
Criminal injuries compensation: Protecting vulnerable applicants

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Each year large numbers of persons sustain injury as a consequence of criminal behaviour. All Australian jurisdictions provide State-funded compensation to those harmed in this way. In the case of vulnerable applicants, the Assessor must consider not simply the appropriate and fair amount of compensation, but also how a person will be affected by the payment of compensation. Often a vulnerable applicant will apply through a guardian or a public trustee, although many apply in person. This article examines the use of legislative provisions, rules, regulations and practices in the various Australian jurisdictions in relation to how vulnerable applicants may be protected and supported once an award of compensation is made in their favour. Most jurisdictions provide for a mechanism by which compensation may be held in trust where the Assessor considers that the applicant may be unable to manage his or her financial affairs in his or her best interests. This article explores what factors are taken into account by Assessors in the absence of and pursuant to legislative directions. It considers how the approach may vary across jurisdictions and creative approaches to financial protection of vulnerable applicants.

INTRODUCTION

Schemes for victims of crime or criminal injuries compensation have operated in all States of Australia since the 1970s.¹ Decision-makers such as judges, magistrates, tribunal members and others (referred to here as Assessors) are required to assess whether an applicant has suffered injury² or loss as a consequence of an offence.³ Assessors must have regard to any pre-existing injury, disability⁴ or impairment⁵ when considering the impact of the offence. In some instances the applicant may have a pre-existing mental disability, which means they need assistance in making an application.⁶ Some applicants with pre-existing mental disability are represented by advocates, either a Public Trustee or solicitors briefed by a government department charged with the duty to care for the applicant. In these cases, any award or order may be paid into trust for the benefit of the applicant. In some jurisdictions an applicant who is not, at the time of making the application, subject to any assisted or substituted decision-making or guardianship orders, may have the award paid into trust because the Assessor determines it is in the applicant's best interests to do so. This is usually done where there is evidence

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¹ See Ian Freckelton, *Criminal Injuries Compensation: Law, Practice and Policy* (Lawbook Co, 2001).

² "Injury" as used throughout this article refers to the sudden or gradual physiological change occurring as a consequence of trauma and includes physical injury and mental and nervous shock.

³ The wording of the legislation varies State by State. This article generally applies the Western Australia provisions.

⁴ "Disability" refers to the effect of injury, specifically whether a person suffers an incapacity for work or other life activity as a consequence of an injury.

⁵ "Impairment" refers to loss of bodily and/or cognitive function arising as a consequence of an injury.

⁶ It is noteworthy that people with mental health disabilities may also be at risk of offending: see, for example, the references cited in Jeffrey Chan et al, "Applying the CRPD to Safeguard the Rights of People with a Disability in Contact with the Criminal Justice System" (2012) (19) 4 *Psychiatry, Psychology and the Law* 558.



that the applicant does not have the capacity to manage his or her own financial affairs or is in some way vulnerable to exploitation by others.⁷ Across jurisdictions the manner in which this is done is not universal and in some cases there is no direct power to protect an applicant who is identified as vulnerable.

This article addresses the following issues:

1. What powers, if any, do Assessors have to pay criminal injuries compensation into trust?
2. If the Assessor does have power to pay compensation into trust, what legal and other influences apply in making such a decision?
3. What criteria would be appropriate in determining any orders or directions to that effect?

The article begins by surveying the range of powers available to Assessors where the applicant lacks capacity to manage their financial affairs. It then considers the range of circumstances which raise the question whether a person has the capacity to manage financial affairs. Next, the article reviews the current law in relation to the issue of capacity in the context of a person's capacity to manage his or her own financial affairs. It also considers case law developed in the area of guardianship where the threshold questions of *capacity* are important issues in deciding whether to appoint a guardian or administrator. In addition, the article reviews those Articles of the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD) that may have application to the issue of capacity to manage financial affairs. It discusses the public policy factors unique to criminal injuries compensation schemes that may be relevant in deciding whether payment of the compensation should be made to a trust. The article concludes with a discussion of the application of the CRPD to criminal injuries compensation matters.

THE POWERS OF ASSESSORS TO PAY MONIES INTO TRUST

Dealing with the first issue, a reasonable starting point is the legislation in the Northern Territory where there is no power to pay money into trust unless the applicant or a person with a "genuine interest" in the welfare of the applicant requests it pursuant to ss 24 and 44 of the *Victims of Crime Assistance Act* (NT). In Tasmania, the *Victims of Crime Assistance Act 1976* (Tas) makes no provision for money to be paid into trust; however, in practice the Commissioner does use his or her discretion if it is considered that the applicant may be unable to manage the funds. The monies are either provided to the Public Trustee for management or, in a small number of cases, the Victims Support Service is asked to manage the funds on behalf of the applicant. In South Australia, there are no specific provisions whereby the Assessor may pay an award into trust; however, that situation is generally governed by rr 78, 257 and 258 of the *District Court Civil Rules 2006* (SA), which require that a person who lacks legal capacity must apply for an award through a litigation guardian and any settlement must be approved by the court, which then orders payment of the award into trust. Awards are routinely paid to the Public Trustee in the case of children but there is no similar provision in relation to adults.⁸

In New South Wales, s 46(1) of the *Victims Rights and Support Act 2013* (NSW) allows an Assessor to pay the financial support or recognition payment to:

- (a) the person to whom the application for such victims support relates, or
- (b) to any other person for the benefit of that person.

In addition, s 77 of the *Civil Procedure Act 2005* (NSW) can be used to deal with payment into trust where a person lacks legal capacity. If an Assessor becomes aware that the applicant may lack capacity to manage financial matters, then an approach can be made to the applicant or his or her

⁷ For a discussion of the interaction between the Assessor of Criminal Injuries Compensation Western Australia and the Public Trustee, see *Public Trustee v Larkman* [1999] WASCA 93.

⁸ That said, s 16 of the *Victims of Crime Act 2001* (SA) provides for the appointment of a Commissioner for Victims' Rights who is empowered inter alia "to marshal available government resources so they can be applied for the benefit of victims in the most efficient and effective way" and "to assist victims in their dealings with prosecution authorities and other government agencies" and "to monitor and review the effect of the law and of court practices and procedures on victims". Section 6 of the *Victims of Crime Act 2001* (SA) provides inter alia that a victim should be "treated with due regard to any special need that arise(s) ... for any other reason".

representative to inquire whether they will seek a Financial Management Order. If so, the award will be paid subject to that Order; if no Financial Management Order is obtained, then the award must be paid to the applicant.

In Queensland, ss 93 and 94 of the *Victims of Crime Compensation Act 2009* (Qld) provide that where the applicant is an adult with an *impaired capacity* who has an administrator for the matter, any lump sum assistance is paid to the administrator; or an attorney for the matter under an enduring power of attorney. The issue of impaired capacity is decided having regard to the *Guardian and Administration Act 2000* (Qld), which in Sch 4 defines “capacity” as:

- (a) understanding the nature and effect of decisions about the matter; and
- (b) freely and voluntarily making decisions about the matter; and
- (c) communicating the decisions in some way.

