999) HC WN AP 232/99 Penlington J. There is an evidential onus on the offender to place before the court evidence of financial capacity. In addition, under section 33(1) of the Sentencing Act 2002, the court may order the probation officer to prepare a reparation report. It may also direct the offender to make a declaration of his or her financial capacity (ss 33(3) and 42). See *R v Quayle* (26 June 2003) CA 39/03, paras 20, 22; *Connett v Police* (18 April 2008) HC ROT CRI-2007-463-148, para 7 Winkelmann J; *R v Khan* (4 April 2006) CA 312/05, para 6.

15 See, for example, *R v Munro* (24 July 2002) CA 132/02; *R v Sheehy* [2007] NZCA 519; *R v Brown* (26 November 1992) CA 267/92; *R v Price* (13 September 2006) HC ROT CRI-2006-063-2593 Rodney Hansen J; *Devonshire v Police* (22 November 2003) HC HAM CRI-2003-419-51 Chambers J.

16 *R v Creek*, above n 13, para 12.

17 Sentencing Act 2002, s 35; *R v Donaldson* (2 October 2006) CA 227/06, para 43; *R v Pender*, above n 13, para 17.

- 2.7 In the case of loss of or damage to property, an offender is required to compensate the victim for the value of that loss or damage. If this is covered by insurance, the insurer can be regarded as having suffered loss or damage, and the reparation order can be made for the benefit of the insurer.<sup>18</sup>
- 2.8 Emotional harm reparation may be considered wherever grief, anxiety or other mental pain and suffering results from the offence.<sup>19</sup> Hammond J has stated:<sup>20</sup>
- The term [“emotional harm”] could obviously span a range of phenomena. At the lowest end of the scale, it could mean simply “mental anguish” occasioned to a victim by a crime; at the other end of the scale, the particular harm might be manifested in identifiable, long term, clinical conditions such as traumatic stress disorders, or even psychotic conditions.
- 2.9 A sentence of reparation can only be imposed for “emotional harm”, including loss or damage consequential on emotional harm, if the person who suffered the harm is a “victim”. The term “victim” is broadly defined in the Sentencing Act and includes members of the “primary” victim’s immediate family in the event of the primary victim’s death.
- 2.10 “Consequential loss or damage” is indirect loss or damage. While it remains to be seen how far the concept of “consequential loss” extends, it is intended to cover the loss flowing from loss of or damage to property, or emotional or physical harm, such as taxi fares incurred as a result of a theft of a car, lost earnings, medical expenses, or funeral expenses.<sup>21</sup> Under this ground, reparation can be imposed where physical harm occasions consequential loss, despite the fact that reparation is not directly available for physical harm to the person, this being covered under the accident compensation scheme.<sup>22</sup>
- 2.11 Section 32(5) of the Sentencing Act provides that a sentence of reparation cannot be made in respect of any consequential loss or damage for which the court believes the victim has entitlements under the accident compensation legislation. It remains unclear whether victims can receive reparation to cover any shortfall between an entitlement provided under the accident compensation legislation and the amount of loss actually incurred. The Court of Appeal has found that a judge may impose a sentence of reparation for the 20 per cent shortfall between the amount of weekly compensation provided for under the Injury Prevention, Rehabilitation and Compensation Act 2001 (“IPRC Act”) and the amount of actual weekly earnings earned by a person before he or she suffered the personal injury.<sup>23</sup> It held that while “there is to be no ‘doubling up’ of recovery”

18 *R v O’Rourke*, above n 13, 158.

19 *Edgecombe v Attorney-General on behalf of the Department of Corrections* [2005] DCR 780, para 37; Hon Bruce Robertson (ed) *Adams on Criminal Law* (loose leaf, Brookers, Wellington, 2007) para SA32.05.

20 *Sargeant v Police* (1997) 15 CRNZ 454, 458.

21 *R v Donaldson*, above n 17, para 17; *Devonshire v Police*, above n 15, para 12; *Davies v Police* [2007] NZCA 484.

22 Sentencing Act 2002, s 32(1)(c); *Davies v New Zealand Police* (19 December 2006) HC CHCH CRI-2006-409-000203, para 20 Panckhurst J. See also *Davies v Police*, above n 21, paras 22 – 23.

23 *Davies v Police*, above n 21. See also *Davies v New Zealand Police*, above n 22, paras 19 – 21.

under the IPRC Act and the Sentencing Act, the legislation cannot leave the victim without compensation for the consequences of physical harm suffered.<sup>24</sup> However, the point is on appeal to the Supreme Court.<sup>25</sup>

- 2.12 A sentence of reparation does not affect any right of a victim to obtain damages. However, in order to prevent double recovery of the debt, the victim cannot receive damages in excess of the amount recovered through reparation.<sup>26</sup> Civil remedies in respect of any remission of the whole or any part of the reparation to be paid and the right to make an accident compensation claim under the IPRC Act for any remitted amount are also preserved in section 145(3) of the Sentencing Act.
- 2.13 To assist a court in determining whether to impose a sentence of reparation, and its quantum and method of payment, a court may order a probation officer to prepare a reparation report. The report contains information regarding the loss, damage and/or harm suffered by the victim, the financial capacity of the offender (including by way of a declaration by the offender), the maximum amount an offender is likely to be able to pay, and the frequency and magnitude of payments where payment by instalments may be desirable. In addition, under section 34 of the Sentencing Act, the probation officer responsible for preparing the reparation report must attempt to gain agreement between the victim and the offender on the amount of reparation that the offender should be required to pay. Information regarding the extent of any such agreement is to be included in the reparation report. The court is not bound by this agreement, and must be satisfied that the agreement can, for example, realistically be paid and enforced, and that it is sufficient to address the harm, loss, or damage suffered.<sup>27</sup>
- 2.14 The court must also take into account “any offer, agreement, response, measure, or action” as described in section 10 of the Sentencing Act, and whether such an “offer of amends” is capable of fulfilment. Such an offer may be made as part of a restorative justice process. An offer of amends may include, for example, payment of a sum to a third party or the “top-up” of compensation received under the IPRC Act.<sup>28</sup> An offer of amends will be taken into account by a judge when assessing the appropriate sentence, including the amount of any sentence of reparation and, where an offer exceeds any reparation that could be properly payable, a judge is likely to conclude that no reparation sentence should be imposed because “the special circumstances of the offer of amends would make it inappropriate.”<sup>29</sup>

24 *Davies v Police*, above n 21, para 23.

25 *Davies v Police* [2008] NZSC 4. The question before the Supreme Court is “whether s 32(5) of the Sentencing Act 2002 prevents the award of reparation to compensate for loss of earnings not compensable under the [Accident Compensation Act].”

26 *New Zealand Guardian Trust Company Limited v Rimoni* [2005] 1 ERNZ 784, paras 20 – 21, 24.

27 *Clutha Chain Mesh Products Ltd v Dept of Labour* (4 August 2004) HC WN CRI-2004-452-522, paras 16, 19 Ronald Young J; *R v Vallily* (10 November 2004) CA 251/04, paras 75 – 76; *R v Quayle* (26 June 2003) CA 39/03, para 24. See also *R v Creek*, above n 13, para 11.

28 *Devonshire v Police*, above n 15, para 15; *Davies v Police*, above n 21, para 25.

29 *Clutha Chain Mesh Products Ltd v Dept of Labour*, above n 27, para 19.

- 2.15 In addition, the Victims' Rights Act 2002 enables a victim to participate in the determination of a sentence of reparation through the victim impact statement. In the victim impact statement, a victim can describe any of the effects of the crime on him or her, which may be read or otherwise presented to the court. One of the purposes of a victim impact statement is that "the victim is given input into the administration of justice. That is a form of catharsis, and may aid in the healing process. And, it assists the Court in seeing things through the victim's eyes."<sup>30</sup>
- 2.16 Section 183 of the Sentencing Act extended the time-to-pay arrangements under the Summary Proceedings Act 1957 from 18 months to five years. This was done in order to increase the number of cases in which reparation could be imposed; an offender may now be required to pay reparation, albeit over a longer period, where he or she may not have been required to pay it in the past. There are some cases in which reparation payments have been ordered to take place over a five-year period, or longer, including after a period of imprisonment.<sup>31</sup>
- 2.17 A sentence of reparation may be enforced as if it were a fine. Part 3 of the Summary Proceedings Act or sections 19 – 19F of the Crimes Act 1961 apply. Part 3 of the Summary Proceedings Act contains an extensive code for the enforcement of the payment of fines. Where a fine has not been paid, the Registrar has a range of actions available, including:<sup>32</sup>
- Issue a warrant for the seizure of property;
  - Make an attachment order that deducts a specified amount from any salary or wages of the offender;
  - Issue a notice requiring the bank to deduct a specified amount from the offender's account;
  - Publish a notice in a newspaper containing the name, last known address and age of the offender.
- 2.18 If those measures prove unsuccessful, or if a defendant does not have the means to pay the amount, section 88 of the Summary Proceedings Act provides that the matter can be referred to a judge who may impose on the offender a sentence of home detention, community detention or community work, or issue a charging order, by which the Crown can collect the proceeds of a voluntary sale of the offender's real property. A judge may also remit some or all of the reparation.
- 2.19 Sections 19 – 19F of the Crimes Act apply in the case of an offender convicted on indictment. Under those provisions, the court may issue a writ of sale against the personal property of the offender or a warrant for the collection of the fine. A period of imprisonment, community work, community detention or home detention can also be imposed in default of payment of a fine.
- 2.20 In addition, legislation allows for records of unpaid fines to be matched with customs and immigration information, meaning that people who have a warrant for arrest made against them and owe reparation or have more than

30 *Sargeant v Police*, above n 20, 456, cited with approval in *R v Burns* (No 1) (2000) 18 CRNZ 212, 214.

31 See, for example, *R v Creek*, above n 13; *R v Neketai* (30 November 2005) CA 58/05; *R v Vallily*, above n 27. Compare *R v Bailey* (10 May 2005) CA 306/03.

32 Summary Proceedings Act 1957, ss 83, 87, 87A, 92, 93, 94A, 95, 104A, 105.



\$5,000 in fines to pay can be prevented from travelling internationally.<sup>33</sup> Greater information-sharing between government agencies has increased the chance of a person being intercepted.

- 2.21 According to information provided by the Ministry of Justice, \$146.48 million in reparation was ordered between 2001 and 2008, and \$116.47 million was paid. Information showing the number of fines and sentences of reparation imposed and their resolution rate is contained in an Appendix to this Paper.
- 2.22 The Justice and Electoral Committee noted Ministry of Justice advice that efforts are being made to improve collection, but it concluded:<sup>34</sup>

We consider that delayed payment can compound victims' stress. We think it vital that reparation be collected and distributed to victims promptly in every case. We would like to see the collection rate improve significantly.

## COMPENSATION FOR PERSONAL INJURY UNDER THE ACCIDENT COMPENSATION SCHEME

- 2.23 Compensation for personal injury suffered by victims of crime is provided by the state through the accident compensation scheme as established in the Injury Prevention, Rehabilitation and Compensation Act 2001 ("IPRC Act"). The purpose of the Act is to "enhance the public good and reinforce the social contract represented by the first accident compensation scheme by providing for a fair and sustainable scheme for managing personal injury that has, as its overriding goals, minimising both the overall incidence of injury in the community, and the impact of injury on the community (including economic, social, and personal costs)" by *inter alia* "ensuring that, during their rehabilitation, claimants receive fair compensation for loss from injury, including fair determination of weekly compensation and, where appropriate, lump sums for permanent impairment."<sup>35</sup>

### Cover for personal injury

- 2.24 Broadly speaking, under the IPRC Act, a person is eligible for cover (compensation and rehabilitation) for "personal injury" when it is suffered as a result of an "accident". The term "accident" is broadly defined in the Act and includes criminal conduct that results in personal injury.<sup>36</sup> "Personal injury" as defined in section 26(1) of the Act includes: (a) the death of a person; (b) physical injuries suffered by a person; (c) mental injury suffered by a person because of physical injuries suffered by the person; (d) mental injury suffered by a person as a result of a criminal offence listed in Schedule 3 of the Act ("Schedule 3 offence"); and, (e) work-related mental injury.
- 2.25 Under section 27 of the Act, "mental injury" is defined as "a clinically significant behavioural, cognitive, or psychological dysfunction." Therefore, a person is not covered under the Act if he or she merely suffers, for example, feelings of anger, humiliation, fear, or embarrassment.<sup>37</sup>

33 Customs and Excise Act 1996, ss 280(D), 280(F); Immigration Act 1987, s 141AE.

34 Justice and Electoral Committee, above n 3.

35 IPRC Act 2001, s 3.

36 As defined in section 25 of the Act, "accident" includes "a specific event or a series of events, other than a gradual process that – (i) involves the application of force (including gravity), or resistance, external to the human body."

37 *Personal Injury in New Zealand* (loose leaf, Brookers, Wellington, 2003) para IP21.04 (last updated 16 May 2008).

- 2.26 There is no cover for mental injury alone under the Act except in relation to injury resulting from Schedule 3 offences, and workplace mental injury.<sup>38</sup> The Schedule 3 offences are primarily sexual offences such as sexual violation, unlawful sexual connection and indecent assault and include infecting with disease and offences pertaining to female genital mutilation. With regard to this provision, it has been noted:<sup>39</sup>

A key feature of s 21 is that a person is entitled to cover for any act falling “within the description of these offences”. Cover is not dependent upon whether or not a person has been charged or convicted of that offence. The section clearly envisages situations where the perpetrator of the act or acts in question cannot be identified or located, or otherwise charged with the offence. It also extends to situations where there has been an acquittal, or where the offence is not capable of proof beyond reasonable doubt, but may still be proven to the civil standard for the purposes of the Act.

