



SUBMISSION TO THE DEPARTMENT OF JUSTICE
Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded awards

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Fitzroy Legal Service

Fitzroy Legal Service (“FLS”) is one of the oldest community legal centres in Australia. Located in the inner Melbourne suburb of Fitzroy, our doors first opened in 1972 to provide casework to clients who live, study or work in a catchment area consisting of Fitzroy, Collingwood, Abbotsford, Brunswick, Richmond, Carlton, East Melbourne and Clifton Hill.

Our service operates both day and night services to best meet the needs of clients and to take full advantage of the many highly experienced lawyers and willing legal students who provide their valuable skills on a pro bono basis.

The service also plays a significant role in the areas of law reform and community legal education, which is closely bound up with the practice of preventative law, demystification of the law, self-help and empowerment. FLS also has a long history of running public interest cases and working closely with communities and individuals who otherwise would not have the opportunity to have their voices heard in public discourse.

Our experiences in the casework practice serve to inform our law reform and community legal education activities.

Overview

We are pleased to have the opportunity to respond to this Review (“the Review”). FLS has for a number of years run Victims of Crime Compensation (VoCAT) matters. Since about 2005, we have also operated a monthly outreach at CASA House to assist female victims of sexual assault claim VoCAT assistance. Our solicitors appear at the local Magistrates Courts and the Collingwood Neighbourhood Justice Centre in relation to VoCAT matters.

FLS has not dealt with many compensation cases at sentencing and civil proceedings. Therefore, most of our submission addresses the themes raised in the Department of Justice’s discussion paper relating to the VoCAT system.

We have provided a number of de-identified case studies to support our submission. These case studies are an indication of the types of VoCAT matters that we deal with.

Recommendations:

We make the following recommendations in our submission:

- **Active offender engagement with the VoCAT process should only occur when the victim in the VoCAT application requests the Tribunal to engage with the offender in order to assist with his/her healing.**
- **There should be specialized Magistrates dealing with VoCAT matters.**
 - **It would be preferable that the gender of the specialised Magistrate be a factor when hearing VoCAT matters of sexual violence.**
- **The obligatory requirement of the Magistrate to take an applicant's past criminal conduct into account in determining an award should be:**
 - **at most, abolished or;**
 - **at least, a *discretionary* power of the Magistrate**
- **That VoCAT work closely with the CASAs and other professional counselling bodies to gain advice and guidance as to how a crime (particularly sexual abuse and/or sexual assault) can impact upon a victim's future employment prospects.**
 - **The Tribunal then take these factors into account in making an award in recognition of loss of potential/possible future earnings.**
- **Legal fees for VoCAT be raised so that there are more private practitioners who are willing to assist clients in VoCAT matters**
- **Medical fees that are incurred as a direct result of the crime be paid immediately upon receipt of a quote from medical professionals.**
- **VoCAT make a Practice Direction, defining its interaction with the Medicare GP Mental Health Care plan.**
- **If the VoCAT claim is not finalized until after a criminal trial, that interim awards for counselling should be made immediately available to the victim (up to the final date of the criminal trial).**

- **The Tribunal make awards of money available for applicants pursuant to section 8(3) of the VoCAT Act .**
- **Special financial assistance provisions be made available to victims of assaults, sexual assaults or sexual abuse who have experienced the incidents of violence prior to 1997.**
- **The Tribunal consider a victim centred approach in making awards for special financial assistance.**

Purpose of Crimes compensation

It is the view of FLS, that crimes compensation is available to Victorians in State recognition of the harm caused to victims who have suffered a crime that has caused physical and emotional trauma, suffering and distress. FLS is pleased that the State Government has been willing to recognize its role in assisting and supporting victims to heal and recover by providing compensation via the VoCAT process.

A large number of our VoCAT clients are victims of historic childhood sexual abuse. Such a crime has significant lasting effects on clients which impact upon a client's future social and professional opportunities. Furthermore, due to the time period by which clients are able to feel emotionally safe enough to either approach the police or ourselves, the offender may have passed away. This can cause our clients to feel further grief over the loss of childhood and future prospects as a result of the criminal act of violence years ago.