Prior to the introduction of the *Guardian and Administration Act 2000*, the repealed *Criminal Offence Victims Act 1995* (Qld) allowed for the Queensland Attorney-General to make ex gratia payments that could be paid into trust in circumstances where the applicant did not lack capacity but where the issue of vulnerability might arise.

As discussed below, the link between guardianship laws and a line of decided cases has considerable bearing on the issue of how and to whom awards for victims are directed.

The power of the tribunal in ss 50 and 70A of the *Victims of Crime Assistance Act 1996* (Vic) to allow the tribunal to pay monies into trust is not confined to the situation where the applicant lacks capacity. The tribunal has a broad discretion to make payments to trust where it considers it appropriate. Section 70A refers to the situation where the applicant is a person with a disability, and requires that monies awarded must be paid to the Supreme Court to be held on trust under the management of the Master of the Court. It is also noteworthy that the objects of the *Victims’ Charter Act 2006* (Vic) are:

- (a) to recognise the impact of crime on the victims of that crime, including the impact on members of victims’ families, witnesses to the crime and in some cases, the broader community;
- (b) to recognise that all persons adversely affected by crime, regardless of whether they report the offence, should be treated with respect by all investigatory agencies, prosecuting agencies and victims’ services agencies and should be offered information to enable them to access appropriate services to help with the recovery process;
- (c) to help reduce the likelihood of secondary victimisation by the criminal justice system.

These objects are generally consistent with the CRPD,⁹ which is discussed in detail below. Although these rights are not replicated in other States, they are consistent with the practice of victims of crime tribunals and courts. Section 6 of the *Victims’ Charter Act 2006* (Vic) explicitly requires that the needs of persons with disability be taken into account, which in turn would be a matter affecting the interpretation of the *Victims of Crime Assistance Act 1996* (Vic). Section 50 of the Act would allow the tribunal to make orders to pay an award into trust in cases where the applicant was regarded as vulnerable.

The *Victims of Crime (Financial Assistance) Act 1983* (ACT) operates in tandem with the *Victims of Crime Act 1994* (ACT). The latter Act includes in its objects to “establish appropriate ways for the treatment of victims by agencies involved in the administration of justice; and [to] help victims deal with the effects of criminal offences”. The former Act provides in s 44 that a Magistrate who determines an application for financial assistance may make an award subject to conditions relating to “the holding of any amount to be paid under the award in trust for a person entitled to the benefit of that amount”. This provision appears to be without limitation as to the matters that the Magistrate is required to take into account.

The breadth of the ACT and Victorian provisions is echoed in s 30(2) of the *Criminal Injuries Compensation Act 2003* (WA), which simply provides that the Assessor may make an award which “includes directions that all or a specified part of the compensation be held on trust for the victim”.

⁹ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

Section 30(5) provides that an Assessor “may at any time for good reason amend or cancel a direction made under section (2)”. These provisions have been relied upon to allow Assessors to pay money into trust where, by reason of lack of capacity or vulnerability, the applicant could not manage his or her financial affairs.

From this brief survey, it can be seen that the powers of Assessors across jurisdictions are not uniform, and range from jurisdictions that have no specific provisions dealing with the issue of paying into trust, to States in which a broad discretion allows Assessors to pay into trust where the applicant lacks capacity or is considered vulnerable. The midpoint appears to be where these powers are limited to situations where the applicant lacks capacity only, such as in Queensland.

It is argued in this article that a decision to pay money on behalf of the applicant into trust involves consideration of a number of principles. In the first instance, consideration must be given to a line of authority traditionally linked to issues of guardianship, relating to the issue of *capacity*. Capacity in this context refers to the broad issues affecting a person’s capacity to manage financial affairs. With the ratification of the CRPD by Australia, it may be that these decisions should also be informed by the principles enunciated in the CRPD, as well as those State and federal laws relating to discrimination against disability. Finally, there are matters involving public policy considerations, which are unique to the context of criminal injuries compensation and which should also be taken to account.

DISABILITY AND VULNERABILITY

There is a range of circumstances which may give rise to consideration of whether a person has capacity to self-manage financial affairs. It is the nature of criminal injuries compensation matters that the applicant will have suffered traumatic injury of some kind. The applicant provides evidence of injury, usually by provision of reports from health care providers. In many cases the injury will involve psychological or psychiatric harm. In some cases the reports provide evidence of cognitive harm to the applicant by reason of the offence. There may also be evidence of mental impairment which pre-dates the offence but which is aggravated by the trauma of the offence. The reports, victim impact statements, police statements and other papers often give the Assessor an insight in the applicant’s capacity to manage financial affairs. This becomes relevant at the time the Assessor makes the order for compensation.

These issues of capacity were touched on in *Erdogan v Ekici*, where Dixon J, dealing with the issue of capacity, observed:

The inquiry is into the quality of cognitive function and mental capacity, which inquiry is partly illuminated by a medical perspective and is partly a factual inquiry for the decision maker. In each context the focus remains on the circumstances of the beneficiary.

It is not an inquiry into the merit of any decision. *If it appears that the beneficiary may be disadvantaged in self-management of his or her affairs, such disadvantage must be caused by disability; cognitive deficit or impaired function from the acquired brain injury.*¹⁰

The information collected by an Assessor may include evidence of injury or impairment of the following kinds:

1. pre-existing psychiatric illness;
2. mental illness induced by drug¹¹ and/or alcohol dependence and abuse;
3. dementia;

¹⁰ *Erdogan v Ekici* [2012] VSC 256, [71]-[72] (emphasis added).

¹¹ Drug/substance addiction has been considered to be a disability for the purposes of the *Disability Discrimination Act 1992* (Cth) following *Marsden v Human Rights and Equal Opportunity Commission* [2000] FCA 1619, but that decision provoked some violent responses resulting in amendments to attempt to exclude addiction to “prohibited drugs” as a disability under the *Anti-Discrimination Act 1977* (NSW) and the *Disability Discrimination Act 1992* (Cth), though it does not appear to have been the subject of legislative change in other jurisdictions. Those attempts have been read down: see *Carr v Botany Bay Council* [2003] NSWADT 209 where methadone addiction was held to be a disability which was not excluded from the operations of the *Anti-Discrimination Act 1977* (NSW) as it was not addiction to a “prohibited drug”. This decision was followed in *Hubbard v Roads and Traffic Authority (NSW)* [2010] NSWADT 99.