- 2.27 The Accident Compensation Corporation must respond to claims within the timeframes set out in sections 56 and 57 of the Act. An expedited process has been set up for “sensitive claims”, which are claims from people who suffer from mental injury as a result of a Schedule 3 offence; these are dealt with by the Corporation’s “Sensitive Claims Unit”.<sup>40</sup>

### Entitlements

- 2.28 Under the IPRC Act, cover comes in the form of “entitlements”. The entitlements provided under the Act are: rehabilitation, comprising treatment, social rehabilitation, and vocational rehabilitation; first week compensation for loss of earnings; weekly compensation for loss of earnings; lump sum compensation for permanent impairment; and entitlements for fatal injuries. With entitlements comes a degree of responsibility on the part of the claimant for his or her rehabilitation, as provided for in sections 70 and 72.<sup>41</sup>
- 2.29 A person who makes a “sensitive claim” will undergo counselling for up to four sessions for the purpose of assisting the Corporation to determine his or her claim. If the claim is accepted, cover can be provided for counselling and related costs. If the claimant suffers from ongoing mental trauma, he or she may be eligible for compensation in the form of the entitlements noted above.<sup>42</sup>

38 Injury Prevention, Rehabilitation, and Compensation Act 2001, ss 21 and 21B. See also *CLM v Accident Compensation Corporation* (12 May 2006) HC WN CIV 2005-485-000893, paras 19 – 20. Note that section 21A of the IPRC Act addresses, among other possible claims, historic sexual abuse claims by extending accident compensation cover and entitlements to those who, before 1 July 1992, suffered mental injury and nervous shock as a result of the commission of an offence that was listed in Schedule 1 of the Accident Rehabilitation and Compensation Insurance Act 1992; *S v Attorney-General* (15 July 2003) CA 227/02; *W v Attorney-General* (15 July 2003) CA 43/02.

39 *A v The Roman Catholic Archdiocese of Wellington and Ors* [2007] 1 NZLR 536, para 509.

40 See the Accident Compensation Corporation “Sensitive Claims Providers’ Newsletter” (May 2008).

41 Note that pursuant to section 120, the Corporation is not liable to provide any entitlement relating to fatal injuries if the claimant’s entitlement arose because of the death of another person and the claimant has been convicted for the death of that person.

42 See the Accident Compensation Corporation “Fact Sheet: What Are Sensitive Claims and How Does the Process Work?” [www.acc.co.nz](http://www.acc.co.nz) (accessed 15 July 2008).



- 2.30 The scheme places considerable emphasis on assisting the claimant in his or her rehabilitation, which is defined in section 6 of the Act as “a process of active change and support with the goal of restoring [...] a claimant’s health, independence and participation.” This includes the preparation of an individual rehabilitation plan, if necessary, with the purpose of identifying the claimant’s rehabilitation needs. “Treatment” includes counselling services, as necessary and appropriate. The Corporation may also pay the cost of services ancillary to the treatment, such as accommodation, transportation to the treatment, and pharmaceuticals. With regard to “social rehabilitation”, a claimant may be eligible for cover for aids and appliances,<sup>43</sup> attendant care, childcare, education support, home help, modifications to the home, and training and/or transport for independence. For “vocational rehabilitation”, a person may be eligible for “the provision of activities for the purpose of maintaining or obtaining employment.”
- 2.31 With respect to earnings-related compensation, the employer is generally required to pay for the first week. Thereafter, the Corporation becomes liable to pay. Weekly compensation is 80 per cent of a claimant’s weekly earnings, to a maximum of NZ\$1,341.31 per week.<sup>44</sup> While the Corporation can continue to assess the incapacity of a person receiving earnings-related compensation, there is no statutory cut-off point beyond which the claimant is no longer entitled to it, until he or she becomes eligible for New Zealand Superannuation.
- 2.32 “Lump sum” compensation is available for permanent impairment relating to physical and mental injury, including mental injury suffered as a result of Schedule 3 offences. The minimum amount of lump sum compensation is \$2,500, payable to a person whose “whole-person impairment” is 10 per cent, and the maximum amount is \$100,000, payable to a person whose “whole-person impairment” is 80 per cent or more.
- 2.33 Entitlements for fatal injuries are:
- A funeral grant up to a maximum of \$4,500;
  - A survivor’s grant paid to a surviving spouse (or spouses), child, and any other dependant of the claimant;
  - Weekly compensation to a surviving spouse, child, and any other dependant of the claimant from the date of the claimant’s death;<sup>45</sup>
  - Childcare payments for children of the deceased claimant from the date of the claimant’s death.<sup>46</sup>

43 Note that this is defined broadly as “any item likely to assist in restoring a claimant to independence”: see clause 12 of Schedule 1 of the IPRC Act.

44 Weekly earnings are calculated on the basis of the formulae provided in Schedule 1, cls 33 – 45, and 48, of the IPRC Act. Note that when a person is assessed to have “vocational independence”, as defined in section 6, the claimant loses his or her entitlement to weekly compensation.

45 Note that weekly compensation for a surviving spouse or partner, child and other dependents is determined on the basis of percentages of the compensation of loss of earnings that the deceased would have been eligible for.

46 Weekly entitlements per child: \$100 for one child; \$60 for two children; \$140 divided by the number of children for three or more children.

## Accident compensation and common law damages

- 2.34 One of the reasons for the establishment of the accident compensation scheme was that the common law system was viewed as an inadequate means of ensuring that people were properly compensated for their injury and loss.<sup>47</sup> The trade-off for the establishment of the scheme was that it became no longer possible to sue for compensatory damages in common law for personal injury or death in New Zealand.<sup>48</sup> The statutory bar on proceedings for common law damages is contained in section 317 of the IPRC Act. It provides that no person may bring proceedings independently of the Act, whether under any law or any enactment, for damages arising directly or indirectly out of personal injury covered by the Act or former Acts.<sup>49</sup> As the Court of Appeal has made clear, the purpose of the statutory bar is to prevent double recovery for the same harm, loss or damage.<sup>50</sup>
- 2.35 There are a number of exceptions to the statutory bar, including claims for punitive or exemplary damages, which are permitted under section 319(1) of the Act.<sup>51</sup> Compensatory damages for breaches of the New Zealand Bill of Rights Act 1990, or “Baigent” damages, may also be available provided that quantum is not assessed by reference to the victim’s personal injury, which is covered under the accident compensation scheme.<sup>52</sup>
- 2.36 Furthermore, the statutory bar does not prevent a victim from bringing proceedings in common law where there is no “personal injury”, where the personal injury is not covered under the Act, or where the damages being claimed do not arise “directly or indirectly” out of personal injury covered by the Act.<sup>53</sup>

### CIVIL CLAIMS

- 2.37 Where proceedings are not barred under the IPRC Act, bringing proceedings for common law damages in respect of the injury and loss suffered may be an additional avenue through which a victim can seek compensation. A successful claim for damages in common law may serve to vindicate the victim, as well as provide full compensation for the victim’s losses.

47 See, for example, Geoffrey Palmer *Compensation for Incapacity: A Study of Law and Social Change in New Zealand and Australia* (Oxford University Press, Oxford, 1979) 215 – 230, 271 – 278; Stephen Todd (ed) *The Law of Torts in New Zealand* (3 ed, Brookers, Wellington, 2001) 22 – 25.

48 *Wilding v Attorney-General* [2003] 3 NZLR 787; Stephen Todd (ed), above n 47, 21, 65.

49 The scope of the statutory bar is discussed in, for example, *Sivasubramaniam v Yarrall* (21 December 2004) HC WN CIV 2004-485-464 Heath J; *Mellow v Tsang* (6 May 2004) HC AK CIV 2003-404-6069 Keane J; *Harrild v Director of Proceedings* [2003] 3 NZLR 289; *Wilding v Attorney-General*, above n 48.

50 *Queenstown Lakes District Council v Palmer* [1999] 1 NZLR 549 (CA), 555.

51 See also IPRC Act, s 317(2) – (5).

52 *Simpson v Attorney-General* (“Baigent’s Case”) [1994] 3 NZLR 667; *Wilding v Attorney-General*, above n 48. See also *Attorney-General v Udompun* [2005] 3 NZLR 204, para 16.

53 For case law addressing the meaning of “damages arising directly or indirectly out of personal injury covered by the [IPRC Act]”, see *Hobson v Attorney-General* [2007] 1 NZLR 374; *Van Soest v Residual Health Management Unit* [2000] 1 NZLR 179 (CA); *Queenstown Lakes District Council v Palmer*, above n 50; *Sivasubramaniam v Yarrall*, above n 49; *Brownlie v Good Health Wanganui* [2005] NZAR 289. See also Stephen Todd “Mental Injury and Actions for Damages” (June 1999) NZLJ 216 – 220, 220; Nicolas J Mullany “Accidents and Actions for Damage to the Mind – Kiwi Style” (1999) 115 LQR, 596 – 601, 598.

2.38 The Prisoners' and Victims' Claims Act 2005 ("PVC Act") provides a simplified process through which a victim can bring a claim against a prisoner who has received damages, and extends the limitation period by which a victim can bring such a claim.<sup>54</sup>

2.39 However, the process provided for under the PVC Act has limited application, and it has scarcely been used. Information provided by the Ministry of Justice indicates that, to date, compensation has been awarded to 15 prisoners and that three victims have made claims under the PVC Act. The victims received \$9,825.49, \$10,135.18, and \$17,000 respectively (\$36,960.67 in total).

## GOVERNMENT-FUNDED SCHEMES

2.40 Victim Support administers a number of government-funded schemes that provide financial assistance to crime victims:

- Counselling for families of homicide victims;
- Discretionary emergency grants for families of homicide victims;
- Travel funds; and
- Victim emergency grants.

### Counselling for families of homicide victims

2.41 Members of families of murder and manslaughter victims (excluding motor vehicle accidents) and witnesses to a homicide can receive state-funded counselling. Initially, six counselling sessions are funded. The number of sessions can be increased on the recommendation of the counsellor. In the year 2007/2008, \$52,611 was spent on counselling for families of homicide victims.

### Discretionary emergency grants for families of homicide victims

2.42 These grants are intended to assist families of homicide victims with the costs associated with sudden death in situations of severe financial hardship. The grant is payable to a family, rather than its individual members. The maximum grant payable to any one family is \$1,500 per homicide. In 2007/2008, money spent on this scheme was \$62,723.

### Travel funds

2.43 Travel funds are provided to assist victims of serious crimes with travel, childcare and accommodation costs associated with attending parole and High Court hearings. In 2007/2008, a total of \$31,883 was spent on costs associated with travel to parole hearings and \$135,803 on costs associated with travel to High Court hearings.

54 *Edgecombe v Attorney-General on behalf of the Department of Corrections*, above n 19, para 24. See also Justice and Electoral Committee "Report on Prisoners' and Victims' Claims Bill" (5 May 2005), 1. Note that under section 8 of the Prisoners' and Victims' Claims Act 2005, "victim" is defined in the same terms as it is in the Victims' Rights Act 2002, which means that a victim who suffers emotional harm but not physical injury or loss of, or damage to, property, cannot make a claim under the PVC Act.

### Victim emergency grants

- 2.44 Through victim emergency grants, victims of serious crime may receive up to \$3,000 for counselling costs. It is available when financial assistance for counselling is not available from elsewhere and victims will suffer financial hardship if they are required to fund the counselling themselves. In 2007/2008, \$34,322 was spent on victim emergency grants.

### Criminal Justice Assistance Reimbursement Scheme

- 2.45 The Government also funds the Criminal Justice Assistance Reimbursement Scheme, which compensates persons who have suffered loss of or damage to property as a direct result of being a witness or assisting with the administration of justice. The minimum amount that can be claimed is \$300 and the maximum is \$30,000.
- 2.46 The Scheme is intended to be a last resort. Since it was established in 1993, 45 claims have been made, 26 of which were approved, although in 14 of these the award was less than that applied for.

# Chapter 3

## Compensation in Comparable Jurisdictions

### IN THIS CHAPTER WE CONSIDER:

The mechanisms that exist in like-minded jurisdictions for the compensation of victims of crime, and how they compare to those existing in New Zealand.

**INTRODUCTION** 3.1 Victims' compensation in other comparable jurisdictions that we have examined is provided through a mix of court orders against offenders and state-funded compensation for personal injury for victims of violent crimes. Within those broad parameters there are some differences in approach. We briefly describe the compensation regimes in two Australian states (New South Wales and Victoria), one Canadian state (Ontario), and the United Kingdom to illustrate the various approaches and to provide a basis for comparison with the position in New Zealand.

**NEW SOUTH WALES, AUSTRALIA** 3.2 The Victims Support and Rehabilitation Act 1996 ("VSR Act") differs from most other legislative regimes in that it provides for court-ordered compensation as an adjunct to the sentencing process and lump sum state-funded injury compensation under the same statutory umbrella. The VSR Act also provides for levies against imprisoned offenders.

### Court-ordered compensation

3.3 Under the VSR Act, a court can, on its own motion or on the application of an "aggrieved person", make a "direction for compensation" against an offender for injury or loss sustained through or by reason of the offence. An "aggrieved person" is a person who suffers injury or, in the case of an injury causing death, an immediate family member. An application for a direction for compensation can be made at the time an offender is sentenced or at any time thereafter on notice to the offender. A direction cannot be made for an amount exceeding AUS\$50,000.



- 3.4 The VSR Act does not specifically require the court to have regard to an offender's means but it must have regard to any behaviour, condition, attitude or disposition of the aggrieved person which may have contributed to the injury suffered.<sup>55</sup> It must also take into account any amount that has been recovered in civil proceedings.
- 3.5 A direction cannot be made in respect of any injury or loss for which statutory compensation has been paid by the Victims' Compensation Tribunal, discussed below. A person is not prevented from bringing civil proceedings in respect of injury or loss that was the basis of a direction for compensation, and damages awarded as a consequence of the civil proceedings must be assessed without regard to the direction.
- 3.6 However, the court cannot enter judgment in respect of any part of the assessed damages that have already been paid under the direction for compensation, and, except with the leave of the court, judgment must not be enforced in respect of the amount of damages that are equivalent to the sum of the amounts that have not been paid under the direction for compensation.