A number of our clients also do not choose to report the historic childhood sexual abuse to the police as they fear family retribution (or indeed, have suffered exclusion from their families as a result of the crime) or fears for their safety. Furthermore, in sexual assault cases, there are usually only two parties involved in the matter, which makes it very difficult for the police to charge alleged offenders on the evidence of one person. When an offender is not charged in these matters, our clients have reported feeling disbelieved and doubted by the legal system. As such, our clients can suffer further trauma due to the fact that the offender is not charged.

Due to our clients' experiences, FLS does not support active offender engagement with the VoCAT process **unless the victim in the VoCAT application requests the Tribunal to engage with the offender in order to assist with his/her healing**. It is also recommended that the Centres Against Sexual Assault (CASA) be consulted by the Department of Justice in relation to the CASA's specialist knowledge in understanding that a crime has occurred to cause the injury that the CASA clients has suffered. This is particularly relevant in matters where the matter has not been reported to the Police.

Victoria's legal system already provides opportunities for offenders to pay compensation to the victim via the civil litigation option explored in the discussion paper. As also explored in the discussion paper, compensation may be sought by the victim during the sentencing process. In the limited experience of FLS in pursuing compensation from the offender via the sentencing and civil litigation options, the process by which to pursue and *enforce* the payment of compensation can cause additional trauma and stress to the victim. Clearly, this option is really only worth pursuing if the offender has the financial means by which to pay compensation.

Case study 1

Mr. Z, was a victim of assault by Mr. Y. Both Mr. Z and Mr. Y were claiming refugee status from different countries. In addition to the assault, Mr. Y stole a sum of money from Mr. Z. Both Mr. Z and Mr. Y are essentially homeless and relying upon the goodwill of welfare organizations and community members to live.

In the course of the criminal proceedings, Mr. Y pleaded guilty to the theft of the sum of money. Mr. Z was very worried about having to appear as a witness in the criminal matter, but did so on the principle that Mr. Y should be made accountable for his actions.

Mr. Y was found not guilty of the assault, however, the Magistrate made comments that had the matter been heard in the civil jurisdiction where the burden of proof was lower, there was a high likelihood that he would be found guilty of the assault. Although the Magistrate ordered restitution of the money that had been stolen, Mr. Y informed the court that it had all been spent. Mr. Y had no assets.

Mr. Z considered commencing civil proceedings against Mr. Y for the assault and also to enforce the payment of the restitution order. However, the idea of having to go through another course of legal proceedings was distressing to Mr. Z. He did not want to have to see Mr. Y again as it was extremely difficult when he had to face him in the criminal proceedings. He also was unable to find an address by which to serve any legal documents upon Mr. Y due to Mr. Y's state of homelessness.

The fact that Mr. Y was unlikely to be able to repay the restitution order also distressed Mr. Z's sense of fairness. He felt angry with the legal system and disappointed by the process. Mr. Z is awaiting the outcome of his VoCAT application in relation to the assault.

Fitzroy Legal Service's experiences of the VoCAT system

It is FLS' general experience that VoCAT Magistrates are sensitive and compassionate to clients when conducting hearings. It is of great support and validation to a client when s/he has had the crime acknowledged by a Magistrate representing the State.

It is imperative that a Magistrate sitting on the VoCAT list be aware that s/he is not managing a criminal trial. The process and (alleged) victim's role in the criminal jurisdiction is very different from his/her role and position in the VoCAT process. It is for this reason that **FLS recommends that there be specialized Magistrates dealing with VoCAT matters. If possible, it would be preferable that the gender of the specialised Magistrate be a factor when hearing VoCAT matters of sexual violence.**

Case study 2

Ms. P was a young University student who had been sexually assaulted by a family member when she was approximately 8 years old. Ms. P was disbelieved by her family in relation to her disclosures and suffered isolation, depression and poverty. The family member responsible for the sexual assault had moved interstate. Ms. P reported the matter to the police, who decided not to charge him.

Ms. P lodged an interim VoCAT application in order to obtain assistance for counselling and expenses associated with her healing. Ms. P had been extensively supported by sexual assault counselors who submitted reports attesting to Ms. P's extensive psychological and emotional injuries suffered as a result of the crime.