4. intellectual disability; and
5. acquired brain injury.¹²

As noted above, there is a range of conditions which may affect a person's capacity to self-manage. As well as the issue of injury and impairment, there are other relevant circumstances. A number of scenarios help to illustrate these issues. A common scenario in relation to criminal injuries compensation is that the applicant has long-term illegal drug dependency/addiction or has been abusing prescribed drugs. Typically, the reports submitted contain some information on this issue, which often prompts the Assessor to make further investigations. The common basis for seeking further information is that the impact of the injury has to be measured, at least to some extent, against a background of the applicant's pre-existing health. This is particularly so where the applicant claims for disorders involving anxiety, depression and shock, which may have aggravated a pre-existing condition. The information gathered in relation to the applicant's medical condition may raise the issue of whether the applicant can self-manage financial affairs, particularly where the applicant has lost cognitive function.

Injury from domestic violence is frequently the subject of criminal injuries applications. Women in these situations have often been in a relationship characterised by fear, violence and often co-dependence. Even when the relationship is brought to an end, usually by the arrest of the male partner, women still live in fear of reprisal by the offender or his family or friends. The offender is usually made aware of the application and is alive to the prospect that the applicant will at some point be paid a lump sum. In some instances, it is appropriate to consider paying awards involving domestic violence victims into trust to protect the applicant from undue influence and duress. Similarly, where the applicant lives in a remote community, where the offender is close at hand and the community is aware of the claim, there is great potential for duress. The last two scenarios, however, do present some options for creative awards. For example, in Western Australia, and probably in other States, the Public Trustee often arranges to make periodic payments to coincide with pension payments, avoiding drawing attention of the community to the payments. An Assessor may make arrangements in these situations to pay sums for outstanding debts or immediate purchases (such as furniture, clothing) and then pay the balance to the Public Trustee for periodic disbursement. In this way, the disruption to the applicant's financial position is minimised and the chances of exploitation markedly reduced.

Finally, there are instances of applicants, usually involving younger men, who suffered acquired head injury as a consequence of a violent attack. The brain injury may be coupled with limited employment history, alcohol abuse and sometimes a criminal history of offences of violence. Prior to the head injury, the applicant's life may have been characterised by impetuosity, immaturity and rash financial decision-making that has precluded him from accumulating any savings. The applicant may have been able to manage day-to-day affairs because his income is limited to Centrelink payments, but the payment of a lump sum would represent considerable challenges and disruption to the person's life.

The forms of disability referred to above all raise the issue of a person's capacity to manage financial affairs; even though these forms of injury or impairment have diverse symptoms, treatments

¹² Acquired brain injury includes traumatic brain injury "resulting from trauma to the head and its direct consequences including hypoxia, hypotension, intracranial haemorrhage, and raised intracranial pressure; diffuse acquired brain injury – diffuse damage arising from trauma due to the above or a range of other acute incidents including hypoxia (eg due to drowning, electrocution, anaesthetic accident), hypoglycaemia, viral encephalitis; cerebrovascular accident (stroke) – which may be ischaemic or haemorrhagic (from aneurysms or arterio-venous malformations) neurosurgical operations (eg removal of a meningioma), radiotherapy, cerebral abscess, bacterial meningitis, and gunshot wounds": L Turner-Stokes et al, "Multi-disciplinary Rehabilitation for Acquired Brain Injury in Adults of Working Age", *The Cochrane Library* (Issue 1, 2011) 3. "Acquired brain injuries (ABI) frequently produce difficulties in attention and short term memory. Patients with ABI report problems with concentration, distractibility, forgetfulness, and difficulty doing more than one thing at a time. Certain aspects of memory are strongly related to attention. Even relatively small decrements in an individual's attention ability may significantly reduce the capacity for new learning and affect academic performance. Attention impairments frequently accompany executive dysfunction Patient complaints and research document problems with the allocation of attentional resources, switching between tasks with different cognitive requirements, time-sharing, processing resources and overcoming automatic responses when faced with non-routine situations": McKay Moore Sohlberg et al, "Evaluation of Attention Process Training and Brain Injury Education in Persons with Acquired Brain Injury" (2000) 22(5) *J Clin Exp Neuropsychol* 656, 656 (references omitted).

and impairment levels, they all implicate the cognitive functioning of the applicant, which in turn raises issues as to that person's decision-making capacity. In addition, a significant proportion of the Australian public will at one time or another develop a psychiatric illness.¹³ Psychiatric illness is often treatable and controllable and, in many cases, curable. A small proportion of people will need lifelong treatment, and may require assisted or substituted decision-making processes to be put in place.¹⁴ A large proportion of criminal injuries compensation applications include evidence of injury and disability in reports which detail forms of psychological distress and psychiatric illness. In addition, as noted above, the Assessor often has the advantage of a vast array of non-medical information that will be part of the factual inquiry referred to by Dixon J in *Erdogan v Ekici*. In this respect, Assessors are generally well placed to engage in the two-part inquiry. This factual aspect of the inquiry often informs the Assessor in relation to aspects of vulnerability that might arise by reason of the applicant's lack of maturity, education or literacy. As noted in the scenarios set out above, vulnerability may also be apparent due to a person's position in the community, which by reason of the association with family, community or peers may result in pressure being applied to the applicant to pay all or part of the award to family, peers or associates. Information of this kind often comes to hand through victim impact statements, police incident reports, criminal histories and other statements supplied by the applicant.

As will be discussed below, there is a need to consider capacity and vulnerability as operating on a spectrum. This acknowledges that the elements may vary from one aspect of a person's life to another. A person may have capacity in one area of life but require assistance in another. Likewise, capacity may vary over time. There can be little doubt that the bare fact of proof of a disability or impairment of function does not warrant the making of a finding that a person is incapable of managing financial affairs or is vulnerable to exploitation. This approach is referred to as the status approach.

An alternative approach is the functional approach, which takes into account whether, at the material time, the applicant lacks the capacity to manage financial affairs or is otherwise vulnerable and, as a consequence, whether the Assessor needs to consider a special form of order. Such an approach necessarily implies that a person may suffer a partial or temporary loss of capacity or that the loss of capacity relates to only some aspects of the person's life but not to all. Therefore in determining a person's *capacity*, regard should be had to the ability to understand, retain and use information, and the ability to foresee the consequences of decisions in relation to financial matters as well as the ability to communicate those decisions to others.¹⁵ There should be a presumption that a person has capacity to manage financial affairs and/or is not susceptible to exploitation.¹⁶ This presumption is embodied in a range of statutes where supported decision-making is at issue, such as guardianship legislation.¹⁷ In *Cadwallender v Public Trustee*, Heenan J said in relation to the question of placing monies into trust, that:

It follows from these considerations that the only justification for the legal estate in the trust fund to be held and administered by the trustee is the protection of the disabled person rendered necessary by his

¹³ Australian Bureau of Statistics, *National Survey of Mental Health and Wellbeing: Summary of Results, 2007* (2008) 7.