### Victims' Assistance Scheme

- 3.7 The VSR Act also provides for a state-funded Victims' Assistance Scheme. Victims of an "act of violence" can apply for lump sum injury compensation from the Compensation Fund Corporation ("the Corporation") which administers a Victims Compensation Fund.<sup>56</sup> There are three categories of victim. A "primary victim" is a person who suffers injury or dies as a result of an act of violence. A "secondary victim" is a person who suffers injury as a result of witnessing such an act or, in the case of a parent or guardian of a child who is injured or killed as a result of the act of violence, becoming aware of the act. A "family victim" is an immediate family member of a person who dies as a result of an act.
- 3.8 Applications for compensation are made to the Corporation and are determined on the papers by compensation assessors. There are rights of appeal to the Victims' Compensation Tribunal and on a point of law to the District Court.
- 3.9 A victim is compensated for a "compensable injury". The compensable injuries and the standard payment that is made in respect of each type of injury are listed in the First Schedule to the VSR Act. Compensation is payable for financial loss, that is, actual expenses, loss of earnings and, in the case of a primary victim, loss of personal effects and "prescribed expenses".<sup>57</sup> In addition, a victim may apply for payment for approved counselling services and interim compensation for funeral expenses in situations of "severe financial hardship".

55 Note that the court can have regard to any "such matters as it considers relevant". This may include an offender's means.

56 An "act of violence" means an act or series of related acts, whether committed by one or more persons: (a) that has apparently occurred in the course of committing an offence; (b) that has involved conduct against one or more persons; and, (c) that has resulted in injury or death to one or more of those persons. See Victims Support and Rehabilitation Act 1996 (NSW), s 5.

57 Note that loss of earnings is calculated after 26 weeks of incapacity. The total amount for prescribed expenses must be more than AUS\$200 and cannot exceed AUS\$1,500, or such other amount as set down in the regulations.

Compensation for mental injury, which requires proof of a psychological or psychiatric disorder, is also available for victims of violent crime when it is “severely disabling”; when it is “moderately disabling”, mental injury can only be compensated when it is the result of an armed robbery, abduction, or kidnapping.

- 3.10 The maximum compensation payable for a single act of violence is AUS\$50,000 and the minimum threshold that needs to be reached before any compensation is payable is AUS\$7,500.
- 3.11 When determining whether or not to make an award of statutory compensation or the amount of that award, the compensation assessor must have regard to a number of factors, including any contribution of the victim to the offence or the injury or death, any failure to mitigate the extent of the injury, whether the matter was reported, and whether assistance was given to the police.
- 3.12 A victim is not eligible for compensation from the Scheme if he or she has received court-ordered compensation. In addition, if the victim has received payment for the injury from other sources, such as insurance policies or civil damages awards, these may be deducted from any compensation assessed as payable.

### Civil recovery

- 3.13 The VSR Act also establishes a civil recovery scheme for reimbursements to the Victims’ Compensation Fund by convicted offenders whose victims have received compensation from the Fund. The Director of the Fund can issue a provisional restitution order against an offender or a person to whom an offender’s property has been transferred to avoid liability. Offenders have 28 days within which to object, in which event the Tribunal will determine the matter. If there is no objection, the Tribunal confirms the order. The Director also has power to enter into arrangements with the offenders for the payment of restitution.

### Levy

- 3.14 Part 5 of the VSR Act provides for a levy to be imposed on offenders convicted of imprisonable offences. The levy is paid to the Fund and is either AUS\$30 or AUS\$70 depending on how the offence is tried. The levy is additional to any other pecuniary penalty and its payment by the offender takes priority over any other pecuniary penalty, including compensation orders. The levy can only be waived if the offender is less than 18 years of age.

### VICTORIA, AUSTRALIA

- 3.15 In Victoria, victims of crime may be compensated through compensation orders made against offenders under the Sentencing Act 1991 and state-funded compensation for injuries resulting from violent offences under a scheme established by the Victims of Crime Assistance Act 1996 (“VCA Act”).

### Court-ordered compensation

- 3.16 Under Victoria’s Sentencing Act, compensation orders against offenders can be made for (a) pain and suffering and related expenses, or (b) the loss, destruction or damage of property, suffered by a victim as a direct result of an offence.



The victim must make an application for a compensation order for pain and suffering within 12 months, and for property loss and damage “as soon as practicable”, after the offender is found guilty or convicted.

- 3.17 In determining whether to make a compensation order and its amount, the court can have regard to any evidence presented by the victim and the offender, including the victim’s victim impact statement. Any person who appears to give evidence may be subject to cross-examination and re-examination. In addition, the financial circumstances of the offender and the effect of an order on the offender may be taken into account by the court when determining the amount and method of payment of the order.
- 3.18 The amount of a compensation order for pain and suffering and incurred expenses must be reduced by any amount awarded to the victim under the Victims of Crime Assistance Tribunal in relation to the same matter. However, a compensation order does not affect the right of the person to bring a claim for damages, or be indemnified against any loss, destruction or damage, to the extent that the loss has not been covered by the compensation order.

### Victims of Crime Assistance Tribunal

- 3.19 As in New South Wales, the VCA Act 1996 establishes three categories of victim who can apply to the state-funded Victims of Crime Assistance Tribunal for “financial assistance.” A “primary victim” is a person who suffers injury as a direct result of an “act of violence”.<sup>58</sup> A “secondary victim” is a person who suffers injury as a result of witnessing the act of violence, or is the parent or guardian of the primary victim of the act and is injured as a result of subsequently becoming aware of the act. A “related victim” is an immediate family member or dependant of a person who dies as a result of an act of violence.
- 3.20 A victim can receive assistance for physical bodily harm, mental illness or disorder, and pregnancy. An award may be paid as a lump sum and/or in instalments. Interim awards may also be made when considered appropriate by the Tribunal.
- 3.21 The type of loss for which assistance can be awarded and the amounts that may be awarded depend on the type of victim. A primary victim can receive financial assistance for expenses for counselling services, medical expenses, loss of earnings up to AUS\$20,000, and expenses incurred through loss of or damage to clothing worn at the time of the commission of the crime. Loss of earnings can be compensated for up to two years. The maximum amount of compensation payable is AUS\$60,000, plus any “special financial assistance”. Special financial assistance is available if the victim suffered a “significant adverse effect”

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58 A “primary victim” is also a person who suffers injury or death as a result of involvement in law enforcement activities. An “act of violence” is a criminal act, or a series of related criminal acts, which has occurred in the state of Victoria, and has directly resulted in injury or death to one or more persons. A “criminal act” means inter alia an act or omission constituting a “relevant offence”. A “relevant offence” is an offence punishable on conviction by imprisonment that involves an assault on, or injury or threat of injury to, a person, a sexual offence, offences of stalking, kidnapping or child stealing, or an offence of conspiracy to commit, incitement to commitment, or attempting to commit any of these offences. See Victims of Crime Assistance Act 1996 (Vic) [VCA Act], ss 3(1), 7.

as a direct result of certain offences.<sup>59</sup> The amounts that may be awarded for special financial assistance depend on the act of violence that resulted in the injury and the severity of the effect or injury suffered by the victim.<sup>60</sup>

- 3.22 Secondary and related victims are eligible for financial assistance on a more restricted basis to a maximum of AUS\$50,000, with loss of earnings being available only in exceptional cases. All three categories of victim may also be awarded assistance to help facilitate recovery in exceptional circumstances and financial assistance may be paid to a person who incurred funeral expenses as a direct result of the death of the primary victim.
- 3.23 When determining whether to make an award, or the amount of an award, the Tribunal must have regard to a number of factors, including the character and conduct of the victim and any contribution of the applicant to the offence or injury.<sup>61</sup>
- 3.24 If the Tribunal is satisfied that applicant did not report the act of violence to the police in a reasonable time, or failed to provide reasonable assistance to the investigation or the arrest or prosecution of the alleged offender, it must refuse to make an award of assistance unless “special circumstances brought about that result.”
- 3.25 The Tribunal must take into account any other payments the victim has received in relation to the injury, including insurance payments, damages or other compensation. In addition, the victim can assign the right to pursue civil remedies to the state. If the victim does successfully pursue civil or other remedies, he or she may be required to refund the amount of compensation paid.

### Civil recovery

- 3.26 Where a person is found guilty of a “relevant offence” and the Victims of Crime Assistance Tribunal has made an award for financial assistance, a court can order the offender to pay to the state all or part of the cost of that award. The offender must be given an opportunity to be heard on his or her financial circumstances.

### ONTARIO, CANADA

- 3.27 In Ontario, compensation for victims of crime is provided through restitution orders (the equivalent of the sentence of reparation in New Zealand), which are provided for under the Canadian Criminal Code. As an example of provincial legislation, state-funded compensation is also provided under Ontario’s Compensation for Victims of Crime Act 1990 (“CVC Act”).

<sup>59</sup> A “significant adverse effect” includes grief, distress, trauma or injury, see VCA Act, s 3.

<sup>60</sup> There are four categories of acts of violence for the purpose of assessing special financial assistance. The maximum amount payable for a category A act of violence is AUS\$10,000 and the maximum amount payable for a category D act of violence is AUS\$650. Category A acts of violence include offences that involve the sexual penetration of a person and attempted murder. Category D acts of violence include threat of injury, assault against the person, attempted assault or the deprivation of liberty of a person. Note that “special financial assistance” was included in the VCA Act in 2000 in order to reinstate compensation for pain and suffering.

<sup>61</sup> In addition, there are a number of considerations pertaining to awards for related victims: (a) any obligations owed to the applicant and any other related victims by the deceased primary victim; (b) the financial resources and needs of the applicant and any other related victim applicants; (c) the relationship between the related victim and the deceased primary victim.

### Court-ordered compensation

- 3.28 The Canadian Criminal Code establishes that courts in Canada, including Ontario, can make restitution orders at the time of sentencing an offender. Such orders are made on application by the prosecutor, or on the court's own motion, and can require an offender to make restitution to the victim to cover the victim's monetary losses or damage to property caused by the commission of the crime.
- 3.29 A judge must consider a range of factors in determining whether to make a restitution order, including the circumstances of the offender and his or her ability to pay an order. An order for restitution takes priority over an order for forfeiture in respect of the same property or a fine where it appears that the offender would not have the means to pay both the restitution order and the fine. A civil remedy is not affected by the making of an order for restitution for the same act or omission.

### Criminal Injuries Compensation Board

- 3.30 Under the CVC Act, Ontario's Criminal Injuries Compensation Board can make compensation orders for the benefit of persons who suffer injury or death as a result of violent crime or involvement in law enforcement activities.<sup>62</sup> Compensation orders can also be made in respect of persons who were responsible for the victim and dependants of a deceased victim.
- 3.31 Compensation may be awarded for: (a) expenses incurred or to be incurred as a result of the victim's injury or death; (b) loss of earnings; (c) pecuniary loss incurred by dependants as a result of the victim's death; (d) pain and suffering; (e) support of a child born as a result of rape; (f) other pecuniary loss reasonably incurred. Additional compensation can be awarded to people who incurred injury while involved in law enforcement activities. The Board may also award interim payments for support, medical expenses and funeral expenses.
- 3.32 The maximum lump sum payment is CAN\$25,000 per victim and the maximum payment in instalments is CAN\$1,000 per month. For one incident, a total award for all victims cannot exceed CAN\$150,000 if it is in the form of lump sum payments, and CAN\$365,000 if it is paid by instalments.<sup>63</sup>
- 3.33 In determining whether to make an order for compensation and the amount of the order, the Board must consider behaviour of the victim that may have directly or indirectly contributed to his or her injury or death. The Board can refuse to grant compensation, or it may reduce the amount of compensation, if satisfied that the applicant failed to report the offence promptly to, or refused reasonable co-operation with, the police.

62 Compensable injuries include injuries resulting from commission of crimes of violence that are offences under the Criminal Code including poisoning, arson, criminal negligence and an offence under section 86 of the Canadian Criminal Code, but does not include an offence involving the use or operation of a motor vehicle other than assault by means of a motor vehicle. See Compensation for Victims of Crime Act RSO 1990 C-24 (Ont) [CVC Act], s 5(a).

63 Note that these limits do not apply in relation to injury or death incurred in the course of law enforcement efforts. See CVC Act, s 19(5).

- 3.34 Applications for a compensation order are heard in public unless a public hearing would either prejudice criminal proceedings against the offender, or be contrary to the interests of a victim, or the dependants of a victim, of an alleged sexual offence or child abuse. Where the claim is based on an act or omission that has formed the basis of a criminal conviction, the conviction is conclusive evidence that the act or omission occurred. Decisions of the Board are final, subject to a right of appeal on any question of law to the Divisional Court.
- 3.35 The availability of compensation does not affect the right of a victim to pursue civil proceedings but the right to bring proceedings is subrogated to the Board which is entitled to be reimbursed from any award of damages.

### Levy

- 3.36 Under Ontario's Provincial Offences Act 1990, if a person is convicted of an offence and a fine is payable, that person is also liable to pay a surcharge.<sup>64</sup> The amount of the surcharge is determined on the basis of the amount of the fine payable.<sup>65</sup> The payment of the fine takes precedence over the payment of the surcharge.
- 3.37 The surcharge is paid into the Consolidated Revenue Fund and credited to the Victims' Justice Fund account. The Victims' Justice Fund supports programmes that provide assistance to victims and makes grants to community agencies assisting victims.

### UNITED KINGDOM

- 3.38 In the United Kingdom, the Powers of the Criminal Court (Sentencing) Act 2000 provides for the making of compensation orders against convicted offenders. In addition, there is the state-funded Criminal Injuries Compensation Scheme, provided by the Criminal Injuries Compensation Act 1995. The Home Secretary also has power to make grants to assist victims of crime pursuant to the Domestic Violence, Crime and Victims Act 2004.