The Magistrate informed the solicitor representing Ms. P that as there had been no charges laid in relation to the offender, that the offender should be contacted so that he was aware of the 'accusations' of Ms. P.

Ms. P was horrified and scared of having to face the perpetrator from her childhood. She had contacted FLS for the purposes of assisting her in her VoCAT claim, not to be the witness in a matter that she was hoping to leave behind her. She feared further repercussions from her family if they found out about her VoCAT application.

FLS successfully argued that the offender not be contacted in this instance.

Ms. P eventually had her final application heard by a sensitive and compassionate female Magistrate who acknowledged to Ms. P that the harms she had suffered as a child had impacted for many years upon her.

Ms. P felt validated by the process and has regarded the finalization of her VoCAT claim as a way to formally leave her past behind her.

Reforms

Advantages of the VoCAT system

FLS is proud to work within a State that is prepared to support and take responsibility for the healing of victims of violent crimes.

FLS supports the existence of Victoria's VoCAT system in that it can play a valuable part in the validation and acknowledgment of the harm suffered by a victim. The VoCAT system is extremely useful in assisting victims to pay for medical, psychological and other costs associated with the crime. In many cases, it is unlikely that the offender is able to pay for these costs, and/or the option of pursuing the offender through either the criminal (sentencing) or civil jurisdictions can be unnecessarily time consuming and expensive. Furthermore, the option of having to 'face' the offender via the non-VoCAT avenues can be overwhelmingly distressing and cause further trauma to our clients.

The VoCAT system has been known to be the preferable option for many of our clients who are seeking a way to 'move forward' from the impact of the crimes they have suffered.

Disadvantages and suggested improvements of the VoCAT system

Whilst the VoCAT system is comparatively less time consuming and expensive than criminal or civil litigation, due to the administrative nature of the jurisdiction, it is still time consuming for clients. The system can also unwittingly traumatize

clients who are already extremely fragile due to the nature of the crimes they have suffered. Examples and suggested solutions are discussed below:

a) **Character**

Section 54 (a) of the VoCAT legislation compels a Magistrate to take into account, inter alia, the past criminal history of a VoCAT applicant in determining whether or not to make an award of compensation.

FLS submits that the current test indirectly discriminates against victims of crime by creating a two tiered system whereby some victims are considered 'more worthy' than others. This can cause legal practitioners to prefer to assist 'more deserving' victims than others. We submit that where the past criminal conduct of the applicant is irrelevant or unrelated to the crime that the person is seeking compensation for under a VoCAT application, then the Magistrate should not take this conduct into account in determining an award.

- **FLS submits that the obligatory requirement of the Magistrate to take an applicant's past criminal conduct into account in determining an award should be:**
 - **at most, abolished or;**
 - **at least, a *discretionary* power of the Magistrate**

Case study 3

M is a young professional. She was the victim of an attempted sexual assault and suffered significant physical, psychological and emotional injuries as a result of the crime perpetrated against her.

M sought advice from a private legal practitioner who advised her that her chances of claiming under the VoCAT scheme would be unsuccessful. The private legal practitioner had noted that she had pleaded guilty to two shop thefts approximately 6 years ago. She was advised that due to her past criminal conduct she would not succeed with her VoCAT application pursuant to the requirements under s 54(a) of the *VoCAT Act 1996*.

M believed that she did not have the right to claim compensation at VoCAT. She felt that she had been stigmatized due to her past. She therefore did not make an application within the 2 year timeframe and as a consequence, suffered prolonged trauma from the crime. She also believed that she was considered a 'bad person' due to her apparent ineligibility for the VoCAT scheme.

Her counselor later contacted the FLS who, in representing M, made submissions that her past criminal conduct was irrelevant to the attempted sexual assault she had suffered. The Magistrate considered M's criminal history but agreed with the submissions and made orders as requested in M's application.

Some clients have engaged with the criminal justice system as a result of coping with crimes that have been perpetrated against them. We have a number of clients who are victims of childhood sexual abuse, and who have turned to illicit drug use as a way of coping with the pain caused by their experiences. In turn, these clients have come into contact with the criminal justice system as a result of their drug use (or their drug use has led to their involvement with other crimes). Such clients should not be indirectly discriminated against by the VoCAT scheme.