¹⁴ For example, a breakdown of the Victorian State Trustees clients during 2009-2010 is as follows: "Alzheimer's disease 2.32%, Huntington's disease 0.57%, Parkinson's disease 0.35%, depression 0.04%, paranoid schizophrenia 4.54%, intellectual impairment 17.18%, bi-polar disorder 1.15%, no capacity, unspecified reason 1.21%, ABI 4.85%, Munchausen's disease 0.01, stroke 0.64%, schizophrenia 14.13%, dementia 9.38%, multiple sclerosis 0.21%, vascular dementia 0.76%, physical disability 1.48%, ABI (motor vehicle) 1.67%, ABI (alcohol) 1.90%, ABI (drug induced) 0.08%, mental illness 9.48%, Korsakoff's disease 0.17%, Prader-Willy syndrome 0.01%": email from State Trustees to Victorian Law Reform Commission, 4 November 2010, cited in Victorian Law Reform Commission, *Guardianship*, Report No 24 (2012) 35 (fn 36) <<http://www.lawreform.vic.gov.au/projects/guardianship-final-report>>.

¹⁵ Legislative Council Standing Committee on Social Issues, Parliament of New South Wales, *Substitute Decision-making for People Lacking Capacity*, Report No 43 (February 2010) 35 <[http://www.parliament.nsw.gov.au/Prod/parliament/committee.nsf/0/e00602d3c8f39ca5ca2576d500184231/\\$FILE/100225%20SDM%20Final%20Report.pdf](http://www.parliament.nsw.gov.au/Prod/parliament/committee.nsf/0/e00602d3c8f39ca5ca2576d500184231/$FILE/100225%20SDM%20Final%20Report.pdf)>.

¹⁶ Legislative Council Standing Committee on Social Issues, n 15, 44.

¹⁷ For example, *Guardianship and Administration Act 1990* (WA) s 4; *Trustee and Guardian Act 2009* (NSW) ss 44, 45; *Guardianship and Administration Act 2000* (Qld) Sch 1 Pt 1.

or her own incapacity. Such an incapacity deemed to exist by reason of infancy alone will disappear on the beneficiary attaining the age of majority and then the beneficiary will be entitled to call for the transfer of the entire corpus of the trust estate. However, where the disability is due to the presence of some other incapacity then the reason for the trust will continue so long as the incapacity continues but not longer. If and when the beneficiary is able to establish that he is no longer disabled because that incapacity has passed or he has recovered from it, then there is no longer any basis to withhold the absolute enjoyment of the trust property. In such cases, however, adequate proof of recovery from the disability must be shown but, once it is, there does not appear to me to be any justification to continue the trust or to withhold the transfer of the corpus to the beneficiary absolutely. As I have previously observed, the exercise of determining whether or not this is the case seems, inescapably, to be a part of the administration of the trust and of the protective role which the court retains in its supervision.¹⁸

From *Cadwallender* it can be asserted that orders relating to substituted or assisted decision-making should only operate where there is continuing evidence of incapacity and that all such decisions should be open for review. It is important to note in the context of criminal injuries compensation that the amount is generally modest compared to other forms of compensation (such as workers compensation) and damages (such as motor vehicle claims or workplace negligence actions) and in most jurisdictions average around \$20,000-\$25,000 per claim.¹⁹

It is not within the scope of this article to discuss the relative merits and appropriateness of substituted decision-making as against assisted or supported decision-making. In practice, some applicants who have serious head injuries, dementia and significant intellectual disabilities require substituted decision-making.²⁰ Others may require assistance and guidance in managing their affairs.

THE BEST INTERESTS OF THE VICTIM AND THE QUESTION OF CAPACITY

This section reviews the authorities dealing with the issue of capacity. In addition, it asserts that other considerations should apply to criminal injuries compensation where Assessors have a broad discretion to pay monies into trust.

The common law has generally been mindful of providing protection to those who might be subject to undue influence and duress,²¹ unconscionable conduct²² or who cannot understand the import of documents they have signed.²³ The law in relation to wills, estates and contract has evolved in the last 50 years to make clear those protections. In addition, the Supreme Court has an extended protective jurisdiction in relation to those who are vulnerable for whatever reason as *parens patriae*.²⁴

¹⁸ *Cadwallender v Public Trustee* [2003] WASC 72, [45]. See also *S v State Administrative Tribunal of Western Australia (No 2)* [2012] WASC 306.

¹⁹ That said, there is provision in some States for award to far exceed these modest amounts where the applicant/victim has been subjected to multiple offences at the hand of multiple offenders. Contrast this with motor vehicle or negligence actions where claims may be significant and involve lifelong management of funds. See, for example, *Re Estate of Partigliani; Ex parte Public Trustee* [1999] WADC 50.

²⁰ Legislative Council Standing Committee on Social Issues, n 15, 49.

²¹ *Watkins v Combes* (1922) 30 CLR 180, 193-194; *Yerkey v Jones* (1939) 63 CLR 649, 675.

²² *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447.

²³ For a discussion of recent developments, see Elise Bant, "Incapacity, Non Est Factum and Unjust Enrichment" (2009) 33(2) MULR 368

²⁴ These principles, recently discussed by Heenan J in *S v State Administrative Tribunal of Western Australia (No 2)* [2012] WASC 306, overlap with statutory requirements as provided for in guardianship legislation have their origin in the *parens patriae* jurisdiction where the Supreme Court may exercise its powers in the best interests of the protected person: *Re Eve* (1987) 31 DLR (4th) 1, 28; *A v A Health Authority* [2002] 3 WLR 24. The *parens patriae* jurisdiction is always exercised with great caution: *VJC v NSC* [2005] QSC 68, [13]. This jurisdiction extends to all those persons who are not able to care for themselves (*Secretary, Department of Health and Community Services (NT) v JWB (Marion's Case)* (1992) 175 CLR 218) and it extends to the interests of infants, persons disabled because of unsoundness of mind or for other reasons.

In considering the question of capacity and vulnerability, the decisions of the courts²⁵ dealing with guardianship²⁶ and trustee issues are instructive.²⁷ As noted above, one of the reasons why an Assessor might pay monies into trust on behalf an applicant is because he or she lacks the capacity to manage financial affairs. In *Morris v Zanki*, the Court observed that:

The court has a duty to consider the future management of the verdict moneys and it has a discretion. The governing consideration is “what is best to be done for the [person under the disability]”. The discretion must be exercised judicially. It cannot be determined arbitrarily.²⁸

In *PY v RJS*, Powell J referred to the lack of capacity in terms of the ability to deal with everyday financial affairs and the risk that exists for the person if this ability is absent:

a person is not shown to be incapable of managing his or her own affairs unless, at the least, it appears:

- (a) that he or she appears incapable of dealing, in a reasonably competent fashion, *with the ordinary routine affairs of man*; and
- (b) that, by reason of that lack of competence there is shown to be a real risk that either:
 - (i) he or she may be disadvantaged in the conduct of such affairs; or
 - (ii) that such moneys or property which he or she may possess may be dissipated or lost (see *Re an Alleged Incapable Person* [(1959) 76 WN (NSW) 477]); it is not sufficient, in my view, merely to demonstrate that the person lacks the high level of ability needed to deal with complicated transactions or that he or she does not deal with even simple or routine transactions in the most efficient manner: see *In the Matter of Case* (1915) 214 NY 199, at p 203, per Cardozo J.²⁹

He also noted that:

it is not sufficient, in my view, merely to demonstrate that the person lacks the high level of ability needed to deal with complicated transactions or that he or she does not deal with even simple or routine transactions in the most efficient manner.³⁰

In *Re C (TH)*, Powell J observed that:

it is not a question of whether the Protective Commissioner or somebody else could manage the affairs of the applicant better, or that if the applicant was left on her own the likelihood would be that her funds would soon be dissipated. One cannot be too paternalistic. People have the right to manage their affairs, unless they fall below the level that is prescribed by the Act.³¹

Clarification of Powell J’s reference to the “ordinary routine affairs of man” appears in *H v H*, where Young J clarified this issue by noting that:

[T]he ordinary affairs of mankind do not just mean being able to go to the bank and draw out housekeeping money. Most people’s affairs are more complicated than that, and the ordinary affairs of

²⁵ There is some diversity of approaches. The so-called objective approach has been enunciated in the New South Supreme Court and followed in the Tasmanian Supreme Court in *Stevenson v Tasmania* [2008] TASSC 27 but distinguished in the Victorian Supreme Court in *Re MacGregor* [1985] VR 861 and *Erdogan v Ekici* [2012] VSC 256, which has adopted a more subjective approach.

²⁶ Except for Queensland, guardianship laws require that a person’s lack of capacity must be due to a disability: *Guardianship and Administration Act 1986* (Vic) ss 3 (definition of “disability”), 22(1)(a)-(b), 46(1)(a)(i)-(ii); *Guardianship and Management of Property Act 1991* (ACT) s 5; *Guardianship Act 1987* (NSW) s 3 (definition of “person in need of a guardian”). However, a diagnostic test is not specifically required in relation to the appointment of a financial manager: s 25G; *Guardianship and Administration Act 1993* (SA) s 3 (definition of “mental incapacity”); *Guardianship and Administration Act 1990* (WA) ss 3 (definition of “mental disability”), 64(1)(a); *Guardianship and Administration Act 1995* (Tas) ss 3 (definition of “disability”), 20(1)(b), 51(1)(b); *Adult Guardianship Act* (NT) s 3(1) (definition of “intellectual disability” for the purposes of this Act); *Guardianship and Administration Act 1986* (Vic) s 36(2).

²⁷ These are similar matters that have to be determined in most States. For example, s 43 of the *Guardianship Act 1996* (WA) provides that subject to s 4, where the State Administrative Tribunal is satisfied that a person incapable of looking after his or her own health and safety, or unable to make reasonable judgments in respect of matters relating to his or her person; or, in need of oversight, care or control in the interests of his or her own health and safety or for the protection of others.

²⁸ *Morris v Zanki* (1997) 18 WAR 260, 286.

²⁹ *PY v RJS* [1982] 2 NSWLR 700, 702 (emphasis added).

³⁰ *PY v RJS* [1982] 2 NSWLR 700, 702.

³¹ *Re C (TH)* [1999] NSWSC 456, [10].

mankind involve at least planning for the future, working out how one will feed oneself and one's family, and how one is going to generate income and look after capital. Accordingly, whilst one does not have to be a person who is capable of managing complex financial affairs, one has to go beyond just managing household bills.³²

In *Re Ghi*, Campbell J referred to two additional factors to be considered when determining whether a person is “incapable of managing their affairs”:

The first is whether or not the person is willing to seek and take appropriate advice. In general, taking advice can “remove the risk that the lack of the abilities will cause the person to be disadvantaged in the conduct of his or her affairs”. The second is whether the person has the ability to identify and deal appropriately with those who may be attempting to benefit from their assets through unfair dealing. In regards to Justice Powell's classic formulation, this factor is relevant since the *skill to identify and deal appropriately with exploitation is necessary to carry out the ordinary routine affairs of mankind*. The lack of this skill may create a real risk that the person may be disadvantaged or that their estate may be dissipated or lost.³³

Powell J has observed that the time at which the capacity should be shown is not just at the time of hearing but having regard to the reasonably foreseeable future.³⁴ These decisions are said to apply an objective test, in so far as they assert that the “ordinary affairs of mankind” are the guiding principle. This approach is discussed in the Western Australian decision of *Re FS*, which considered the *Guardianship Act 1990* (WA) requirement that the trier of fact to determine whether a person is able to make “reasonable judgements” in relation to certain financial matters.³⁵ This phrase is not defined in the legislation. It was held that:

the making of a “reasonable judgment” is the *outcome of a process that involves knowledge, understanding and evaluation* ... The effect of all of this as it relates to the operation of s 64(1)(a) of the GA Act, is to require the Tribunal to consider *the extent to which a person with a mental disability is able to engage in the cognitive process that culminates in an ability to make a “reasonable judgment” (which will vary from person to person and may include a lack of any observed ability), and then to set that ability against the requirements of the person's individual estate and circumstances*.³⁶

The subjective approach adopted in Western Australia, Tasmania and Victoria appears to be more in accord with the CRPD. These decisions may assist in forming a view in relation to criminal injuries compensation matters, although there may be broader issues which need to be considered. In Western Australia and arguably the ACT and Victoria, the legislation does not prescribe any jurisdictional trigger (such as *capacity*) for payment of monies into trust. Therefore while the issues of capacity are relevant, the discretion of an Assessor is not limited to such issues. Hence the principles of *parens patriae* also inform considerations of capacity and vulnerability. While an Assessor does not exercise the *parens patriae* jurisdiction, which includes protection of the interests of infants, persons disabled because of unsoundness of mind *or other reasons*,³⁷ the breadth of the Assessor's discretion in Western Australia and Victoria extends, it is submitted, to persons who are vulnerable but who may not necessarily have a disability. In this respect, Young J in *Re R* noted that “best interests” includes the “welfare, health and well-being of the person in a wider sense than is suggested by protection from neglect, abuse or exploitation”.³⁸

Having regard to the issues of vulnerability, it has been noted above that the applicant may be subject to influence and persuasion by associates and family. They may have a capacity to manage the

³² *H v H* (unreported, Supreme Court of New South Wales, Young J, 20 March 2000) [7]-[8].

³³ Law Society of New South Wales, *When a Client's Capacity is in Doubt: A Practical Guide for Solicitors* (2009) 11-12 (emphasis added), referring to *Re Ghi* [2005] NSWSC 581, [119]-[125].