### Court-ordered reparation

- 3.39 During sentencing, a court can order an offender to compensate a victim of the offence for any personal injury, loss or damage resulting from the offence, or to make payments for funeral expenses or bereavement in respect of a death resulting from the offence.
- 3.40 In determining whether to make a compensation order, and in determining the amount of an order, the court must have regard to the means of the offender "so far as they appear or are known to the court." The court must also determine the amount of a compensation order having regard to "any evidence and to any representations" made by or on behalf of the offender or the prosecutor. Where the offender has insufficient means to pay both the compensation order

64 Note that Canadian federal law also provides for the imposition of a victims' surcharge. See Criminal Code, RS C 1985 C-46, s 737.

65 For example, if the amount of the fine is up to CAN\$50, the surcharge is CAN\$10, if the amount of the fine is between CAN\$201 – 250, the surcharge is CAN\$50, and if the amount of the fine is over CAN\$1000, the surcharge is 25 per cent of the actual fine. See Victim Fine Surcharges Reg. 161/00 (Ont).

and a fine, the compensation order takes priority. When an order for compensation is made by a magistrates' court, the maximum amount of the order allowable is £5,000.

- 3.41 The making of a compensation order does not prevent the victim from bringing a claim for civil damages. However, a plaintiff can only receive an amount of damages that is the difference between the actual damages and the amount of the compensation award, or a sum equal to the amount of the compensation award that the plaintiff fails to recover.

### Criminal Injuries Compensation Scheme

- 3.42 Through the Criminal Injuries Compensation Scheme, state-funded compensation is payable by the Criminal Injuries Compensation Authority to a victim who suffers "criminal injury" or death caused by a "crime of violence" (including arson, fire-raising or an act of poisoning), trespass on a railway, or as a result of involvement in law enforcement activities. Compensation can also be paid to a "qualifying claimant" if the victim has died.
- 3.43 A person can be compensated for physical and mental injury, but compensation cannot be awarded for mental injury resulting from physical injury or for injury arising from a sexual offence unless specific circumstances existed at the time of the injury.<sup>66</sup> Compensation payments are usually paid in a lump sum. Interim payments can be made as the claims officer considers appropriate.
- 3.44 The following types of compensation are payable by the Authority to a maximum amount of £500,000:
- The "standard amount" of lump sum compensation based on the type of injury sustained and determined by the Tariff Schedule, with a maximum payment of £250,000 and a minimum of £1,000.
  - Compensation for loss of earnings where the applicant has lost earnings or earning capacity for longer than 28 weeks, compensable from the 29<sup>th</sup> week of incapacity.
  - Compensation for "special expenses" where the applicant has lost earnings or earning capacity for longer than 28 weeks or is incapacitated to a similar extent. Special expenses include loss of or damage to certain property belonging to the applicant, certain medical and care costs, and other specified costs.
- 3.45 A claims officer may withhold or reduce an award if the applicant failed to: (a) take, without delay, all reasonable steps to inform the police, or other appropriate body, of the circumstances giving rise to the injury; (b) co-operate with the police in attempting to bring the alleged offender to justice; or (c) reasonably assist the Authority in connection with his or her application.

66 The circumstances that must have existed are that the applicant: (a) was put in reasonable fear of immediate physical harm to his own person; (b) had a close relationship of love and affection with another person at the time when that person sustained the physical and/or mental injury, the relationship subsists and the applicant either witnessed and was present when the other person sustained the injury, or was closely involved in its immediate aftermath; (c) was the non-consenting victim of a sexual offence; or, (d) being a person employed in the business of a railway, either witnessed and was present on the occasion when another person sustained physical injury (including fatal) directly attributable to an offence of trespass on a railway, or was closely involved in its immediate aftermath. See Criminal Injuries Compensation Scheme 2001 (UK), para 9.



The applicant's conduct before, during or after the incident that gave rise to the application, and his or her character demonstrated through criminal convictions or otherwise, are also taken into account.

- 3.46 Assessments of compensation are made on the papers by a claims officer. There is a right to review by a more senior claims officer and a right of appeal to an adjudication panel.
- 3.47 Awards payable by the Scheme are reduced by the amount of any social security benefits or insurance payments that compensate for the same injury. They are also subject to reduction by the amount of any civil claim or compensation payment made by the criminal court. A person who subsequently receives compensation or damages after a payment of compensation by the Authority is required to refund it.
- 3.48 The Domestic Violence, Crime and Victims Act 2004 authorises the Home Secretary to make regulations allowing for the cost of payments made by the Criminal Injuries Compensation Authority to be recovered from offenders by issue of a recovery notice. The Act also gives the Home Secretary power to make grants to assist victims. As a result of this provision, a fund has been established which makes grants to victims' organisations for the provision of victims' services.

### Levy

- 3.49 The Domestic Violence, Crime and Victims Act 2004 also imposes a duty on the courts to order the payment of a surcharge on conviction of one or more offenders in the situation where the court imposes a fine, or a fine and a compensation order.
- 3.50 The amount of the surcharge is set at the flat rate of £15.<sup>67</sup> Where the court decides to make a compensation order, and it considers that the offender does not have the means to pay both the surcharge and compensation, the court must reduce the amount of the surcharge, to nil, if necessary. However, if the offender does not have the means to pay both the fine and the surcharge, then the fine must be reduced to enable the offender to pay the surcharge.
- 3.51 The surcharge was established because of support for a proposal to raise money for services for victims and witnesses. The money raised goes into the Consolidated Fund, but is ring-fenced to ensure that the money is used to support services for victims and witnesses.

<sup>67</sup> Criminal Justice Act 2003 (Surcharge) Order 2007 (UK).



NEW ZEALAND'S  
INTERNATIONAL  
OBLIGATIONS

3.52 There are no international legal instruments that create binding obligations for New Zealand in relation to the compensation of victims of crime.<sup>68</sup>

3.53 There are, however, a number of “soft law” declaratory instruments that aim to focus international attention on the situation of victims of crime. In particular, and with respect to victims’ compensation, the United Nations “Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power” recommends that offenders should, where appropriate, make fair restitution to victims, their families or dependants, and calls upon states to consider compensation as an available sentencing option in criminal cases.<sup>69</sup> It suggests that when compensation is not fully available from the offender, states should endeavour to provide financial compensation to victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes, and to the family of the victim, in particular, dependants of persons who have died or become physically or mentally incapacitated as a result of the victimisation.<sup>70</sup> In this respect, the Declaration encourages the establishment, strengthening and expansion of national funds for compensation to victims.<sup>71</sup>

COMPARISON  
WITH NEW  
ZEALAND

3.54 All jurisdictions provide reparative mechanisms as part of, or as an adjunct to, sentencing, state-funded compensation for personal injury, and the possibility to bring civil claims. The systems in New South Wales and Victoria differ from the systems in New Zealand in that compensation orders are not necessarily made at the time of sentencing. We understand that, in Victoria, generally compensation orders are dealt with, if at all, in a separate and later hearing with the consequent extra cost and inconvenience to both victim and offender. In this respect the New Zealand system of dealing with reparation at the time of sentencing seems preferable.

3.55 The approaches taken to compensating victims of crime in New Zealand and the four other jurisdictions we examined are broadly similar, in that state funding is available for physical injury while general property loss or damage is only

68 Note that the United Nations has addressed the issue of victims’ rights to compensation in the context of violations of international human rights and humanitarian law. See, for example, Basic Principles and Guidelines on the Right to a Remedy and Reparations for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (21 March 2006) A/RES/60/147. With regard to international crimes, the Rome Statute of the International Criminal Court provides for reparations to be paid to victims and establishes a Trust Fund for that purpose, see arts 75 and 79. In addition, there are general obligations on states to establish procedures to provide access to compensation and restitution for victims with regard to specific international crimes. See United Nations Convention Against Transnational Organized Crime (15 November 2000) A/RES/55/25 and Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the Convention Against Transnational Organised Crime (15 November 2000) A/RES/55/25.

69 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (29 November 1985) A/RES/40/34, arts 8 and 9 [UN Declaration of Basic Principles]. See also United Nations Office for Drug Control and Crime Prevention “Handbook on Justice for Victims – On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power” (1999) 43 – 49 [“UNODCCP Handbook”]; United Nations Office for Drug Control and Crime Prevention “Guide for Policy Makers – On the Implementation of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power” (1999) 24 – 27 [“UNODCCP Guide”].

70 UN Declaration of Basic Principles, above n 69, art 12.

71 UN Declaration of Basic Principles, above n 69, art 13.

compensated through payment by the offender. There are a number of differences, most particularly in respect of compensation for mental injury and emotional harm.

- 3.56 New Zealand’s approach is consistent with international best practice as set out, for example, in the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Furthermore, the accident compensation scheme, as a means of providing state-funded compensation for victims of crime who suffer personal injury, is “often cited as an example for other States to follow.”<sup>72</sup>
- 3.57 The similarities and differences in approach to state-funded compensation (as distinct from compensation to the victim from the offender) can be seen in the table that follows.

72 UNODCCP Guide, above n 69, 44; UNODCCP Guide, above n 69, 26 – 27.

	NEW ZEALAND	NSW	VICTORIA	ONTARIO	UNITED KINGDOM
Statutory Maximum for Compensation Overall	No	AUS\$50,000	AUS\$60,000 for a primary victim, plus an additional amount up to AUS\$10,000, if eligible for "special financial assistance"	CAN\$25,000 lump sum or CAN\$1,000 in instalments	£500,000
Loss of Earnings	Yes, 80 per cent of earnings to a maximum of \$1,341.31 per week until eligible for national superannuation. Payable after first week of incapacity	Yes, payable after 26 weeks of incapacity, and within maximum amount of compensation payable	Yes, payable for two years to a maximum of AUS\$20,000	Yes, within maximum amount of compensation payable	Yes, after 28 weeks of incapacity and within the maximum amount of compensation payable
Lump Sum Payments for Physical Impairment	Yes, based on degree of impairment to a maximum \$100,000	Yes, based on type of injury to a maximum AUS\$50,000	No	No	Yes, based on type of injury to maximum £250,000
Pain and Suffering	No	No	Yes, as "special financial assistance", based on category of criminal act and serious of injury suffered	Yes	No
Mental Injury Alone	Yes, if results from a Schedule 3 offence or is "work-related mental injury"	Yes, but limited to injury resulting from armed robbery, abduction or kidnapping where injury is only "moderately disabling"	Yes	Yes	Yes, in limited and defined circumstances
Expenses	Yes	Yes	No	Yes	"Special expenses" available after 28 weeks of incapacity
Rehabilitation or Vocational Assistance	Yes, wide range of benefits, e.g. home help, home modifications, aids and appliances, etc	No	No	No	No

	NEW ZEALAND	NSW	VICTORIA	ONTARIO	UNITED KINGDOM
Fatal Injury	Funeral expenses Survivors' grant (\$4,702.79 and \$2,351.40 for spouse and dependants respectively) Weekly compensation based on a percentage of lost earnings Childcare payments	Compensation for injury and financial loss to a maximum of AUS\$50,000	Counselling, medical expenses Funeral expenses Distress Loss of money that is likely to have been received from the deceased for up to two years Total for all family members/dependants AUS\$100,000 and no more than AUS\$50,000 to any one victim	Reasonably-incurred expenses Funeral expenses Pecuniary loss incurred by dependants Pain and suffering	Standard amount of compensation Loss of parent compensation "Dependency" compensation Funeral expenses
Property Damage	No	Loss of personal effects only	Loss or damage to clothing worn at time of commission of offence	No	Only as part of a special expense payable after 28 weeks of incapacity

### Physical injury

- 3.58 All jurisdictions compensate victims for physical injury that they suffer as a result of a commission of a crime.<sup>73</sup> New Zealand is unique in providing personal injury compensation through a comprehensive, no-fault accident compensation scheme, which is designed to provide fair and equitable compensation to all people who suffer personal injury by accident, including victims of crime. The conduct and character of the victim have no bearing on eligibility for cover.
- 3.59 In the other four jurisdictions, compensation for physical injury is only provided to victims of violent crime. It is provided through criminal injuries compensation schemes. The character and behaviour of the victim are relevant to any award.
- 3.60 There are two different methods across the jurisdictions for assessing compensation for physical injury. It is compensated either on the basis of standard payments, which are set according to the type of injury suffered or degree of impairment (New Zealand, New South Wales, United Kingdom) or through payment of expenses incurred as a result of the injury and awards for pain and suffering (Victoria, Ontario).
- 3.61 New Zealand provides further types of compensation in the form of cover that is aimed at rehabilitating the claimant. This strong focus on assisting the person through to complete rehabilitation is not a feature of any of the criminal injuries compensation tribunals.

<sup>73</sup> Note that, however, in Ontario, there is no distinction made between the types of victim and possible awards. In that regard, it appears that the primary victim and a "person responsible for the support of the victim" are eligible for the same compensation. The victim's dependents become eligible for the same compensation if the victim dies.

### Mental injury

- 3.62 In all of the jurisdictions, compensation for mental injury, which is broadly understood as an injury that constitutes a diagnosed psychological or psychiatric condition, is provided. However, the ways in which this is done differ.
- 3.63 The primary distinction is that in New Zealand and the United Kingdom, mental injury is not compensated in the absence of physical injury, except in specific circumstances. In New Zealand, for example, if mental injury is to be compensated, it must have resulted from the commission of a Schedule 3 offence.<sup>74</sup> Where mental injury results from physical injury, the full range of compensation is available.
- 3.64 In New South Wales, Victoria and Ontario, mental injury is considered one type of injury for the purposes of compensation. As such, there is no requirement that the mental injury must have resulted from the physical injury, although it must have been the result of a criminal offence.<sup>75</sup> In New South Wales, however, compensation for mental injury that is “moderately disabling” is only available when the injury has resulted from the commission of an armed robbery, abduction, or kidnapping. Where it is “severely disabling” there is no such restriction.
- 3.65 Furthermore, unlike in New Zealand, in New South Wales and Victoria, compensation for medical and counselling expenses is payable to persons who suffered an injury as a result of witnessing, or alternatively, in Victoria, becoming aware of, the crime that led to the injury or death of the primary victim.<sup>76</sup>

### Pain and suffering or emotional harm

- 3.66 There is no state-funded compensation specifically for pain and suffering or emotional harm that does not reach the threshold of mental injury in New Zealand. However, the lump sum payments for incapacity under the accident compensation scheme incorporate pain and suffering. Similarly, in New South Wales and the United Kingdom, there are lump sum payments based on degree of impairment rather than payments specifically for pain and suffering. In contrast, Victoria and Ontario compensate for pain and suffering but do not have lump sum payments based on degree of impairment.