Discrimination due to a person's irrelevant criminal history has been apparent in employment practices.¹ We submit that the VoCAT scheme should not subject additional discrimination upon these applicants. This is supported also by section 8(3) of the *Victorian Charter of Human Rights and Responsibilities* ("the Charter") where each person is entitled to equal protection before the law without discrimination.

b) Loss of earnings

It is of assistance to applicants that the VoCAT legislation recognizes loss of earnings for up to 2 years after the crime has occurred.

However, applicants who have not been employed or engaged in casual employment are unable to benefit from this provision. It is FLS' experience that a large number of our VoCAT clients have either been unable to obtain gainful employment, or their employment opportunities have been significantly hampered as a *result* of the crime perpetrated against them. This is particularly the case for victims of childhood sexual abuse or assault. The historic nature of these crimes can also be coupled with the fact that clients may have also engaged with the criminal justice system as discussed above.

Case study 4

L, who is in her early 50's- has been engaged with the criminal justice system for many years.

When she was 9 years old, she was sexually abused by a family member. She was removed from her family and placed in State care. She was subjected to further physical and sexual abuse whilst in State care. She does not have any relationship with her biological family. She did not proceed past year 8 in her education.

¹ See comprehensive discussion on this issue with Australian Human Rights Commission on http://www.hreoc.gov.au/human_rights/criminalrecord/ and submission received by the Commission on http://www.hreoc.gov.au/human_rights/criminalrecord/submissions/index.html

L was drug and alcohol dependent for over two decades. She has been charged and convicted with offences related to drug and alcohol misuse and various summary offences.

L is extremely isolated. L has never been able to engage in paid employment due to her circumstances.

She came to FLS as the request of her drug and alcohol counselor who suggested that she make a VoCAT claim. She is in the process of learning how to read and write and had been making clear progress in relation to her drug and alcohol dependency. She hopes to work with animals in the future as she has felt great comfort around animals throughout her life.

Whilst her background and circumstances were taken into account by the Magistrate at the Tribunal, FLS were unable to argue for any lost wages as she had never been able to work in paid employment.

Case study 5

Ms. F, who is in her early 50's, works in a higher education institution. She has never progressed further professionally despite the fact that her peers have progressed to Executive levels within her profession.

Ms. F is in the process of making a VoCAT application for a brutal sexual assault she suffered when she was about 4 years old. She has only recently realized that she had been suffering from trauma amnesia which acted as a 'block' to the memory of the assault. She has been suffering from the effects of recovering her memory and essentially 'reliving' the assault.

With support and research, Ms. F has now realized that the reasons why she has been reluctant to apply for promotions which may have required her to work in enclosed spaces, or to work in high rise buildings, is linked to the circumstances of her sexual assault. Her grief in suffering from the crime is doubled with her grief over her lost opportunities in her professional life. She has told FLS that she "could have been so much more" than who she is now.

Identifying the possible lost potential of employment (or opportunities for employment) can be a complex challenge. However, doing so can be a major source of validation and healing for victims who have been hindered in their employment opportunities due to the crimes perpetrated against them. It would be of great assistance if the Tribunal could award a sum of money in recognition of the loss of earning capacity or earning potential for people in these situations.

- **It is recommended, that VoCAT work closely with the CASAs and other professional counselling bodies to gain advice and guidance as to how a crime (particularly sexual abuse and/or sexual assault) can impact upon a victim's future employment prospects.**

- **It is then recommended that the Tribunal take these factors into account in making an award in recognition of loss of potential/possible future earnings.**

c) **Administration and fees for legal practitioners**

The VoCAT system is extremely paper intensive as the Tribunal and applicants are reliant on a number of third parties to be able to supply the requisite documentation in support of an applicant's claim. These can be doctor's/hospital/psychological reports, quotes for courses etc. Due to the backlog of cases at the Tribunal, clients sometimes submit material that is deemed out of time by the time the Tribunal finally determine the outcome of the case. Unfortunately, this requires the applicant to be either reassessed by the relevant third party or to find another third party to assess the client's suitability for counselling/courses etc. This can be time consuming and onerous upon both a client and the relevant third party.