³⁴ *CF v TCML* [1983] 1 NSWLR 138, 141; *McD v McD* [1983] 3 NSWLR 81, 86; *DML v LMR* (unreported, Supreme Court of New South Wales, Powell J, 20 June 1991) 61.

³⁵ *Re FS* [2007] WASAT 202, [103]-[110]. Similar provisions apply in *Guardianship and Administration Act 1995* (Tas) ss 20(1)(b), 51(1)(b); *Adult Guardianship Act* (NT); *Guardianship and Administration Act 1986* (Vic).

³⁶ *Re FS* [2007] WASAT 202, [109]-[110] (emphasis added).

³⁷ *Secretary, Department of Health and Community Services (NT) v JWB (Marion's Case)* (1992) 175 CLR 218.

³⁸ *Re R* [2000] NSWSC 886; see also *McD v McD* [1983] 3 NSWLR 81, 86.

lower spectrum of financial affairs in the sense that they can make reasonable judgments about day-to-day or routine affairs but their will or ability to do this may be overborne by those in their community, peers or associates. It is submitted that where there is cogent evidence of these circumstances then it may be appropriate to pay the award into trust.

In considering issues of vulnerability the question of where to pay the money is instructive. In *Morris v Zanki*, it was held that while there was a pre-disposition towards payment to the Public Trustee, the Court observed:

Where the court is asked to exercise the power to place funds with a private trustee rather than the Public Trustee the judge must examine all of the circumstances and decide what is in the best interests of the person for whose benefit the funds are to be held. This will, of necessity, require a consideration of available options and alternatives. But this is not to say that a pre-disposition towards the Public Trustee is an impermissible fetter on the discretion. It serves a number of purposes. It indicates that the onus is on the person seeking the exercise of the discretion in his or her favour to establish grounds on which the order should be made. It means that if no application is made or if no good reason is shown for preferring a private trustee, the Public Trustee will assume the role. We have chosen the adjective "good" (in relation to the reasons that are advanced in support of the application) quite deliberately. We would avoid other possible descriptions such as "cogent" or "special" or "exceptional".³⁹

In *Martin v Castelanelli*, the Western Australian Supreme Court set out the following factors to be taken into account in determining who should be a trustee:⁴⁰

1. the financial security of the fund in the long term;
2. the necessity to have some independent entity or person in a position to ensure that at all times the plaintiff's interests are protected;⁴¹
3. the wishes of the family;
4. the harmonious relationship between the family and the trustee;⁴² and
5. the level of fees likely to be charged by the trustee.⁴³

In *Re AW*, Assessor Dempsey observed that s 30(2) of the *Criminal Injuries Compensation Act 2003* (WA) provides that when making a compensation award the Assessor may include directions that all or a specified part of the compensation be held in trust for the applicant.⁴⁴ The Assessor had before her a proposal that the applicant's mother or father could be trustee for the applicant. The Assessor noted that the Act does not require that, in circumstances where an Assessor determines a person suffers from a disability, any award or part thereof *must* be held by the Public Trustee. There is no doubt the law permits and encourages loved ones and confidants to advise and comfort those in need of their support. She noted *Martin v Castelanelli* and observed that:

Whilst I accepted that the applicant's mother and father would wish the best for their son's welfare at all times, the primary concern I had with the proposal for the *applicant's parents to be made trustees is that their very closeness to the applicant would not make them independent.*

I specifically asked Dr Shymko at the hearing on 28 April 2004 to comment on the applicant's capacity to manage his financial affairs and, possibly, a large sum of money. In Dr Shymko's view the applicant was not capable of managing his finances. In particular, he had concerns about the applicant's level of impulsivity and recklessness. In addition, Dr Shymko commented that the applicant lacks the ability to plan appropriately and therefore to manage his finances in a capable sort of manner. Dr Shymko also said that he thought it would be an imposition and difficult if the applicant's parents were to look after any money which was awarded to him.

³⁹ *Morris v Zanki* (1997) 18 WAR 260, 286.

⁴⁰ *Martin v Castelanelli* (1999) 23 SR (WA) 18, 21.

⁴¹ *Morris v Zanki* (1997) 18 WAR 260, 293-295.

⁴² *Jones v Moylan* (1997) 18 WAR 492, 500, 501.

⁴³ Applied in *Sullivan v Kalina* [2009] WADC 57; *Collins v RL & B Burns Nominees Pty Ltd* [2002] WADC 242.

⁴⁴ *Re AW* [2004] WACIC 46.

I therefore directed in my award that the sum of \$64,600 be paid to the Public Trustee. This was the balance of the amount I awarded for injuries and loss of earnings less the sum of \$4,400 costs to be paid to the applicant's solicitor.⁴⁵

In *Re P9/2000*, Hallen J summarised the authorities in relation to family members as trustees:⁴⁶

I accept that there are inherent advantages in A's estate being continued to be managed by a family member, with appropriate advice or expertise, rather than by a statutory body, particularly if the estate is of modest size, *if there is no conflict of interest and duty, and where a relationship of love and affection between the respondent and the managed person is established.*⁴⁷

These cases alert the Assessor to considerations of conflict of interest. A vulnerable claimant may seek to have money paid to him or her directly, rather than to trust, because he or she is indebted financially or otherwise to family or associates. This perception may be guided by certain community or religious values or influenced by pressures or (wrongly perceived) notions of duty, or cultural imperatives, the latter often being poorly enunciated. This theme is returned to below.

THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

This section reviews those Articles of the CRPD that have direct application to victims of crime matters. In making awards of compensation, Assessors must strike a balance between, on the one hand, protecting vulnerable people from harm either from themselves or from others who would take advantage of them, and on the other hand, respecting and promoting their right to manage their finances autonomously. Where a decision is made to pay monies into trust for the benefit of a person who lacks capacity or who is vulnerable, it might be argued that the decision-maker is making the order or award because they know better than the applicant where their best interests lie. With the introduction of the CRPD, consideration now needs to be given to those principles that assert the presumption of legal capacity, the principle of least restriction of rights for the shortest period possible and the promotion of assisted decision-making, as opposed to substitute decision-making. The CRPD generally adopts a human rights approach to disability such that disability is located in society rather than in the individual. This approach does not undermine the importance of medicinal and other services.⁴⁸ A focus on capacity rather than disability is consistent with this approach. These principles do not relieve a decision-maker from the duty to protect those who lack capacity. A decision to direct monies be payable to a trustee involves some encroachment on the freedom of the individual. Importantly, most jurisdictions allow the court or tribunal to review, vary or revoke formal pre-emptive, informal or formal court or tribunal-sanctioned substitute decision-making arrangements.

A preliminary question arises as to the extent which an Assessor should have regard to international instruments. In this respect, there are a number of factors that now point strongly to the need for Australian courts and tribunals to have regard for international instruments. The High Court in *Minister for Immigration and Ethnic Affairs v Teoh* restated the rule that the provisions of a ratified treaty do not form part of Australian law unless validly incorporated by domestic legislation.⁴⁹ The Court also affirmed the accepted rule that ratification will have significance for Australian law through the interpretation of legislation where provisions are ambiguous.⁵⁰ This decision was later subjected to

⁴⁵ *Re AW* [2004] WACIC 46, [102]-[104] (emphasis added).