74 Note that, more broadly, cover for mental injury is now available for “workplace mental injury”: Injury Prevention, Rehabilitation, and Compensation Act 2001, s 21B. Section 21B came into force on 1 October 2008.

75 In New South Wales, the injury must have resulted from an “act of violence” that occurred in the course of committing an offence. In Victoria, a “relevant offence” is one punishable on conviction by imprisonment and includes assault, sexual offences, stalking, kidnapping, and child stealing. In Ontario, compensation is available when an offence under the Canadian Criminal Code was committed.

76 Note that in Victoria, “related victims” may also receive compensation for expenses incurred for counselling services.

- 3.67 However, in all jurisdictions, the courts can order the offender to compensate the victim for emotional harm or pain and suffering. Like in New Zealand, in all the overseas jurisdictions, the ability of the offender to pay is a relevant consideration when the court is making such an order.<sup>77</sup> In addition, amounts that may be ordered are capped in New South Wales.

### Property loss or damage

- 3.68 No jurisdictions provide state-funded compensation for loss of or damage to property, with three minor exceptions. In Victoria and New South Wales, the criminal injuries compensation tribunals may compensate a victim for loss of or damage to clothing, or personal effects, worn at the time of the commission of the offence that resulted in the harm suffered. In the United Kingdom, if a victim has lost earnings or earning capacity for longer than 28 weeks, he or she may receive compensation for “special expenses”, which include the loss of or damage to property or equipment as a direct result of the injury that the victim relied on as a physical aid. Examples of physical aids are spectacles and dentures.
- 3.69 As with emotional harm or pain and suffering, courts in all jurisdictions can order the offender to compensate a victim for any property loss or damage resulting from an offence.

### Consequential loss

- 3.70 All jurisdictions provide for state-funded compensation for loss of earnings by a primary victim. In the overseas jurisdictions, earnings-related compensation forms part of the maximum payment that can be made to a victim. In contrast, under the IPRC Act, claimants in New Zealand can receive 80 per cent of their weekly income in addition to other forms of cover. The payment of weekly compensation is not subject to time limitations, and may continue until the claimant becomes eligible for superannuation. A deceased’s partner or spouse may also receive weekly compensation. Earnings-related compensation is also payable to a secondary victim in Victoria in exceptional circumstances, although it forms part of the victim’s statutory compensation limit.
- 3.71 All jurisdictions provide for state payment of funeral expenses. Furthermore, in New Zealand, where the victim dies, family members and/or dependants can receive childcare payments through the accident compensation scheme. In the United Kingdom, where the victim has died, dependants and close family members may receive compensation for “dependency”. A person under the age of 18 may also be compensated for the loss of his or her parent. In Victoria and Ontario, family members may receive compensation for financial loss resulting from the death of the primary victim.
- 3.72 In New Zealand, “consequential loss” as a ground of reparation is very broadly construed; a court can order an offender to compensate the victim for any kind of indirect loss. An offender may also be ordered to compensate a victim for indirect loss or damage in New South Wales, Ontario, and the United Kingdom,

<sup>77</sup> Note that a possible exception to this is in New South Wales, where offenders’ means is not a specific consideration.



although limits on the amounts of such orders exist in New South Wales and the United Kingdom. In Victoria, an offender cannot be ordered to compensate the victim for indirect loss or damage; compensation may only be ordered with respect to expenses, loss or damage incurred as a direct result of the offence.

- 3.73 In addition, although not “compensation”, it is worth noting that under the accident compensation scheme, primary victims can receive state-funded assistance to help in their recovery in a wide range of areas, including the payment for services related to rehabilitation (such as accommodation and transport necessary to enable treatment), vocational assistance, attendant care, childcare, home help, modifications to the victim’s home, assistance with personal care, and “training for independence”. In Victoria, some financial assistance can be provided to assist primary, secondary, and related victims with recovery, although this assistance must come within the statutory maximum amounts available for each type of victim. Assistance has been provided for, for example, removal expenses, home security, and remedial tutoring.

### Effect on civil claims

- 3.74 In New Zealand, a victim cannot bring proceedings in common law for damages for personal injury that is covered under the accident compensation scheme. In the other jurisdictions, there is no statutory bar to prevent a victim bringing civil claims for personal injury. However, criminal injuries compensation tribunal awards must be taken into account when determining amounts of damages. In effect, therefore, all jurisdictions have provisions that are designed to prevent double recovery.

### Conclusion

- 3.75 It is difficult to draw precise comparisons between the approaches taken to compensation of victims in New Zealand and the other jurisdictions we examined because of the differences in structure and focus. In broad terms, however, there are a number of areas of comparison that are useful to identify.
- 3.76 In New Zealand, overall state-funded compensation is not capped, which is a feature of all the systems overseas. As a result, crime victims who suffer permanent or long-term injury are likely to receive considerably more state assistance than they would from the compensation schemes overseas. In cases of less serious physical injury, the position is less clear-cut and dependent on the circumstances. For example, the accident compensation scheme has limited provision for mental injury that did not result from the physical injury suffered. Consequently, some crime victims and witnesses who suffer mental injury alone may fare better under the compensation schemes in Australia or Ontario than they would in New Zealand.
- 3.77 New Zealand unlike other jurisdictions places a significant emphasis on the rehabilitation of the victim. The accident compensation scheme is a forward looking scheme that endeavours to assist victims to full recovery. In our view this is a particular strength of the New Zealand system.

# Chapter 4

## The Issues and Options

INTRODUCTION 4.1 Although the sentence of reparation and the accident compensation scheme taken together are intended to provide fairly comprehensive cover for all of a victim's losses, there are a number of features of the system that may be perceived by victims to be inadequate. The main areas that could give rise to concern are as follows:

- The IPRC Act provides cover for only 80 per cent of a victim's earnings to a maximum level of \$1,341.31 per week. A proportion of the victim's lost earnings will not be compensated. There is some uncertainty whether the law allows the shortfall between a victim's actual earnings and his or her accident compensation entitlement to be met by a reparation order. In *Davies v Police*, the Court of Appeal held that a reparation order can do so.<sup>78</sup> However, leave has been granted for an appeal to the Supreme Court on this question.<sup>79</sup>
- Victims may perceive there is inadequate provision under the IPRC Act for lump sum payments for physical injury. The focus of the Act is on rehabilitation and earnings-related compensation. While lump sum payments are available in cases of permanent impairment, the amount may be perceived as insufficient where a victim has suffered significant disability as a result of intentional wrongdoing.
- The provision for compensation for mental injury where there is no physical injury may also be perceived as too limited. Under the IPCR Act, there is compensation for mental injury suffered because of a physical injury, as a result of the commission of a Schedule 3 offence (essentially sexual offences), or that constitutes "work-related mental injury". Compensation for mental injury suffered by the victims of non-Schedule 3 offences can only be recovered through reparation or civil proceedings.
- There is only limited provision for the costs of counselling to be met other than through reparation orders. State-funded counselling is available only if there is "mental injury" cover under the IPCR Act or under the Counselling for Families of Homicide Victims scheme administered by Victim Support.

<sup>78</sup> *Davies v Police*, above n 21.

<sup>79</sup> *Davies v Police*, above n 25.

- The absence of lump sum payments for pain and suffering or emotional harm may also be perceived as unwarranted given the significant impact of crime on its victims.
- There is no state-funded compensation for property loss or damage. Accordingly, unless a victim is insured, he or she will be left to recover from offenders by way of reparation or civil proceedings.
- While reparation potentially fills some of the gaps in the accident compensation scheme, reparation is not always available. The offender may not be apprehended or prosecuted. Reparation may not be ordered or there may be only a partial award of reparation because the offender lacks the ability to pay. According to the Justice and Electoral Committee, for example, only 24 per cent of property offences and 11 per cent of violent offences resulted in awards of reparation in 2004.<sup>80</sup> In cases where there is no reparation, victims who suffer property loss or emotional harm that does not amount to “mental injury” covered by the IPCR Act will not be compensated.
- Where reparation is awarded, it is frequently paid by instalments and is often difficult to collect. For example, in the four years to June 2005, \$74.9 million reparation was ordered and, in the same period, only \$50.87 million was received, some of which was reparation ordered in previous years.<sup>81</sup> The ongoing existence of unpaid reparation can impact negatively on victims, not only because of its failure to provide any real reparation but also because it prolongs the involvement of the victim with the offender and with the crime itself.
- Civil remedies are available in cases where reparation is not ordered. However, these are likely to be of little or no utility to a victim because if reparation is unavailable there is also little real prospect of recovering damages. Moreover, the costs, risks and complexity of civil proceedings are significant disincentives to this form of action.
- The process for providing state-funded compensation to crime victims may also be seen as unsatisfactory because it forms part of the wider accident compensation scheme and is not specifically focused on victims of crime.
- Unlike in other jurisdictions, no levy is imposed on offenders in order to fund victims’ services.

**Q1** Are there any other issues that may be of concern to victims?

- 4.2 These areas of concern could be addressed through changes to the existing arrangements. Before discussing the various options for change, it is useful to recap on the possible rationales for doing so as this is relevant not only to the question of whether change should be made, but also to the extent of any such change.
- 4.3 As we outlined in Chapter 1, it is generally accepted that the state has an obligation, in civilised and compassionate societies, to meet the basic needs of its citizens where they are unable to meet those needs themselves. We agree. That is the very essence of our welfare system. But our task is

<sup>80</sup> Justice and Electoral Committee, above n 3, 32.

<sup>81</sup> Justice and Electoral Committee, above n 3, 33.

a narrower one: to consider the extent to which there should be an obligation to compensate victims, and where that obligation should fall. That requires a different approach, not based on general welfare considerations. In the first place, we noted in Chapter 1 that victims' compensation schemes cannot be justified on the basis of abstract notions about the social contract between state and citizen. Furthermore, while some initiatives may be able to be justified on a cost-benefit analysis, it is generally difficult to justify special treatment of crime victims on grounds of social utility. Accordingly, should any changes be considered desirable, they are likely to be justified primarily by the need to maintain public confidence in the justice system and their symbolic value as an expression of public sympathy to crime victims.

4.4 We consider the following options for reform on this basis:

- increasing entitlements for compensation for personal injury;
- extending eligibility for compensation for mental injury;
- the provision of state-funded trauma counselling;
- improving the mechanisms for recovering compensation from offenders;
- the provision of state-funded reparation;
- increased funding for and/or additional special purpose schemes;
- imposing an offender's levy.

#### INCREASING ENTITLEMENTS FOR PERSONAL INJURY

4.5 It would be possible to provide greater benefits to crime victims who suffer personal injury. This could be done by increasing the percentage of earnings-related compensation to which the crime victim would become entitled, by increasing the lump sum payments for impairment, and/or by introducing a payment for pain and suffering. Increased entitlements could be delivered in one of three ways: (i) the accident compensation scheme; (ii) a victims' compensation tribunal; (iii) a hybrid system.

4.6 As noted in paragraph 4.3, the only real argument in favour of singling out crime victims for special entitlements in this respect is essentially a symbolic one: that it expresses the sympathy and concern felt for them by the community. Whether or not this argument is accepted as valid (as to which, see above, paragraphs 1.31 – 1.34), increased entitlements for personal injury that were confined to crime victims would be difficult to justify and would be problematic in practice for four reasons.

4.7 First, unlike other accident victims, crime victims can obtain compensation through the sentence of reparation for injury or harm that is not otherwise covered. In addition, if the Court of Appeal decision in *Davies v Police* is correct, a crime victim is able to recover any shortfall in compensation provided through the accident compensation scheme, while other accident victims cannot. The availability of reparation is based on the view that, where the loss is not spread to the community as a whole on the grounds of social utility, it should instead be shifted to the offender. The special status of the crime victim as a person who has been wronged is already recognised by that loss-shifting structure. While it may often be an inefficacious structure, that does not in itself justify spreading the loss to the rest of the community.

- 4.8 Secondly, the accident compensation scheme is designed to reflect a balance between fair compensation and an affordable scheme. There is always room for debate about where the appropriate balance lies. However, increasing compensation awards for crime victims would need to be offset by reductions elsewhere in the scheme to avoid compromising its affordability. Alternatively, the increased compensation would have to be paid for by a greater injection of taxpayer funds, reducing the amounts available for other state-funded services.
- 4.9 Thirdly, increased entitlements specifically for crime victims would reintroduce the notion of fault in determining eligibility. As we note below, this would be more problematic if the increased entitlement were provided through a stand-alone tribunal rather than through the accident compensation scheme. However, it would potentially add to the victim's trauma regardless of the vehicle for the delivery of the additional compensation. In particular, there would need to be proof that a crime had taken place: either the offender would need to have been convicted or, where that had not occurred, it would need to be shown on the balance of probabilities that a crime had taken place. The focus would therefore be on the offender rather than the victim. The alleged offender, if known, would be entitled to be heard. This could revictimise the victim.
- 4.10 Finally, if the additional entitlements were to relate to pain and suffering (which was seen by the Justice and Electoral Committee as a positive feature of the Victorian regime<sup>82</sup>), there would be practical difficulties in determining the quantum of fair compensation. Providing a pain and suffering award would involve some duplication with the lump sum impairment payments under the accident compensation scheme; the latter is designed to compensate "dignitary" loss that incorporates associated pain and suffering. More importantly, it is difficult to administer payments for pain and suffering in a fair and consistent manner because loss of this kind is very hard to quantify. As Hon Bill Birch observed when announcing the abandonment of the separate payment for "pain and suffering and loss of enjoyment of life" that had existed under the earlier scheme:<sup>83</sup>

The Government has decided that compensation for pain and suffering and loss of enjoyment of life will be discontinued. Besides being virtually unique to New Zealand's statutory accident compensation scheme, it is very difficult to administer in a fair and consistent manner, reflecting the essential problem of assessing monetary compensation for non-economic loss. This form of lump sum compensation, due to substantial increases in the average awards and the increases in claims, is also contributing to the severe financial pressure the scheme is facing.

