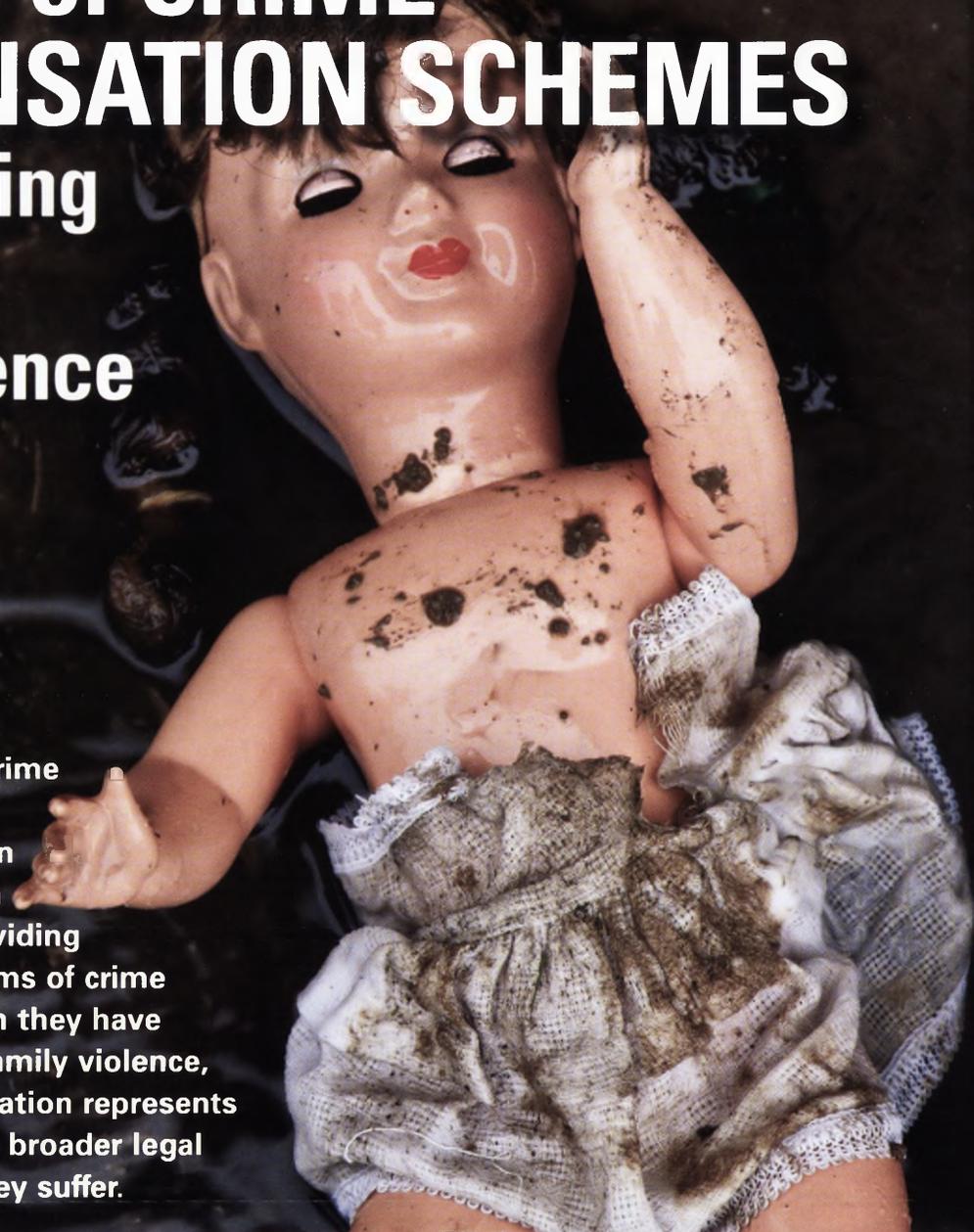


By Christine Forster

VICTIMS of CRIME COMPENSATION SCHEMES

Compensating victims of family violence

State-funded victims of crime compensation schemes exist in all eight Australian states and territories with the broad purpose of providing monetary awards to victims of crime in recognition of the harm they have suffered.¹ For victims of family violence, the provision of compensation represents good practice as part of a broader legal response to the harms they suffer.