⁴⁶ A case involving a clear conflict of interest is *Re FNB* [2010] NSWGT 9.

⁴⁷ *Re P9/2000* [2011] NSWSC 49, [21], citing *Re L* [2000] NSWSC 721.

⁴⁸ Annegret Kampf, "The Disabilities Convention and its Consequences for Australian Mental Health Laws" (2008) 26(2) *Law in Context* 10; Frederic Megret, "The Disabilities Convention: Towards a Holistic Concept of Rights" (2008) 12(2) *International Journal of Human Rights* 261; Vanessa Torres Hernandez, "Making Good on the Promise of International Law: The Convention on the Rights of Persons with disabilities and Inclusive Education in China and India" (2008) 17(2) *Pacific Rim Law and Policy Journal* 500.

⁴⁹ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

⁵⁰ Wendy Lacey, "In the Wake of Teoh: Finding an Appropriate Government Response" (2001) 29(2) *FL Rev* 219

heavy criticism and ultimately its effect was limited.⁵¹ State and federal legislation in relation to disability pre-dates the ratification of the CRPD. Arguably, while the CRPD may not necessarily be used as a tool to interpret ambiguous provisions in legislation, it may be a legitimate influence on the development of the common law in so far as domestic legislation should not derogate from a rule of international law.⁵² Notwithstanding the limitations of *Teoh*, international law now arguably has an entrenched influence on Australian jurisprudence. For example, in *Royal Womens Hospital v Medical Practitioners' Board of Victoria*, Maxwell P said: "The Court will encourage practitioners to develop human rights-based arguments where relevant to the question in the proceeding."⁵³ It follows that in considering those matters to take into account in relation to paying monies into trust, an Assessor should be mindful of the CRPD and related legislation dealing with disability.

Article 12 of the CRPD provides for equal recognition before the law and the presumption of capacity. It provides that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life and that they should be provided with access to the support they may require in exercising their legal capacity. Article 12 also requires safeguards be put in place to ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence.

Article 13 relates to access to justice and requires that persons with disabilities should have equal access, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, whether at investigative and other preliminary stages.

Article 16 provides for member states to enact provisions that prevent exploitation, violence and abuse, which includes ensuring, among other things, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities. Further, this Article includes reference to providing for measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse. The CRPD directs that effective legislation and policies, including women and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted should be put in place. In the context of victims of crime, this Article is an alert to issues of vulnerability and exploitation. These aspects are discussed further below.

Article 17 relates to the protection of the integrity of the person, while Art 19 deals with aspects of persons with disabilities living independently and being included in the community, such as the opportunity to choose a place of residence and where and with whom they live. Article 22 relates to issues of privacy so as to prevent arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication or to unlawful attacks on his or her honour and reputation, in particular privacy of personal, health and rehabilitation information.

These Articles and others in the CRPD provide useful parameters for some of the issues which arise in determining if payment of an award or order should be made to a third party as a substitute or assisting decision maker for the applicant.

PUBLIC POLICY CONSIDERATIONS IN VICTIMS OF CRIME MATTERS

This section addresses the issue of public policy as a factor to be taken into account when paying monies into trust on the basis that the person lack capacity or is vulnerable.

There is good reason to assert that not only should issues of *capacity* be considered but also more general issues of vulnerability, and in particular the potential for an applicant/victim to be subject to

⁵¹ The decision in *Teoh* has since been undercut both by the High Court and successive federal governments of both political hues. Both have introduced legislation to overturn *Teoh*, albeit the legislation has never passed through Parliament due to proroguing before it went through the necessary stages. See Jocelyne Scutt, "Sparing Parents Pain or Spoiling the Child by the Rod: Human Rights Arguments against Corporal Punishment" (2009) 28(1) U Tas LR 1.

⁵² See Mary Ann Yeats, "Criminal Justice without a Bill of Rights" (2001) 30(1) UWAL Rev 99, citing *Polites v Commonwealth* (1945) 70 CLR 60.

⁵³ *Royal Womens Hospital v Medical Practitioners' Board of Victoria* (2006) 15 VR 22, 38-39.

exploitation or undue influence. It is argued below that the best interest of the applicant requires consideration of issues of public policy.⁵⁴ Victims of crime legislation provides compensation to victims of crime in some but not all circumstances. In most States, there are provisions that prevent payments being made where the applicant has committed a crime when they were injured or where they have otherwise contributed to their injuries. In some States, compensation is not payable where there is an ongoing relationship between the offender and victim, whereby money paid under the award is likely to benefit or advantage the offender. There are provisions that require applicants to claim other forms of insurance prior to making victims of crime applications, such as motor vehicle and workers compensation insurances. Universally, there are provisions that preclude compensation where the applicant did not reasonably assist prosecuting authorities.⁵⁵ It follows that legislation of this kind attempts to strike a balance between the public interest of compensating victims of crime, while precluding payment in certain circumstances where it would be against public policy to do so.⁵⁶ In addition, it is also relevant to take into account that:

1. the victims of crime compensation is paid by the State out of the public purse;⁵⁷
2. the allied or connected notions of prevention of crime, that is, it is implicit that the Assessor should not make an award that would foreseeably aid the commission of a crime; and
3. the therapeutic implications of the Act, in so far as the Assessor can facilitate counselling and other treatment modalities for victims of crime.

One important issue for an Assessor in deciding whether to make an order to hold monies in trust is the extent to which the applicant/victim will or should be allowed to make bad decisions.⁵⁸ It also noted that a person should not be presumed to lack capacity simply because other persons may consider the decisions the person has made to be unwise.⁵⁹ Even those who do not lack capacity to manage their financial affairs and the most robust in the community make poor financial decisions. While it is difficult to articulate what a “bad” decision would be, it seems reasonable to intervene where public funds are in issue and where the applicant/victim is likely to make a decision that would cause them harm. This is clearly a matter of degree – the point at which something is simply “unwise” becomes “harmful”. In this context, the Assessor has usually been provided with a range of materials that assist in coming to a view on this spectrum. It would also include facilitating unconscionable conduct or undue influence on behalf of third parties to the detriment of the applicant. Assessors need to be alert to associates of the applicant/victim who aggressively initiate a particular transaction, insulate the applicant/victim from outside supervision, or discourage the applicant/victim from seeking independent advice. Insights into the latter are usually obtained from file materials, which show an applicant’s inexperience in dealing with large sums of money, indications that the applicant may feel somehow unreasonably indebted to a person or persons, or patterns of spending that in the past have lead to sustained debts which have prevented the applicant from securing the basic comforts of life.