82 Justice and Electoral Committee, above n 3, 34.

83 Hon Bill Birch "Accident Compensation – A Fairer Scheme" (Wellington, 1991) 50 – 51. See also page 51, where Hon Bill Birch cites an example of such an inequity:

[T]he Appeal Authority has awarded two sums of \$10,000 each plus one of \$6,000 and one of \$4,000 to an amateur sports person for injuries received while playing over several seasons – the logic of these awards being that the injuries impacted upon the claimant's enjoyment of life and, in particular, the enjoyment received from playing sport. By way of contrast, a tetraplegic who suffers one catastrophic injury receives only the maximum of \$10,000. The Working Party doubted Parliament ever intended such contrasting outcomes.



**Q2** Should crime victims receive greater entitlements to compensation for personal injury than other accident victims? Why? If so, how much more compensation is required and for what type of loss?

- 4.11 If it is considered that crime victims should have greater entitlements to compensation for personal injury, there are three ways in which those might be provided.

### Option 1: Enhanced entitlements under the accident compensation scheme

- 4.12 Crime victims could remain under the accident compensation scheme but be given greater entitlements than other accident victims.
- 4.13 The main advantage of this approach is that, although it would involve some additional administration costs as a result of running a separate regime within the accident compensation system, these are likely to be considerably less than establishing an entirely new and separate system for administering victims' compensation.
- 4.14 However, there are also some risks. First and foremost, this approach would undermine two of the fundamental principles on which the accident compensation scheme is based, namely, the principles of equity and no-fault. While there is already a degree of inequity within the scheme, particularly in relation to workplace injury, treating crime victims more favourably than other victims might be seen as unfair, particularly if the crime victim were to receive substantially more than an accident victim with comparable injuries. This could also result in other categories of victims seeking to be singled out for more favourable treatment. In other words, the creation of significant exceptions has the potential to undermine the overall scheme.
- 4.15 Secondly, the introduction of a fault element into the accident compensation scheme would mean that new systems would need to be established to enable the assessment of whether or not particular injuries were caused by crime and, therefore, give rise to extra entitlements. While that might be relatively straightforward in some cases, particularly if the offender had been convicted, in others it might require the assessment of complicated facts, the examination of witnesses, and findings of credibility. Inevitably, this would add to the overall costs and complexity of the scheme.

### Option 2: A criminal injuries compensation tribunal

- 4.16 It would be possible to remove crime victims' compensation from the umbrella of the accident compensation scheme and return it to the position that existed prior to 1975 of having a criminal injuries compensation tribunal. The tribunal could make comprehensive compensation awards on a basis that was different from, and more generous than, the benefits under the accident compensation scheme.
- 4.17 The main advantage of this approach is that it would enable crime victims to receive more generous compensation than other accident victims without undermining the fundamental principles of the accident compensation scheme.



- 4.18 Against that are a number of disadvantages. The approach would return crime victims to a fault-based system in respect of the total compensation for their injury. This would have significant disadvantages for crime victims. The victim would receive no compensation until such time as it had been established that a crime had taken place. Where the offender had been prosecuted, the victim would not be eligible for compensation unless and until the offender was convicted. This would inevitably result in significant delays before a victim would receive compensation. On the basis of the experience of criminal injuries compensation schemes overseas, it would also mean that the conduct of the victim would come under scrutiny and have a bearing on the amount of any compensation award.
- 4.19 The process for obtaining compensation would also be much more difficult for a crime victim under the tribunal system than under the accident compensation scheme. In this respect we disagree with the Justice and Electoral Committee, which stressed the advantages of the process provided by the Victims of Crime Assistance Tribunal in Victoria. In the Committee's view:<sup>84</sup>

The tribunal allows the victim to be central, and to be heard fully, in a formal non-adversarial process within the justice system. The tribunal members with whom we spoke told us that they considered this to be vital in addressing victims' needs. In New Zealand, victims are heard only as witnesses by the police and in Court. There is no formal non-adversarial setting where the victim can recount their experience and be recognised.

- 4.20 In our view, the benefits of an oral hearing are debatable. The argument by the Justice and Electoral Committee seems to be based on the misapprehension that the schemes overseas are not adversarial. However, the tribunals in Victoria and other jurisdictions bear many of the features of an adversarial process, such as cross-examination of the victim and offender. Natural justice requires that the offender be given an opportunity to be heard. Where the offender appears, the victim will be cross examined, which can revictimise the victim, although in practice not all offenders do appear. As a result of the detrimental effect of this process on the victim, when possible, Victoria's Victims of Crime Assistance Tribunal prefers to deal with matters on the papers. The Tribunal has noted that "many applicants prefer to have their applications dealt with without attending a hearing, and in straightforward applications this is possible."<sup>85</sup> Similarly the Ombudsman of Ontario, in recommending against oral hearings unless necessary, commented on "the misguided practice of the tribunal of requiring victims to tell their stories over and over again".<sup>86</sup>
- 4.21 If, as has been suggested, there are concerns about the lack of victim focus within the accident compensation scheme, these could be addressed in a much more straightforward and less expensive way through the proper training of staff and possibly "initiatives such as the establishment of 'formal victim focused units'", as recommended by the Justice and Electoral Committee.<sup>87</sup>

<sup>84</sup> Justice and Electoral Committee, above n 3, 41.

<sup>85</sup> Victims of Crime Assistance Tribunal (Vic) "Review of the Criminal Offences Victims Act 1995 and the Delivery of Services to Victims of Crime" (23 May 2008) 12.

<sup>86</sup> Ombudsman of Ontario *Report – Investigation into the Treatment of Victims by the Criminal Injuries Compensation Board – Adding Insult to Injury* (February 2007) 53 – 54.

<sup>87</sup> Justice and Electoral Committee, above n 3, 41.

- 4.22 Furthermore, establishing a criminal injuries compensation tribunal would raise complex issues about the interface between a stand-alone tribunal and the accident compensation system. For example, should a crime victim be able to choose to accept cover through the accident compensation scheme rather than through the tribunal process? Would the accident compensation scheme be available in the event of an unsuccessful application to the tribunal or if the benefits awarded by the tribunal were less than those provided through the accident compensation scheme, perhaps because of the view taken by the tribunal of the victim's conduct?
- 4.23 There are also issues of cost. The costs would be substantial. It would require a significant investment of resources to establish a new tribunal system and to administer it. The existence of two compensation regimes in New Zealand would also be likely to result in considerable duplication of resources.

### Option 3: A hybrid system

- 4.24 The third option would be to continue to administer crime victims' compensation for personal injury through the accident compensation scheme but provide additional compensation through a separate tribunal. This would address the difficulties described above about the delays in receiving compensation that arise with a criminal injuries compensation tribunal. It would also overcome some of the difficulties arising from the interface between an additional compensation mechanism and the accident compensation scheme. However, there are disadvantages with this proposal. A "top-up" tribunal would create two application processes, which would double the transaction costs for delivering compensation to victims. Furthermore, two systems for addressing the same injuries could result in different decisions regarding the nature and cause of the injuries, which would create considerable confusion and uncertainty.

Q3 Should any additional entitlements be administered by the accident compensation scheme, a stand-alone tribunal, or under a hybrid scheme?

Q4 Should improvements be made to the processes for delivering compensation to victims under the accident compensation scheme (see paragraph 4.21)? If so, what improvements could be made?

#### EXTENDING ELIGIBILITY FOR COMPENSATION FOR MENTAL INJURY

- 4.25 As we have already outlined, cover under the IPRC Act for mental injury is not generally available in the absence of physical injury. This is subject to exceptions in the case of Schedule 3 offences (essentially sexual offences) and "work-related mental injury". Victims of non-Schedule 3 offences who suffer mental injury without physical injury cannot get cover for that injury. This could be overcome by broadening the circumstances in which a person is eligible for cover for mental injury, including where it has been suffered as a result of any criminal act.
- 4.26 The United Kingdom takes a similar approach to that in New Zealand. However, some jurisdictions, such as Victoria, make little or no distinction between compensation available for mental or physical injury. In New South Wales, a distinction between mental injury and physical injury is drawn on the basis of the severity of the mental injury. Mental injury that is "moderately

disabling” can be compensated only if it has resulted from an offence of kidnapping, abduction or arson, whereas severe mental injury can be compensated if it results from any violent crime.

- 4.27 The work-related mental injury exception in the IPRC Act is new. Under this exception, compensation can be provided for mental injury caused by exposure to a sudden traumatic event in the workplace.<sup>88</sup> A person is eligible for work-related mental injury cover if the injury is caused by a single event that “could reasonably be expected to cause mental injury to people generally”. Work-related mental injury will be funded by an increase in the employers’ levy.<sup>89</sup> The reasons advanced for this exception were that the lack of cover for work-related mental injury represented a “gap” in a scheme where workers are otherwise covered for workplace injury and that New Zealand was out of step with other jurisdictions in this area.<sup>90</sup>
- 4.28 The provision of coverage for Schedule 3 offences and work-related mental injury runs counter to the basis of the accident compensation scheme, that all victims of equivalent injuries should receive compensation on grounds of social utility regardless of their cause. It also has the potential to create some serious anomalies. For example, if a bank teller suffers mental injury from being present during an armed robbery in the workplace, he or she will be compensated under the workplace injury exception. A customer who witnesses the same event will not. Similarly, a person who suffers mental injury as a result of an armed robbery at home or in the street is ineligible for compensation. However, there appear to be three related reasons for the current position.
- 4.29 First, there are questions of cost and affordability. We note that the option of extending cover under the Act for persons witnessing traumatic events was investigated during the policy development phase of the 2001 amendment to the accident compensation legislation. Based on the approach taken in British Columbia, the cost of such an extension of cover was estimated at \$15 million, although it was noted that there were other possible models.<sup>91</sup> It was rejected on the ground that it was unaffordable.<sup>92</sup>
- 4.30 Secondly, to qualify as a “mental injury”, the injury must be a “clinically significant dysfunction”. This high threshold is designed to ensure that the accident compensation scheme is not exposed to a multitude of claims for less

88 Injury Prevention, Rehabilitation, and Compensation Act 2001, s 21B.

89 Injury Prevention, Rehabilitation, and Compensation Amendment Bill (No 2), Explanatory Note, 22 – 23.

90 Cabinet Business Committee “Injury Prevention, Rehabilitation, and Compensation Act 2001: Proposal to Provide Cover for Mental Injury Caused by a Work-Related Traumatic Event” (6 July 2007) CBC (07) 131; Department of Labour *Report to the Transport and Industrial Relations Select Committee – The Injury Prevention, Rehabilitation, and Compensation Amendment Bill (No 2)* (May 2008) 16.

91 Ad Hoc Cabinet Committee on ACC Reforms “Policy Package for ACC Legislation” (17 May 2000) 6, Table 2.

92 Cabinet Business Committee, above n 90; Cabinet Minute “Policy Package for ACC Legislation” CAB (00) M 19/8, 5.

serious and debilitating emotional harm.<sup>93</sup> However, it is often difficult to assess whether a clinically significant dysfunction actually exists, since it is largely dependent on the self-report of the person claiming the injury. It is equally difficult to assess whether mental injury is the result of a particular event, such as a crime or an accident, rather than individual or personal factors. Generally, mental injury arises from a combination of both. The point at which the injury may properly be attributed to the accident rather than personal factors is not always clear. There is accordingly a significant risk of over-inclusiveness in the scheme and the potential for unnecessary intervention, which makes including mental injury alone difficult to justify in cost-benefit terms.

4.31 In relation to crime victims, there has been an attempt to address this difficulty by confining coverage to a particular category of offence where mental injury routinely reaches a threshold that justifies intervention in such cost-benefit terms. The mental injury arising from Schedule 3 offences can be seen as *sui generis* and in a different category from other injuries, thus justifying the exception. In relation to work-related mental injury, the difficulty has been addressed by a test that requires a single traumatic event that “could be reasonably be expected to cause mental injury to people generally.” As the provisions have only recently come into force, it is unclear how this test will operate in practice and whether it will enable consistent distinctions to be drawn between qualifying and non-qualifying mental injuries.

4.32 Thirdly, in relation to Schedule 3 offences, there is also a symbolic argument that supplements the social utility arguments underpinning the exception. Hon Bill Birch, when explaining the exception, put the matter as follows:

Most victims of criminal injury suffer a physical injury and as such would be eligible for compensation under the proposed scheme. There is a small group of criminal injury victims who suffer mental injury but no physical injury. These are usually the victims of sexual crimes. The Government is very aware of their needs and of the need to achieve equitable compensation for them.

4.33 This implies that the exception is justified by considerations of equity. In other words, it is just and fair for the community to express its tangible support for the victims of these particularly sensitive crimes.

4.34 These arguments suggest that there should be at least some exceptions to the exclusion of mental injury as a category that in its own right justifies compensation. The question is whether the current exclusions are appropriate or whether they should be reduced or expanded. There are three options.

93 Geoffrey Palmer “The Design of Compensation Systems: Tort Principles Rule, OK?” (1995) 29 *Valparaiso University Law Review* 1115, 1146, 1147 – 1148; Cabinet Business Committee, above n 90, where limiting cover for workplace mental injury to “those with a clinically significant degree of functional impairment ... would ensure that temporary distress that constitutes a normal reaction to trauma is not covered.” Note that a psychological dysfunction is considered clinically significant if it is diagnosed as meeting the Diagnostic and Statistical Manual of Mental Disorders (DSM IV) criteria, see Department of Labour, above n 90, 14.

**Option 1: Retain the status quo**

- 4.35 Under this option, the same mental injury would continue to be treated differently depending on its cause. This would be contrary to the original intention of the accident compensation scheme, and would leave some significant anomalies. Even if there is an argument that mental injury arising from a Schedule 3 offence differs from other forms of mental injury because of the highly sensitive nature of these offences, it is very difficult to draw any meaningful distinction between work-related mental injury and mental injury resulting from the commission of a crime, as illustrated by the comparison given above between the bank teller and the customer who witness an armed robbery.