Compensation may benefit victims of family violence in their recovery from the medical, psychological, cultural, vocational and relational consequences of the abuse. The rehabilitation of victims may also benefit the family, friends and partners of victims and the wider community itself.² In a broader sense, the presence of a compensatory framework that operates effectively to compensate victims of family violence provides a clear statement of the unacceptability of such behaviour in the community.³

Historically, the schemes have failed to recognise the specific context of family violence – that it is primarily perpetrated by men against women and children; that it is

difficult for victims to report family violence to the police because of the shame, secrecy and lack of acknowledgement that continues to surround it; the gruelling nature of the criminal justice system for such victims; the low rate of convictions even when reported; and the particular form of the injuries typically suffered. The result has been that the schemes have failed to compensate victims adequately. The introduction of targeted provisions in the schemes by New South Wales (NSW), Queensland, the Northern Territory (NT), the Australian Capital Territory (ACT) and Victoria⁴ represents a good practice response to the particular circumstances of victims of family violence. However, none, in their current form, provides an ideal model.

INCIDENCE AND IMPACT OF DOMESTIC AND SEXUAL VIOLENCE IN AUSTRALIA

Family violence is pervasive in Australian society and is perpetrated mostly against women and children irrespective of age, culture, class and background. In 2005, it was reported that an estimated 443,800 Australian women (5.8 per cent of the population) had experienced physical or sexual violence in the previous 12 months from a male perpetrator. More than a million women had experienced physical or sexual violence by their male current or ex-partner since the age of 15.⁵ These may be conservative estimates, however, as victims may either refuse to participate or fail to disclose during an interview for reasons such as shame, fear or denial.⁶ An estimated 27 per cent of those who experienced violence by a current partner said that children in their care had witnessed the violence.⁷ Statistics in indigenous communities are even higher. A 2006 survey estimated that one in four Aboriginal or Torres Strait Islander people aged 15 years or over had been a victim of physical or threatened family violence in the previous 12 months, over twice the rate for the non-indigenous population.⁸

A range of regulatory legal responses has been initiated in Australia in response to this incidence of family violence. In general, priority has been given to strategies located within the body of criminal law designed to prevent abuse, to protect victims and to punish offenders. By contrast, few resources have been allocated to the facilitation and expansion of avenues of compensation for victims for the injuries they suffer. Nevertheless, family violence causes devastating harm. Victims may suffer physical injuries such as lacerations, bruises, broken bones, head injuries, internal bleeding;⁹ psychological injuries such as low self-confidence, depression, suicidal thoughts, flashbacks, nightmares, anxiety, emotional numbing, and insomnia;¹⁰ and economic losses such as medical bills, legal bills, the costs of moving, replacing damaged or lost household items and replacing school uniforms and equipment when children change schools, and loss of income if they are unable to retain their employment.¹¹ Children can also be profoundly affected by witnessing domestic and sexual violence: a growing body of research documents the major effects on a child's psychological, physical, educational, and social wellbeing.¹²

KEY COMPONENTS OF VICTIMS OF CRIME COMPENSATION SCHEMES

Three potential avenues currently exist in Australia through which victims of crime can obtain compensation. Reparation orders, rarely used, are a remedy located in the criminal law. The order specifies a monetary sum awarded at the time of sentencing payable by the defendant to the plaintiff rather than as a fine to the state.¹³ The second avenue is civil litigation for damages, usually in the trespass tort of battery, although sometimes in negligence and equity. The third avenue is seeking support under one of the various statutory victims of crime compensation schemes that exist in each Australian state and territory. State-run statutory schemes designed to facilitate compensation for victims

of crime began to emerge in the early 1960s. The impetus for the schemes can be attributed to Margery Fry, a British magistrate and social reformer, who wrote widely in the 1950s promoting the concept of state-funded schemes to compensate victims of crime. New Zealand was the first to introduce a scheme in 1964, followed by the United Kingdom in the same year.¹⁴ New South Wales was the first Australian jurisdiction to introduce a scheme to compensate victims of crime in 1967.¹⁵ Gradually, all other jurisdictions introduced similar models.¹⁶

Victims can claim compensation only for injuries and loss that fit within the defined categories of the schemes. Some of the schemes compensate for financial loss including loss of earnings, expenses associated with damage to clothing and the cost of security installation or relocation. There is limited provision for counselling and medical costs in the schemes. In NSW, up to \$10,000 in special payments beyond the maximum of the scheme may be made for approved counselling services for up to 20 hours, with more possible sessions if 'necessary'.¹⁷ In Victoria, a primary victim can recover up to \$60,000 for expenses actually incurred for reasonable counselling services¹⁸ and for medical expenses as a direct result of the act of violence.¹⁹ In the NT, counselling is available but is subject to the \$40,000 overall limit of the scheme. In Queensland, provision for 'reasonable counselling expenses incurred' as a direct result of the act of violence is subject to the \$75,000 overall limit of the scheme. In most of the other jurisdictions there is scope to include compensation for medical, counselling and other expenses but it is restricted by the overall limit on compensation for each 'criminal event'.