The administration and support required in VoCAT matters are high compared to the fees offered by VoCAT to legal practitioners. Whilst this is not an issue for community legal centres who undertake VoCAT work- the small amount of fees claimable can act as a disincentive for private legal practitioners. This can then impact detrimentally upon clients who wish to use private practitioners. It also creates a demand upon community legal centres. This demand unfortunately can not be met due to the current lack of funding and resources for community legal centres.

It is FLS' experience that a simple VoCAT matter takes approximately 18 months to finalise. The typical work undertaken by a practitioner in a simple case may involve client support; requesting reports from the Police, counselors, hospitals and doctors (and then following up on these reports to ensure that they are received by the Tribunal); obtaining quotes for financial assistance and additional written submissions to the Tribunal to finalise a claim. The fees involved in a simple case (approximately \$800 in total for the period of 18 months) would not be able to sustain a private practitioner practicing in this jurisdiction.

- **It is recommended that the legal fees for VoCAT be raised so that there are more private practitioners who are willing to assist clients in VoCAT matters.**

d) **Interim orders**

Whilst Interim orders are available for urgent matters (and can be determined administratively by the Tribunal), it is FLS' recent

experience that applications for interim orders are taking as long as some final applications to determine.

This no doubt is due to a lack of resources for the Tribunal, and the backlog of cases as discussed in the discussion paper. However, unfortunately, this has resulted in clients feeling extremely disempowered by the system. Furthermore, as many FLS clients do not have the financial means to obtain private health insurance, they are reluctant to have medical procedures undertaken as they are unable to afford to pay the fee upfront. Due to the length of time involved in the VoCAT process, quotes received shortly after the incident can be grossly out of date, even in interim applications. It then becomes difficult in some cases to ascertain if any future medical work required is directly related to the act of violence.

- **It is recommended that medical fees that are incurred as a direct result of the crime be paid immediately upon receipt of a quote from a medical professionals.**

The Medicare GP Mental Health Care plan is available for referrals to psychologists or other medical practitioners to assist people in caring for their mental health. Whilst this is an excellent source of support for people, due to its recent application, it is unknown how this scheme will interact with the VoCAT scheme.

Case study 6

S, a victim of sexual assault is waiting for the criminal trial of the perpetrator. She

has utilized her quota of all the CASA counselling appointments available to her and was using a private counselor who she feels has assisted her greatly.

However, S can no longer afford to pay for the private psychologist. She is emotionally fragile, particularly as she awaits for the criminal trial. She has lodged an interim and a final application to VoCAT. The interim application requests for fees to be made available for her to see her psychologist only.

VoCAT have informed FLS that both applications will only be considered once the outcome of the final criminal trial is over. VoCAT have asked S to consider whether she is eligible for the Medicare GP mental health care plan.

S's doctor (her trusted family GP) has informed S that she is not eligible for the Medicare GP mental health care plan. S is reluctant to go to another GP for advice as she will need to disclose that she has been sexually assaulted. She feels emotionally unsafe and does not want to disclose to a stranger the circumstances of her sexual assault. She also does not want her medical files subpoenaed by the defence in the criminal trial. She is now worried that if she is not eligible for the mental health care plan, if this will affect her VoCAT claim.

S feels that she has been left with no support for her upcoming criminal trial. She also feels that it is unfair that she as a victim has had to justify and 'prove' why she requires urgent assistance for counselling. She is extremely distressed and has lost faith in the legal system.

- **It is recommended that VoCAT make a Practice Direction, defining its interaction with the Medicare GP Mental Health Care plan.**
- **If the full VoCAT claim is not finalized until after a criminal trial, it is recommended that interim awards for counselling should be made immediately available (up to the final date of the criminal trial).**

e) **Awards**

It is FLS' experience that due to the issues discussed in this submission, many VoCAT clients are living with chaos and turmoil in their lives. As a result, it can be difficult for clients to provide the requisite documentation within the timeframes required by the Tribunal.

Pursuant to section 8(3) of the VoCAT Act, the Tribunal has powers to award victims reasonable amounts that would assist him/her to heal from the impacts of the crime. Practically, this section applies by supplying quotes to the Tribunal for activities that the victim could engage in. This typically involves gym memberships, training courses and the like. The Tribunal determines if these are appropriate and then pays for the elected activities directly to the service providers.