**Option 2: Expand the Schedule 3 exception to further categories of crime victims (including witnesses) who are traumatised by serious crime**

- 4.36 This option would also result in the differential treatment of some victims depending on the crime that caused their mental injury. However, it would meet the needs of crime victims better than the current law does. A case described to us by Victim Support helps to illustrate how case such an expansion would assist. A woman was held hostage during an armed robbery over 10 years ago. She still suffers severe anxiety and depression, which is having a debilitating effect on her life, but she is not eligible for cover under the accident compensation scheme. However, she would be covered if the Schedule 3 offence exception applied to all serious crime.
- 4.37 It would be necessary to decide which crimes should fall within an expanded Schedule 3. These would need to be those that generally result in mental injury or, to use the language of the work-related mental injury test, “could reasonably be expected to cause mental injury to people generally”. While it remains to be seen how the work-related mental injury test will be applied in practice, it may be possible to identify crimes that are particularly likely to result in mental injury. For example, aggravated robbery may be more likely to cause mental injury to victims than burglary. This approach assumes that some crimes are more likely than others to result in mental injury. However it could mean that some people who in fact suffer mental injury as a result of crime do not receive compensation because the crime is not identified as one likely to result in mental injury and therefore not included in an expanded schedule.

**Option 3: Compensate mental injury for all events (including offences) that could reasonably be expected to cause mental injury to people generally**

- 4.38 This option does not single out certain offences in respect of which mental injury would be covered, but would make cover available under the IPRC Act for mental injury generally, regardless of the cause of the injury. Provision of this form of cover would be consistent with the intention of the accident compensation scheme that all injury sufferers be treated in the same way, regardless of the cause of injury. It would also be appropriate on the basis that there is no reason in principle to treat mental injury differently from physical injury.



- 4.39 Cover could be determined on the basis of the test recently formulated for work-related mental injury. As the test has only recently been enacted, it is not certain how the limb “could reasonably be expected to cause mental injury to people generally” could be applied to the multitude of incidents that could lead to mental injury, including criminal acts. With regard to the latter, it would appear to require an assessment to be made about how ordinary people respond to events of a criminal nature. Such an assessment would be complex and could give rise to a considerable number of applications for review of decisions about cover.
- 4.40 Furthermore, there may be issues of affordability. Extending mental injury cover in this manner would clearly increase the costs of the accident compensation scheme, in terms of both the payments for the extended cover and the associated administrative costs.

Q5 Do you agree there should be some exception to the rule that mental injury alone is not compensated? Why?

Q6 If so, which option do you consider to be appropriate?

Q7 If option 2 is appropriate, which crimes do you consider cause mental injury so as to warrant their inclusion in an expanded Schedule 3?

#### PROVIDING STATE-FUNDED TRAUMA COUNSELLING

- 4.41 If cover for mental injury under the accident compensation scheme is not extended to victims of crime, a fund could be established for trauma counselling. The purpose of this counselling would be to provide immediate short-term assistance to victims in circumstances where ACC counselling is unavailable. The fund would be administered by Victim Support, similar to the scheme that currently provides counselling for the families of homicide victims.
- 4.42 Victim Support presented a number of recent cases where it believed that trauma counselling would have been desirable but there was no avenue through which it could be funded by the state. One of these cases involved two children who witnessed the stabbing of their mother, resulting in her being severely injured, but were not eligible for any form of financial assistance for counselling.
- 4.43 Assuming that trauma counselling for crime victims is effective, it could have a number of advantages that would make state funding worthwhile. Addressing emotional trauma early may mean that more serious and incapacitating mental health problems do not develop. It could therefore have direct benefits for the victim and his or her family. It could also benefit the state by reducing the likelihood that state services would be needed later down the track to cope with more intractable problems. However, before any decision could be made about funding trauma counselling for all crime victims, further research is needed into the effectiveness of different types of counselling in dealing with trauma, when it is best delivered (immediately after a crime or at some stage later), and what qualifications should be held by the counsellor.
- 4.44 The costs of state-funded trauma counselling for crime victims would depend on eligibility criteria. Even if these were defined, it would be difficult to determine in the absence of specific information what trauma counselling would cost, how many victims would want it, and how many sessions would be needed for



each victim. As an indication, Victim Support pays \$90 – \$120 per counselling session under the Counselling for Families of Homicide Victims scheme. The average number of sessions provided to a family member is three, and more than six counselling sessions is provided in 35 per cent of cases. However, these figures are not necessarily applicable to other forms of trauma. If this option were to be considered further, costings would need to be done.

- 4.45 There are two possible approaches to defining eligibility for trauma counselling. The first option is to confine it to victims and witnesses of serious violent crimes that are most likely to be associated with significant trauma, such as murder, manslaughter, kidnapping, and aggravated robbery. This approach assumes that there is a high correlation between the offence and the trauma suffered. However, a distinction based solely on offence category may have unfair and discriminatory outcomes. A victim who suffers trauma as a result of an offence that falls outside an offence category would not be eligible for counselling, no matter how traumatised.
- 4.46 Alternatively, counselling could be provided to all crime victims who suffer “significant emotional trauma”. It would be left to the administering agency to determine eligibility on the basis of the trauma suffered on a case-by-case basis and within the limits of the funds available. This would avoid the rigidity of applying funds for trauma counselling only to confined categories of crime, but it could be seen as too subjective a basis for allocating these funds.

Q8 Should state-funded trauma counselling be available? Why?

Q9 If so, for what category of crime victims and under what circumstances?

#### IMPROVING MECHANISMS FOR RECOVERING COMPENSATION FROM OFFENDERS

- 4.47 There may be ways of making it easier for victims to obtain reparation payments from offenders and/or civil remedies, which could allow victims to be more fully compensated for all harm, loss or damage suffered as a consequence of the commission of a crime.
- 4.48 As we outlined earlier, a presumption in favour of reparation was introduced by the Sentencing Act 2002. Reparation must be awarded unless the court is satisfied it would result in “undue hardship” for the offender or the dependants of the offender, or there are other circumstances that would make a sentence of reparation inappropriate. The Justice and Electoral Committee described this test as a “legislative requirement to cause no hardship to the offender”, and considered that it imposed greater restrictions on the use of reparation than exist in other jurisdictions.<sup>94</sup> However, that is to misunderstand the test. It does not require that no hardship to an offender be caused at all, but rather that any hardship must not be “undue”. As a result, a high threshold must be reached before the strong statutory presumption in favour of imposing a sentence of reparation can be overcome. In that regard, it is more likely that a sentence of reparation will be imposed in New Zealand than in other jurisdictions; the effect of the statutory presumption is that a court must consider imposing

<sup>94</sup> Justice and Electoral Committee, above n 32, 53.

reparation in every case and must do so unless one of the defined circumstances that makes it “inappropriate” exist. In other jurisdictions, judges are merely required to consider imposing a sentence of reparation.

- 4.49 Some may argue that reparation should be imposed in every case. This would mean that reparation would be ordered more frequently than it is at present, and it would have some symbolic value. But there are a number of difficulties with this possibility. Imposing reparation in every case (including cases where the offender simply has no means of paying) would inevitably result in a much larger proportion of unpaid reparation than exists currently, with the consequent risk of a loss of public confidence in the system. In addition, it would revictimise victims by leaving them as notional beneficiaries of unenforceable sentences. It would also have adverse effects on offenders and their families who would be faced with a debt they simply cannot meet. In those circumstances, offenders could resort to further crime as the only means of paying the debt.
- 4.50 We have considered whether there are other more effective ways of enforcing reparation sentences. As we outlined in Chapter Two, fines collection is dealt with under the Summary Proceedings Act 1957 and, in the case of convictions on indictment, under the Crimes Act 1961. The Summary Proceedings Act gives the Registrar broad enforcement powers including powers to issue warrants to seize property, to make attachment orders on offenders’ accounts, to issue deduction notices requiring banks and financial institutions to deduct monies from offenders’ accounts, to publish names of fines defrauders and to seek substituted sentences. The Crimes Act provisions are more limited and provide only for writs of sale of personal property, warrants for collection of fines and substituted sentences. This seems problematic in two respects. First, as a large number of indictable matters proceed in the District Court, the enforcement regimes under both the Summary Proceedings Act and the Crimes Act would seem to apply in these cases. However, there is no indication which statutory regime prevails. This has the potential for confusion, particularly where similar enforcement mechanisms are available under the two regimes but the circumstances in which they apply are differently defined. Second, there seems no reason in principle to have different enforcement regimes depending on whether a fine is imposed in the District or High Court. Why should there be more extensive enforcement powers available in the District Court than in the High Court? We recommend amendments to bring the two regimes into line.
- 4.51 Apart from that matter, having examined the means of enforcement available in overseas jurisdictions, there do not appear to be any other obvious additional enforcement mechanisms that could be enacted here.<sup>95</sup> While there may be further initiatives that could assist at the margins, the basic problem with collecting reparation relates as much to offenders’ inability to pay as to a lack of willingness. Additional enforcement mechanisms will not overcome that inherent problem.

95 See also UNODCCP Guide, above n 69, 24, which suggests initiatives that states could implement to enforce, or encourage compliance with, reparation orders, most of which already exist in New Zealand.

- 4.52 The same difficulty arises with civil proceedings. There are a number of initiatives that could make it easier for crime victims to bring civil proceedings. These include the waiver of fees, increased eligibility for legal aid, extending the simplified process under the PVC Act, or enacting a statutory presumption that certain crimes cause emotional distress, as exists in Ontario.<sup>96</sup>
- 4.53 However, the system of reparation already provides a simplified process for recovering from offenders and there appears to be little to be gained by changes to civil proceedings, particularly as they cannot overcome the likelihood that an offender will not have the financial capacity to pay any damages awarded.
- 4.54 Another alternative that offers some, albeit limited, scope for receiving reparation is the provision of services by offenders to victims instead of payment of monies. This can, and does, occur through the restorative justice process. However, it would be entirely inappropriate to foist the services of an offender upon an unwilling victim where an offender is unable to pay reparation. In addition, many offenders simply lack the skills that would enable them to provide useful services. While greater use of restorative justice may assist in some cases, it cannot, in itself, resolve the problems with reparation.
- 4.55 We have therefore concluded that there are no changes to sentencing law and practice that would produce a real and effective increase in the amount of reparation paid to victims. We agree with the conclusions of the Ministry of Justice in its report “Review of Monetary Penalties in New Zealand” (2000) that this could only be achieved if the state itself was to accept greater responsibility for providing redress:

If there is to be an emphasis on guaranteeing compensation for victims it would probably have to be done with the assistance of the state through advance payments of reparation to victims or through a state-funded compensation system for victims of crime. Provision could be made for offenders to pay back the state all or part of the sums involved, although it is unlikely that the full amount would be collected, and so consequently there are significant cost implications if such changes were introduced.

Q10 Should the fines enforcement regimes under the Summary Proceedings Act 1957 and the Crimes Act 1961 be brought into line?

Q11 Can the systems for recovering reparation from offenders be improved? If so, how?

#### PROVIDING STATE-FUNDED REPARATION

- 4.56 The only option that would ensure full reparation for victims is the payment of reparation by the state. Such a scheme could either take the form of a state-advances reparation scheme or a state-funded reparation scheme. The restitution systems used in New South Wales and Victoria provide possible models for recovery processes for both types of scheme.

<sup>96</sup> Victims' Bill of Rights SO 1995 C-6 (Ont), s 3(2).

- 4.57 As noted in the Justice and Electoral Committee report, property offences are the most likely type of offence to result in a reparation sentence; 24 per cent of property offences resulted in reparation sentences in 2004, compared with the next most common type, violent offences, in relation to which 11 per cent resulted in reparation sentences.<sup>97</sup> As such, it is likely that both of the schemes outlined below would be largely concerned with property loss or damage, although they could also address reparation for emotional harm and consequential loss or damage.

### A state-advances reparation scheme

- 4.58 Under a state-advances reparation scheme, the state would establish a fund which would be used to make immediate payment of reparation sentences where the offender is unable to do so. That would ensure that victims obtain full reparation in a timely way. The state could then recover the costs from the offender, including an amount of interest. None of the other jurisdictions we examined has this type of scheme.
- 4.59 Such a scheme is superficially attractive because it appears to maintain the current loss-shifting structure, albeit backed by a state guarantee. However, it would, in reality, involve a significant degree of loss-spreading. A state-advances reparation scheme is likely to involve substantial costs, which would have to be paid out of taxpayer funds. There would be some recovery from offenders, but significant sums of reparation may never be recovered. Moreover, the very existence of the scheme could lead some judges to impose reparation despite an offender's lack of means, knowing that the state would pick up the tab. Furthermore, apart from the costs of paying reparation, there would also be significant costs associated with establishing and administering the scheme.
- 4.60 There are issues about how the scheme would mesh with private insurance. This relates particularly to reparation for property loss or damage. A Ministry of Justice study into victims' experiences and needs indicates that many victims of crime did not have private insurance when the crime that caused their loss or damage was committed. It found that 38 per cent of victims who had suffered property loss or damage through crime were covered by insurance, although that figure was higher in relation to offences involving vehicles (48 per cent).<sup>98</sup> In this context, there are two permutations of a state-advances reparation scheme that can be considered:
- The scheme would only cover uninsured harm or loss.
  - The scheme would cover all property loss or damage caused through offending. Where the victim had insurance, the state would reimburse the insurer, and where the victim was uninsured, the state would compensate the victim.

<sup>97</sup> Justice and Electoral Committee, above n 3, 32.

<sup>98</sup> Ministry of Justice *Victims' Experiences and Needs: Findings from the New Zealand Crime and Safety Survey 2006* (Wellington, 2008) 17.