All of the schemes provide compensation for non-financial loss, defined as bodily injury and/or nervous and mental shock (or in substantially similar terms). Victoria provides compensation for non-financial loss only for victims of a very limited group of crimes. All the schemes limit the total amount of non-financial compensation that can be awarded for each criminal event, ranging from \$30,000 in Tasmania to \$75,000 in Queensland. There are two primary modes of organising and delivering awards for non-financial loss in the schemes: the tariff model and the discretionary model. The most popular model is the discretionary model, which leaves the assessor to ascertain the appropriate amount within the fixed limits of the scheme that best reflects the level of harm suffered by the victim. Alternatively, the tariff model guides the assessor with a table of amounts to be awarded for particular, specified injuries. Typically, the table lists a range of body parts and particular harms to those body parts specifying particular amounts for each injury, depending on their perceived seriousness. This approach involves minimal discretion.

BARRIERS TO COMPENSATION FOR FAMILY VIOLENCE VICTIMS

Victims of family violence face considerable hurdles when they seek compensation from the victims of crime compensation schemes. Many of these hurdles are created >>

because the schemes do not recognise the context of family violence or the difficulties faced by victims in the criminal justice system which make convictions hard to obtain.

Requirement for a crime

The initial requirement that must be satisfied by an applicant seeking compensation through the schemes is that she or he must prove that an event recognised in the criminal law has occurred. That event is variously termed in the schemes as an ‘offence’, an ‘act of violence’, a ‘violent crime’ a ‘personal offence’ or a ‘conviction’. Regardless of the term adopted, the schemes uniformly assume that a crime recognised in the criminal law has occurred. In practice, this means that physical and sexual violence are recognised but other forms of family violence such as verbal, emotional or financial abuse are excluded. Additionally, the assessor often relies on convictions to determine whether a crime has occurred. For victims of family violence, this creates a major burden because reporting rates, prosecution rates and the conviction rates in instances of family violence in the Australian criminal justice system are extremely low.²⁰

Requirement to report crime within a ‘reasonable’ time

Most of the schemes require a victim to report the criminal event to police authorities within a ‘reasonable time’. Victims of family violence are less likely to report the crime than victims of many other crimes because of shame and embarrassment, fear of retaliation, economic dependency, victim-blaming attitudes, the gruelling nature of the criminal justice system and the knowledge that control over the proceedings resides with the police authorities.²¹ Aboriginal women are even less likely than other victims to report abuse due to a history of discrimination by institutional structures; community pressure to keep the matter from the scrutiny of the state; a concern by victims about the well-being of their partners and family members when detained in police custody, and due to a lack of culturally appropriate legal advice.²² Only in Victoria is an explicit exception included requiring the Tribunal to consider whether the offender was ‘in a position of power, influence or trust’.²³ This is an important provision, which should be extended to other jurisdictions.

Multiple criminal events and the ‘related acts’ provisions

Most of the schemes have ‘related acts’ provisions that reduce multiple criminal events to a single event for compensation purposes if they can be shown to be ‘related’. Criminal events are ‘related’ in the schemes if there is a similarity between the events that caused the injuries or similarities in the injuries themselves, or a close timeframe

A compensation model that specifically recognises and targets domestic violence and sexual abuse would be the most effective approach to compensating victims.

between the events that caused the injuries. Victims of family violence are more likely to be affected by the ‘related acts’ provisions than other victims of crime, since family violence is intrinsically characterised by such ‘similarities’. As well as reducing the potential award for victims of family violence, the related acts provisions effectively entrench and

support a view of a crime as an isolated event perpetrated by a stranger, contrary to the reality of family violence which is typically pervasive, continuous and perpetrated by someone known to the victim.