There are however, a number of our clients who would simply like to have a sum of money awarded to them instead of money to be put towards courses, gym memberships and the like. Sometimes clients would prefer this option as they may not be able to determine what activities or service providers could assist them to heal. There will also be clients who find the gym memberships etc to be inappropriate for them. Furthermore, as a number of our clients have often been subjected to circumstances where they have been immensely disempowered (such as experiencing child sexual abuse, sexual assault), it is arguably an empowering experience to for clients to be able to have a sum of money awarded to them to do *as they choose*. It may assist the Tribunal if professional supports such as counselors, made these recommendations in support of an applicant's healing processes.

- **It is recommended that the Tribunal make awards of money available for applicants pursuant to section 8(3) of the VoCAT Act .**

f) Special financial assistance categories

Due to the significant changes brought about by the Victims of Crime Assistance Act 1996, people who suffered sexual abuse prior to 1997 could not be awarded special financial assistance in recognition of their pain and suffering.

It is FLS' experience that victims of childhood sexual abuse are unable to feel emotionally or psychologically able to seek assistance until they are significantly older and made progress into recovery. This is generally after years of counselling and support.

FLS continues to see clients who have suffered assaults or sexual abuse prior to 1997 and who are unable therefore to claim special financial assistance. It is an act of courage for clients to come forward and seek assistance and acknowledgement for suffering childhood sexual abuse. As discussed above, the impact of such crimes can have long-lasting effects on a client's relationships, employment prospects and social connectedness. The inability to claim special financial assistance in these circumstances can further re-traumatise victims.

- **It is recommended that special financial assistance provisions be made available to victims who have experienced assaults, sexual abuse or sexual assaults prior to 1997.**

FLS notes that special financial assistance categories are reliant upon the categorisation of the offence rather than the impact the action has had on the victim. We submit that that current classification of offences is not a victim centred approach.

Case study 7

P was stabbed in the head, chest, arms and back. The medical reports verified that P had suffered over 30 lacerations and stab wounds. The injury occurred prior to 2007.

The offender was charged and convicted with *intentionally causing serious injury*.

As a result of that charge, P was only eligible to claim up to \$1000 for special financial assistance.

However, FLS argued that due to the significance and number of stab wounds, the action of the offender was arguably an attempted murder. FLS argued that the Magistrate had the discretion to uplift the classification of the offence. Since the incident of violence, P had suffered significant psychological and emotional fear and anguish. He has difficulties using public transport, has issues with

sleeping (nightmares and flashbacks) and was made homeless as the offender had been sharing a house with him.

The Magistrate rejected these arguments.

- **It is recommended that the Tribunal consider a victim centred approach in making awards for special financial assistance.**

Compensation awards and offenders

We submit that it is inappropriate to reduce compensation awards due to an offender's financial means. The civil litigation and sentencing options are available for victims to pursue offenders for compensation in the event that they choose to do so. Reducing a VoCAT award due to an offender's means may also result in more offenders contesting a VoCAT application. This can have a devastating effect upon victims seeking assistance from the Tribunal.

FLS also submits that it is inappropriate for VoCAT material to be used by the court to assist in the consideration of a compensation order at the time of conviction. This is due to the fact that in criminal proceedings, the defence must have the opportunity to view the material in order to respond. The material submitted in VoCAT proceedings is extremely personal to an applicant as it comprises of medical and psychological reports. It is imperative that this confidentiality is maintained for the benefit of the applicant, and his/her ability to maintain trust and confidence in the legal system, and in his/her healing process

Therapeutic and restorative justice processes can play a part in the victim compensation scheme only when a victim chooses to take this approach. We submit that it is extremely inappropriate in sexual assault and sexual abuse cases.

Conclusion

The current VoCAT system should be bolstered and resourced in recognition of the State's valuable role in assisting victims of violent crimes. As the system is meant to empower victims of crime, it could be improved by focusing on a more victim centred approach that recognizes the many experiences of victims seeking to recover and heal.

FLS are pleased to have had the opportunity to respond to the review of this very important area of the law and look forward to the recommendations of the Department of Justice.

Please feel free to contact the writer for any further comments.