It is also important to consider that payment of lump sums may in some circumstance involve some sophisticated interactions with Centrelink in relation to preclusion periods.⁶⁰ Likewise, the

⁵⁴ There seems little doubt that issues of public policy are a consideration in victims of crime compensation: see, for example, *South Australia v Nguyen* (1991) 57 SASR 252; *Richards v South Australia* [1997] SADC 3577.

⁵⁵ See, for example, in Western Australia: *Attorney-General (WA) v Schoombee* [2012] WASCA 29.

⁵⁶ For example, see *Young v Northern Territory* [2004] NTSC 16; *Victims Compensation Fund Corp v Brown* (2003) 201 ALR 260.

⁵⁷ Reference to the public purse as a factor for consideration appear in *Lanyon v Northern Territory* [2002] NTSC 6; *Hohn v King* [2004] QCA 254; *Richards v South Australia* [1997] SADC 3577.

⁵⁸ Legislative Council Standing Committee on Social Issues, n 15, 55.

⁵⁹ Legislative Council Standing Committee on Social Issues, n 15, 47.

⁶⁰ Centrelink, *Notes for Compensation and Damages* <<http://www.humanservices.gov.au/spw/customer/forms/resources/modc-1403en.pdf>>.

Australian Taxation Office is watchful of lump sum settlements.⁶¹ There is also a body of literature which indicates that recipients' of large payments do not necessarily have positive health outcomes⁶² and that in many instances the inevitable time lapse between injury and payment results in accrual of debts that need to be managed.⁶³ Often the critical decision for the Assessor arises because there is likely to be significant change in the applicant's position, and the question arises as to whether that change can be managed adequately. Injury which often gives rise to unemployment is linked in turn to increased prospects of depression. Taking all these matters into account, the Assessor might then consider:

1. What is the range of abilities that is required for the applicant to manage their financial affairs?
2. Considering the spectrum of applicant's abilities, how well does the applicant manage his or her day-to-day financial matters, and having regard to all relevant factors (such as financial experience, debt management, peer support or lack thereof) how would the applicant adjust to managing a lump sum payment?
3. Has the applicant sought advice in relation to his or her financial affairs in the past? From whom did he or she seek advice and was this appropriate in all the circumstances?
4. What medical or other conditions reduce the applicant's capacity to manage his or her financial affairs?
5. What factors, associations or past decisions make him or her vulnerable to undue influence or unconscionable conduct by others?
6. Is the applicant likely to do harm to himself or herself by reason of his or her disability and/or vulnerability? Harm in this context includes facilitating physical harm, such as illegal drug taking and supporting drug addiction and the like.
7. Whether the reduced capacity or vulnerability is permanent or temporary. "Permanent" in this context means for the foreseeable future.
8. Whether the person or their advocates can participate in the decision to pay monies into trust, regardless of their lack of capacity or vulnerability.
9. The person's past and present wishes, feelings, beliefs and values.

The weight to be attached to each of these factors would vary in each case.

⁶¹ Many taxation issues are unresolved. For example, see Australian Taxation Office, *Income Tax: Compensation Payments for Personal Injury*, Withdrawn Draft TR 94/D20, 5 May 1994 (in relation to taxation on personal injuries settlements which may include victims of crime compensation) <<http://law.ato.gov.au/atolaw/view.htm?docid=DTR/TR94D20/NAT/ATO/00001>>, which appears to have been followed by Australian Taxation Office, *Income Tax: Assessability of Statutory Personal Injury Compensation Scheme Payments*, Withdrawn Draft TR 2002/D13W, 18 February 2004 <<http://law.ato.gov.au/atolaw/view.htm?locid=DTR/TR2002D13W/NAT/ATO&PiT=20060701000001>>. See also Australian Taxation Office, *Income Tax: Assessability of Lump Sum Compensation Receipts and Interest Paid under Section 45A of the Workers Rehabilitation and Compensation Act 1986 (South Australia)*, CR 2010/8, 17 March 2010 (in relation to workers compensation settlements in South Australia) <<http://law.ato.gov.au/atolaw/view.htm?locid=clr/cr20108/nat/ato>>. See generally Australian Taxation Office, *Compensation Payments* <<https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/In-detail/Information-for-your-objection/Income-tax--capital-gains/Compensation-payments>>.

⁶² Alan Clayton in *Review of the Tasmanian Workers Compensation System* (September 2007) fn 29 observed that: "It should perhaps be noted that the only large scale, methodologically sophisticated, Australian study of the health outcomes of the recipients of lump sum settlement payments compared to workers remaining on weekly payments indicates that those receiving settlements have worse future health outcomes. This study of 1,021 New South Wales WorkCover claimants involved matching the impact of different compensation pathways for workers with similarly matched injury and illness conditions. It showed that the common law pathway was associated with, on average, greater than double the odds of poor health outcomes compared to the weekly benefit pathway. The lump sum redemption (commutation) pathway was also associated with greater odds of poor health outcomes than the weekly benefit pathway, but not as great as that associated with the common law pathway. This effect remained unchanged after adjustment for socio-demographic factors: PriceWaterhouseCoopers, *Health, return to work, social and financial outcomes associated with different compensation pathways in NSW: Quantitative survey of claimants*, September 2003." Delay in determination of claims may also give rise to depression: see, for example, Krysia N Mossakowski, "The Influence of Past Unemployment Duration on Symptoms of Depression among Young Women and Men in the United States" (2009) 99(10) *Am J Public Health* 1826.

⁶³ Arthur Owen Woodhouse, *Report of the National Committee of Inquiry on Compensation and Rehabilitation in Australia* (AGPS, 1974). See the seminal work of Catherine Ross and Joan Huber, "Hardship and Depression" (1985) 26(4) *J Health Soc Behav* 312.

CONCLUSIONS

This article has surveyed the current laws in relation to the payment of award into trust for victims of crime. It has established that there is a variation in these procedures across the Australian jurisdictions. While some jurisdictions such as Western Australia, Australian Capital Territory and Victoria may provide broad discretion to pay monies into trust, there is no legislative direction as to when and why this should be done. Relying on the case law in relation to the issue of capacity may provide some assistance, but other considerations should also be taken into account, such as public policy issues. Those public policy issues may appear to impinge upon the rights of a person to manage their own financial affairs. However, when account is taken of an applicant's vulnerability, the applicant's right to self-determination is in fact enhanced where a protective order is put in place to prevent them being overborne or suffering further harm. Guardianship legislation in Australia is under review. Two major jurisdictions have undertaken significant studies of their laws in the light of the CPRD.⁶⁴ Similarly, questions that arise as preliminary issues in relation to assisted and substitute decision-making also need to be considered in light of the CPRD, as well as in light of existing anti-discrimination legislation.

⁶⁴ Legislative Council Standing Committee on Social Issues, n 15; Victorian Law Reform Commission, n 14, 35 (fn 36).