Requirement to lodge a claim within a fixed time period

All of the schemes limit the period of time after the crime during which a victim can lodge a claim. The period ranges from one to three years. Many victims of family violence fail to pursue claims within the specified time as they feel ashamed and humiliated. Most schemes do incorporate a discretion to extend the time, which is often exercised in family violence claims, and four jurisdictions specifically provide exceptions. In NSW, ‘leave should be given in cases of sexual assault, domestic violence or child abuse unless the Director is satisfied there is no good reason to do so’,²⁴ and in the NT, in deciding whether to grant an extension of time the Director must have regard to ‘whether the injury or death occurred as a result of sexual assault, domestic violence or child abuse’.²⁵ In Queensland and Victoria the scheme manager and the Tribunal respectively must consider whether the offender was ‘in a position of power, influence or trust’.²⁶ These are important provisions that should be extended to other jurisdictions.

Requirement for recognised injury and loss

Most compensation awarded to victims of family violence to date is for non-financial injury and is categorised as ‘nervous and mental shock’. In some schemes, this constitutes a requirement for a ‘recognisable psychiatric illness’ and in other schemes, even if there is no official requirement for a recognisable psychiatric illness, there appears to be an expectation (among lawyers, applicants and assessors) that a psychiatric diagnosis should be sought from an expert. Imposing a requirement or placing an expectation on victims of family violence to establish that they are suffering from a recognisable psychiatric illness is problematic for victims. It places a significant onus on them to portray themselves as ‘ill’ in ways that may not assist them in recovery, so that they accord with a psychiatric category. In contrast to categories of psychiatric illness, the typical effects of family violence are best described as interpersonal, social, behavioural, or vocational. In the case of Aboriginal women, the harm may be specifically cultural and linked to community perceptions

of the harm and the cultural expectations embedded in Aboriginal society.

Targeted provisions for non-financial loss

Victoria, NSW, the ACT, Queensland and the NT have introduced targeted provisions to compensate sexual violence and, to a much lesser extent, domestic violence victims for non-financial loss. These targeted models have addressed some of the problems identified above and facilitated improved access to the schemes for family violence victims. But none provides, in their current form, an ideal model of compensation.

NSW, Victoria and Queensland have adopted models that are primarily 'offence-based', meaning that the amount of compensation is largely determined by the criminal 'seriousness' of the event causing the harm. In each model, bands of compensation accord with offences in the criminal law. As the offence becomes more serious in the eyes of the criminal law, the available award range becomes higher. Thus, in NSW, (which is confined to sexual violence) Category 1 includes indecent assault or assault with violence in the course of attempted unlawful sexual intercourse, with an award range of \$7,500 to \$10,000; Category 2 includes unlawful sexual intercourse or the infliction of serious bodily injury in the course of attempted unlawful intercourse, with an award range of \$10,000 to \$25,000; and Category 3 includes a pattern of abuse involving Category 1 or 2 sexual assault; unlawful sexual intercourse in which serious bodily injury is inflicted; unlawful sexual intercourse in which two or more offenders are involved; or unlawful sexual intercourse in which the offender uses an offensive weapon, with an award range of \$25,000 to \$50,000.²⁷ In Victoria, there are four bands of compensation. The top band A is defined as 'any offence that involves the sexual penetration of a person or attempted murder', with an award range of \$4,667 to \$10,000. The lowest band D is defined as 'any offence that involves a threat of injury or an assault against a person or an attempted assault or the deprivation of the liberty or an act of violence not otherwise specified' with an award range of \$130 to \$650.²⁸ In Queensland, there are also four bands of compensation. The top band A is defined as 'attempted murder; rape; incest with a person under 16 or within impaired capacity; maintaining a sexual relationship with a person under 16'; with an award range of \$5,000 to \$10,000. The lowest band D is defined as 'an attempt to commit a Category C act of violence; unlawful stalking; deprivation of liberty', with an award range of \$130 to \$650.²⁹ In all three models, once the appropriate band is identified, compensation is awarded according to the severity of injury. In NSW, there is no guiding formula for that assessment and the assessor has discretion to determine the amount. In Victoria, the victim must show that she or he has suffered a 'significant adverse effect' defined as 'grief, distress, trauma or injury'. Once the assessor has determined that there has been a significant adverse effect, a guiding formula assists to determine the amount of award in the relevant band of compensation. For example, the maximum should be awarded in Category A if the applicant

has suffered a very serious physical injury³⁰ or been the victim of a series of 'related acts' of indecent assault or sexual penetration.³¹ The toughest regime is in Queensland, where once the offence band is identified, the victim must also satisfy a 'circumstances' requirement. For example, Category A 'circumstances' require the victim to have 'suffered a very serious injury' or 'been infected with a very serious disease' before any compensation can be awarded.³²