- 4.61 If the scheme only covered uninsured loss, it is probable that insurance companies would exclude from cover situations where reparation was available from the state. However, if insurance companies continued to provide cover, an issue of equity between the insured and uninsured would arise because the uninsured would receive reparation from the state without paying any premium.
- 4.62 If the state were to cover all property loss or damage, when it came to insured victims of crime, the state could pay the amount of the excess, or it could reimburse the insurance company for the full cost of the loss or damage. Again, and in both these cases, the equity issue would arise; the uninsured victim would receive a comparative advantage over the insured victim because he or she would receive state-funded insurance without paying any insurance premium.
- 4.63 A state-advances reparation scheme would also unjustifiably discriminate between victims on the basis of whether offenders were brought to justice. Victims in whose favour a sentence of reparation was imposed would receive full state-funded reparation, while those victims who could not obtain reparation because the offender had not been prosecuted or was unable to pay reparation would not receive any financial assistance at all.

Q12 Should there be a state-advances reparation scheme? Why?

Q13 If so, should it cover both insured and uninsured loss, or uninsured loss only?

### A state-funded reparation scheme

- 4.64 A state-advances reparation scheme would not assist those victims who do not receive court-ordered reparation. If these victims are to be compensated, that can only be done through a fully funded state reparation scheme which, in effect, would make the state the insurer in respect of injury and damage caused by offending. A system would have to be developed through which the amount of reparation awarded to each victim could be fixed and the amount then recovered from the offender, when identified.
- 4.65 A scheme of this kind would spread the costs of property loss and damage from crime across the community, much as occurs with the costs of personal injury under the accident compensation scheme. However, there do not appear to be any particular social benefits from state-funding of property loss or damage. The ownership of property is a private matter and so are the impacts of its loss or damage. Moreover, if the community were to bear this kind of loss, it is difficult to see why it should do so in relation to crime victims only and not also people who suffer property loss or damage from other causes, such as third party negligence. The symbolic benefits of state intervention for crime victims alone which, as noted above, are arguable in relation to physical injury, are even more tenuous in relation to property loss or damage.
- 4.66 The costs of such a scheme would also be significant. There would be the costs associated with establishing and administering the scheme. There would also be the costs of the reparation awards themselves. If the state paid reparation to all



victims, including those in relation to which the offender was not identified, it may be expected that a large proportion of the reparation paid would not be recoverable. There would be considerable potential for fraudulent claims. Enforcement mechanisms would be necessary for both ensuring maximum recovery from the offender and protecting against fraudulent claims, as insurance companies currently do. This would add to the overall costs of the scheme.

- 4.67 These costs would be borne by the taxpayer. It would inevitably require either a reduction in the funding of other state services or a substantial increase in taxation. While state insurance would provide some cover for people who cannot afford private insurance, the overall benefits of the adoption of such a role by the state are dubious. For example, it is a matter of debate whether the state could provide insurance more efficiently than the private sector. In particular, if the state were the insurer, there might be an increase in fraudulent claims because the state is likely to be less concerned with enforcement than the private insurance market. Furthermore, state-funded insurance would remove individual choice around how to redistribute risk, including the choice to opt out of insurance.
- 4.68 There is no international precedent for what would largely be a state-funded property insurance scheme. As in New Zealand, the other jurisdictions we examined proceed on the basis that the choice of distributing the risk of property loss or damage through private insurance is a matter of individual choice. The scheme would have significant repercussions for private insurance. As with the state-advances reparation scheme, there would be a real disincentive to take out private insurance for the particular harm and loss that was covered through a sentence of reparation. The disincentive effect might be compounded if the state-funded reparation scheme were more generous than private insurance. Most insurance companies do not cover full loss as there is usually some excess. There would also be disincentives on private individuals to take sensible precautions to avoid the risks of property loss or damage (such as incurring costs associated with avoiding loss or damage, for example, installing burglar alarms) through crime because any loss or damage would be fully compensated by the state.
- 4.69 An alternative approach, which would achieve the same effect, would be to introduce a system of compulsory insurance for property loss and damage caused by offending. This would ensure that victims did receive compensation for this kind of loss, while still retaining at least some of the efficiencies of competition in the private market. However, it would take away freedom of choice and could reduce the incentives for insurance companies to be competitive. There would also be issues about how such a scheme should be administered and enforced, and how the costs associated with running such a scheme should be met.

Q14 Should there be a state-funded reparation scheme? Why?

Q15 Should consideration be given to an examination of the feasibility of a compulsory insurance scheme for property loss or damage caused by offending?

## INCREASING FUNDING FOR SPECIAL PURPOSE SCHEMES

- 4.70 The amount of state funding allocated to special purpose assistance schemes could be increased. This could be either an increase in funding to existing schemes or the creation of new schemes if there are perceived to be other areas in which an expression of public sympathy would be appropriate. For example, the Counselling for Families of Homicide Victims scheme could be extended to a broader range of victims and travel funds could be made widely available. In addition, state assistance could be provided in cases where property is lost or damaged, causing serious hardship to the victim. This could be done either by extending the scope of the Criminal Justice Assistance Reimbursement Scheme to provide financial assistance to all crime victims who suffer serious hardship, not only those who become victims as a result of assisting with the administration of justice, or creating a new scheme.
- 4.71 As a preliminary step it would be useful to undertake some analysis of the way in which the existing schemes are used to assess the adequacy of the current funding. It would also be identify any situations where it may be desirable to provide further assistance to victims but where no form of funding is currently available.
- 4.72 An advantage of using special purpose schemes is that it allows the targeting of assistance to those most in need. Given limits on state funds, it would also enable the questions of how much funding should be made available to crime victims to be weighed against other social assistance priorities.

**Q16** Is the funding and coverage of the existing special assessment schemes adequate?

**Q17** Is there a need for additional special assistance schemes, and if so, what schemes and to whom should they apply?

## IMPOSING AN OFFENDER LEVY

- 4.73 Imposing a levy on offenders at sentencing would be a way of raising revenue that could be ring-fenced for victims' services. It would provide some guarantee that funding would be available, although it is not clear how much. It may also be seen by some as an appropriate way of bringing home to an offender the consequences of his or her actions by imposing an additional punishment that has a direct link to the victims of crime. Those who see a levy as having a benefit of this kind have contrasted it with other sanctions such as fines and imprisonment, which generally have no apparent connection with the consequences of the offending for the victim.
- 4.74 Notwithstanding these possible benefits, there are a number of significant issues and potential problems with a levy system.
- 4.75 There is an issue about which category of offenders it should apply to. For example, should it apply to everyone regardless of penalty or should it be confined to offenders who receive particular kinds of penalty such as fines? On the one hand, it would be odd to confine it to offenders who receive fines, since whether or not a levy was imposed would then depend upon decisions unrelated to the purpose of the levy. On the other hand, if everyone, including those sentenced to imprisonment, was subject to the levy this would increase the inevitable problems with collection.

- 4.76 Whatever the range of offences to which it is applied, the financial circumstances of many offenders already impact on the making, amount and payment of sentences of reparation, as well as fine collection, and introducing a levy would exacerbate this. It would be possible to set the amount of the levy at such a low rate that it would not make any, or would only make a small discernible, difference to the offender's financial situation. However, that would clearly reduce the amount of revenue that could be raised. There would be particular difficulties with imposing levies on persons who have been sentenced to long-term imprisonment. Moreover, the non-payment rate of small levies imposed on all offenders would probably be so high that the administration costs of enforcement would exceed the amount collected.
- 4.77 If levies of the same amount were imposed on all offenders, that would raise proportionality issues: why should an offender convicted of a very minor offence without any direct victim at all pay the same amount as an offender convicted of rape or wounding with intent to commit grievous bodily harm?
- 4.78 There would also be issues about whether the levy should have priority over reparation and fines or vice versa. If the levy had to be paid before a sentence of reparation, victims may feel aggrieved that their particular harm or loss was not being addressed first. In addition, if it applied to prisoners and other offenders against whom reparation was not ordered, the victim might feel aggrieved the state was paid while he or she was not. On the other hand, if priority were given to the payment of reparation sentences, the prospects of the offender paying the levy would be further reduced. Similar arguments can be advanced in relation to the payment of fines; if the levy had to be paid before a fine, it could detrimentally impact on fine collection and, if the fine had to be paid before the levy, it would be more difficult to ensure payment of the levy.
- 4.79 More generally, there are two core problems with using levies on offenders to fund victim services. First, it is relatively unpredictable. The level of funds would fluctuate from year to year based on decisions that are unrelated to the question of what funding should be available. While this could be adjusted by changes in government funding to make up any shortfall, any adjustment would be after the event, creating uncertainty for victims' services which need to be able to plan their activities.
- 4.80 Secondly, there is an argument that earmarked funds of this sort are inherently undesirable because they bypass the normal process of government priority setting. Ordinarily, funding for core government activities and initiatives, such as policing, crime prevention, health and education, are matters for government determination. The level of funding for victim support services should equally be a matter for government determination. Earmarked funds mean that the level of funding is not decided by elected representatives but instead driven by unrelated factors. In this sense, they can be said to bypass the ordinary democratic process.
- 4.81 In the Commission's view, therefore, if an offender levy were to be introduced, the proceeds from it should be paid into the consolidated fund as a contribution to the funding of victim services. Government decisions about the level of funding should not be dependent on the size of that contribution.

- Q18 Should a levy be imposed on offenders? Why?
- Q19 If so, on what categories of offenders should it be imposed? For example, should it be imposed on traffic offenders, including those who commit infringement offences? Should it be imposed on offenders sentenced to imprisonment?
- Q20 Should a levy take priority over reparation and/or fines? Why?
- Q21 What should the money raised be used for? Do you agree with the Commission's view that it should be paid into the consolidated fund rather than an earmarked pool?

# Appendices




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# Appendix A

## Summary of Questions

- Q1 Are there any other issues that may be of concern to victims?
- Q2 Should crime victims receive greater entitlements to compensation for personal injury than other accident victims? Why? If so, how much more compensation is required and for what type of loss?
- Q3 Should any additional entitlements be administered by the accident compensation scheme, a stand-alone tribunal, or under a hybrid scheme?
- Q4 Should improvements be made to the processes for delivering compensation to victims under the accident compensation scheme (see paragraph 4.21)? If so, what improvements could be made?
- Q5 Do you agree there should be some exception to the rule that mental injury alone is not compensated? Why?
- Q6 If so, which option do you consider to be appropriate?
- Q7 If option 2, is appropriate which crimes do you consider cause mental injury so as to warrant their inclusion in an expanded Schedule 3?
- Q8 Should state-funded trauma counselling be available? Why?
- Q9 If so, for what category of crime victims and under what circumstances?
- Q10 Should the fines enforcement regimes under the Summary Proceedings Act 1957 and the Crimes Act 1961 be brought into line?
- Q11 Can the systems for recovering reparation from offenders be improved? If so, how?
- Q12 Should there be a state-advances reparation scheme? Why?

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- Q13 If so, should it cover both insured and uninsured loss, or uninsured loss only?
- Q14 Should there be a state-funded reparation scheme? Why?
- Q15 Should consideration be given to an examination of the feasibility of a compulsory insurance scheme for property loss or damage caused by offending?
- Q16 Is the funding and coverage of the existing special assessment schemes adequate?
- Q17 Is there a need for additional special assistance schemes, and if so, what schemes and to whom should they apply?
- Q18 Should a levy be imposed on offenders? Why?
- Q19 If so, on what categories of offenders should it be imposed? For example, should it be imposed on traffic offenders, including those who commit infringement offences? Should it be imposed on offenders sentenced to imprisonment?
- Q20 Should a levy take priority over reparation and/or fines? Why?
- Q21 What should the money raised be used for? Do you agree with the Commission's view that it should be paid into the consolidated fund rather than an earmarked pool?

# Appendix B

## Imposition and Resolution of Fines and Reparation

The information provided by the Ministry of Justice, and set out below, presents the number of all impositions (fines and reparation) imposed, the number of reparation sentences imposed, and their resolution rate. The graph compares the resolution rate of impositions generally, with that of reparation orders. It indicates that the rate of collection of reparation is roughly analogous with that of the collection of all impositions. However, while fines are often remitted, this rarely happens with reparation, which may indicate that the resolution rate for sentences of reparation is higher than that of fines.

For each period, “Age of Fine” also relates to the financial year the reparation order or fine was imposed. “Less than one year” means the reparation order or fine was imposed in the 2008 financial year, “1 to 2 years” is the 2007 financial year, and “9 to 10 years” is the 1999 financial year.

TABLE 1: RESOLUTION RATE OF ALL IMPOSITIONS

All impositions (including reparation)			
Age of Fine	Number of Fines Imposed	Number of Fines outstanding	Resolution Rate
Less than 1 year	1,163,737	789,621	32.37%
1 to 2 years	1,138,848	496,524	56.52%
2 to 3 years	1,069,754	343,878	68.06%
3 to 4 years	1,068,134	260,898	75.66%
4 to 5 years	1,072,929	197,996	81.62%
5 to 6 years	903,227	124,366	86.16%
6 to 7 years	807,292	84,981	89.43%
7 to 8 years	710,386	56,912	92.00%
8 to 9 years	643,757	43,590	93.29%
9 to 10 years	684,478	42,744	93.77%

TABLE 2: RESOLUTION OF REPARATION ORDERS

Reparation			
Age of Fine	Number of Reparation Orders Imposed	Number of Reparation Orders Outstanding	Resolution Rate
Less than 1 year	21,557	13,928	35.39%
1 to 2 years	20,269	9,171	54.75%
2 to 3 years	19,009	6,425	66.20%
3 to 4 years	18,173	5,079	72.05%
4 to 5 years	17,354	3,733	78.49%
5 to 6 years	16,585	2,782	83.23%
6 to 7 years	13,536	1,801	86.69%
7 to 8 years	14,785	1,610	89.11%
8 to 9 years	14,286	1,058	92.59%
9 to 10 years	15,645	1,051	93.28%

GRAPH: RESOLUTION RATE OF REPARATION COMPARED TO RESOLUTION RATE OF ALL IMPOSITIONS