The ACT and the NT have adopted models that are primarily harm-based, meaning that the amount of compensation is determined by measuring the severity of the injury suffered by the victim, rather than focusing on the culpability of the offender as in NSW, Victoria and Queensland. In the NT, victims (where domestic violence is defined as 'a violent act involving a pattern of abuse, committed by an offender with whom the victim is in a domestic relationship' or 'a violent act of stalking in contravention of a domestic violence order'³³) can receive an award in the range of \$7,500 to \$10,000 for 'physical illness or injury or psychological or psychiatric disorder'.³⁴ The injuries must be 'more than transient or trifling, though they need not be serious'.³⁵ In the ACT, victims of offences of a sexual nature are entitled to 'special assistance': up to \$50,000 for pain and suffering.³⁶ The injuries must be 'extremely serious',³⁷ which is defined as 'a range of physical permanent impairments' or 'a permanent mental or behavioural disturbance that is extremely serious and will >>

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remain so permanently'.³⁸ In both models, the amount of compensation is determined by the assessor on the basis of the severity of the injuries.

CONCLUSION

A compensation model that specifically recognises and targets family violence is the most effective approach to compensating victims. Limitation and reasonable reporting provisions should not require victims to report the offence to police authorities or to have lodged their claim within the restrictive time periods designated in the schemes as in NSW and the NT. Counselling costs, available in NSW, Queensland, NT and Victoria, should be provided for in all jurisdictions. The provision of counselling should be generous, allocated on the basis of need and independent of the compensatory sum and conceptualised as part of the broad spectrum of public health and the public health budget. The provision of counselling costs recognises the devastating harm that family violence causes, provides a symbolic message to the victims and the community that the state is concerned about its impact and can provide valuable therapeutic assistance to victims and their families.

Targeted provisions for non-financial injuries, which respond to the particular circumstances of the victims of family violence, have the potential to compensate victims more effectively. Although targeted provisions have been introduced by five jurisdictions, none represents an ideal approach. All provide very low awards (except for the ACT and NSW with a \$50,000 maximum). All five models require proof of a criminal offence, some requiring (and all preferring) a criminal conviction. All require proof of injury and some require 'serious' injuries before any compensation ensues. In all schemes except Victoria, injury must take the form of visible bodily injury or a recognisable psychiatric illness rather than the social, behavioural and interpersonal harms typically suffered by victims of family violence. The Victorian model's inclusion of a more expansive definition of injury as 'grief, distress, trauma or injury' is promising. However, the low award range makes this a limited advantage. Some of the models reduce the impact of the 'related acts' provisions by including multiple 'related' acts of violence in the higher award bands, acknowledging the context of most family violence. However, this approach removes the potential for the victim to be compensated for each separate 'crime' and, consequently, victims may receive less compensation than applicants in other jurisdictions who can pursue multiple awards for 'non-related' crimes. This disadvantage could, however, easily be overcome with higher awards.

In conclusion, a harm-based approach rather than an offence-based approach appears to be the more favourable approach of the two. The offence-based models confine victims to the band range that accords with the culpability of the offence. By contrast, a harm-based approach accords more closely with the restitutionary purpose of tort law, which aims to put the victim back into the position she or he was in prior to the crime, to the extent that money can achieve such an outcome. It removes the juxtaposition of the

criminal law objectives from the compensatory forum, and places the focus on the victim rather than the perpetrator. ■

Notes: **1** *Criminal Injuries Compensation Act 1975* (Tas); *Victims of Crime (Financial Assistance) Act 1983* (ACT); *Victims of Crime Assistance Act 1996* (Vic); *Victims Support and Rehabilitation Act 1996* (NSW); *Victims of Crime Act 2001* (SA); *Criminal Injuries Act 2003* (WA); *Victims of Crime Assistance Act 2008* (NT); *Victims of Crime Assistance Act 2009* (Qld). **2** See I Freckelton, 'Compensating the Sexually Abused' in P Eastale (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture* (Sydney: Federation Press, 1998) 191 at 194. **3** See J Temkin, *Rape and the Legal Process* (Oxford: Oxford University Press, 2nd ed, 2002) at 347. **4** *Victims Support and Rehabilitation Act 1996* (NSW), Schedule 1; *Criminal Offence Victims Act 1995* (Qld), Regulation 1 A(1) and (3); *Victims of Crime Assistance Act 1996* (Vic), s3. **5** Australian Bureau of Statistics, Office of the Status of Women, *Personal Safety Survey*, Canberra, Australian Government Printing Services, 2005 at 9 (ABS 2006b). **6** See P Eastale, 'The Cultural Context of Rape and Reform' in P Eastale (ed) *Balancing the Scales: Rape, Law Reform and Australian Culture* (Sydney: Federation Press, 1998) 1 at 7. **7** See *Personal Safety Survey*, note 5 at 11. **8** F Al-Yaman, M Van Doeland & M Wallis, *Family Violence Among Aboriginal and Torres Strait Islander Peoples*, (2006 Canberra) at 9. **9** L Avila-Burgos, R Valdez-Santiago, M Hajar, A del Rio-Zolezzi, R Rojas-Martinez, & C Medina-Solis, 'Factors Associated with Severity of Intimate Partner Abuse in Mexico: Results of the First National Survey of Violence Against Women' (2009) 100(6) *Canadian Journal of Public Health* 436. **10** G Brewer et al, 'Domestic Violence: The Psychosocial Impact and Perceived Health Problems' (2010) 2 *Journal of Aggression, Conflict & Peace Resolution* 12 at 13. **11** K Ling Chan & E Yin-Nei Cho, 'A Review of Cost Measures for the Economic Impact of Domestic Violence' (2010) 11 *Trauma, Violence & Abuse* 129 at 138. **12** UNICEF, *Behind Closed Doors: The Impact of Domestic Violence on Children* 2006. Available at <http://www.unicef.org/protection/files/BehindClosedDoors.pdf>; P Pinheiro (Independent Expert for the United Nations Secretary-General's Study on Violence against Children), *World Report on Violence against Children* 2006 at 70. Available at <http://www.unicef.org/violencestudy/l.%20World%20Report%20on%20Violence%20against%20Children.pdf>. **13** See, for example, NSW, Pt 4 of the *Victims Support and Rehabilitation Act 1996* (NSW) where the courts may order the payment of compensation at the time of sentencing. **14** *Criminal Injuries Compensation Act 1963* (UK). **15** *Criminal Injuries Compensation Act 1967* (NSW). **16** See note 1. **17** *Victims' Support and Rehabilitation Act 1996* (NSW), s21(1)(3). **18** *Victims of Crime Assistance Act 1996* (Vic), s8(2)(a). **19** *Ibid*, s8(2)(b). **20** See Australian Law Reform Commission, *Family Violence – A National Legal Response (Report 114)* (Canberra, 2010) at 14. **21** See J Stubbs, 'Shame, Defiance and Violence Against Women: A Critical Analysis of "Communitarian" Conferencing' in S Cook and J Bessant (eds), *Women's Encounters with Violence: Australian Experiences* (London: Sage, 1997) 109 at 122. **22** M Willis, *Non-Disclosure of Violence in Australian Indigenous Communities*, (Canberra, 2011) at 2. **23** *Victims of Crime Assistance Act 1996* (Vic), s53(c). **24** *Victims' Support and Rehabilitation Act 1996* (NSW), s26(3)(b). **25** *Victims' Financial Assistance Scheme 2008* (NT) s31. **26** *Victims of Crime Assistance Act 2009* (Qld), s54(2)(c); *Victims of Crime Assistance Act 1996* (Vic), s29(3)(c). **27** *Victims' Support and Rehabilitation Act 1996* (NSW), Schedule 1. **28** *Victims of Crime Assistance Act 1996* (Vic), s8A(5) and Regulation 5. **29** *Victims of Crime Assistance Act 2009* (Qld) Schedule 2. **30** *Victims of Crime Assistance Act 1996* (Vic), Regulation 5(a). **31** *Ibid*, Regulation 5(c). **32** *Victims of Crime Assistance Act 2009* (Qld) Schedule 2. **33** *Victims of Crime Assistance Regulations 2008* (NT) s5. **34** *Victims of Crime Assistance Act 2009* (Qld), s6. **35** *Victims of Crime Assistance Regulations 2008* (NT), s5(1)(b). **36** *Victims of Crime (Financial Assistance) Act 1983* (ACT), s10(1)(f). **37** *Ibid*, s5(2)(a). **38** *Ibid*, s11.

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