

# Submission

THIS SUBMISSION WAS PREPARED BY THE FEDERATION OF COMMUNITY LEGAL CENTRES (VIC) INC, IN CONSULTATION WITH MEMBER CENTRES

**February 2010**

## **Reviewing Victims of Crime Compensation: Sentencing Orders and State-Funded Awards**

### **Response to Department of Justice Discussion Paper**



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## About the Federation of Community Legal Centres (Vic) Inc

The Federation is the peak body for fifty one community legal centres across Victoria. A full list of our members is available at <http://www.communitylaw.org.au>.

The Federation leads and supports community legal centres to pursue social equity and to challenge injustice.

The Federation:

- provides information and referrals to people seeking legal assistance
- initiates and resources law reform to develop a fairer legal system that better responds to the needs of the disadvantaged
- works to build a stronger and more effective community legal sector
- provides services and support to community legal centres
- represents community legal centres with stakeholders

The Federation assists its diverse membership to collaborate for justice. Workers and volunteers throughout Victoria come together through working groups and other networks to exchange ideas and develop strategies to improve the effectiveness of their work.

## About community legal centres

Community legal centres are independent community organisations which provide free legal services to the public. Community legal centres provide free legal advice, information and representation to more than 100,000 Victorians each year.

Generalist community legal centres provide services on a range of legal issues to people in their local geographic area. There are generalist community legal centres in metropolitan Melbourne and in rural and regional Victoria.

Specialist community legal centres focus on groups of people with special needs or particular areas of law (eg mental health, disability, consumer law, environment etc).

Community legal centres receive funds and resources from a variety of sources including state, federal and local government, philanthropic foundations, pro bono contributions and donations. Centres also harness the energy and expertise of hundreds of volunteers across Victoria.

Community legal centres provide effective and creative solutions to legal problems based on their experience within their community. It is our community relationship that distinguishes us from other legal providers and enables us to respond effectively to the needs of our communities as they arise and change.

Community legal centres integrate assistance for individual clients with community legal education, community development and law reform projects that are based on client need and that are preventative in outcome.

Community legal centres are committed to collaboration with government, legal aid, the private legal profession and community partners to ensure the best outcomes for our clients and the justice system in Australia.

## Introduction

The Federation welcomes the opportunity to comment on the Department of Justice Discussion Paper, 'Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards'.

Crimes compensation under the *Victims of Crime Assistance Act 1996* (Vic) (VOCAT Act) provides important support and assistance to victims of crime to help them to recover from the physical, emotional and financial impacts of the crimes committed against them.

There are a range of other legal issues relevant to victims of crime. Safety issues are often of primary concern to victims, particularly in relation to family violence and sexual assault. In certain circumstances, victims of crime may be entitled to protection through intervention orders against offenders.

Victims often need legal advice and support before deciding to report crimes to police. Once the crime is reported, the criminal justice processes can be technical and confusing. Victims often need legal advice and support to properly understand criminal justice issues like bail, options for giving evidence, why they may receive a subpoena forcing them to give evidence, and the role of victim impact statements.

Victims often also need legal assistance in relation to making crimes compensation claims under the VOCAT Act, obtaining and enforcing compensation orders made under Part 4 of the *Sentencing Act 1991* (Vic), and making civil claims for damages against offenders and others.

Once an offender is sentenced, victims of crime may be entitled to go onto the victims register established under the *Corrections Act 1986* (Vic) to receive information about an offender's prison sentence and to make submissions in relation to parole for an offender.

The *Victims Charter Act 2006* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) are important advocacy tools to promote adherence to victims' rights. Advocacy is particularly important for more vulnerable victims who are less able to advocate effectively on their own behalf, such as sexual assault victims with a cognitive impairment.

To properly realise victims' rights, and to promote victims understanding and empowerment through the criminal justice processes affecting them, victims of crime need ready access to legal information, advice and representation.

Community legal centres currently provide a wide range of assistance to victims of crime. A large part of this work involves helping victims of family violence obtain intervention orders. In 08/09, Victorian community legal centres which record on the CLSIS database, provided legal advice on family violence on almost 5,000 occasions, and conducted around 4,500 family violence cases. Centres also assisted victims with the broad range of other issues identified above.

For some years, the Federation has been advocating for increasing resources to expand the capacity of Victorian community legal centres to undertake this work. A summary of our proposal in this regard is attached in the Appendix to this submission. We are also currently finalising a proposal for an advocacy service to promote the realisation of the rights of victims of sexual assault with a cognitive impairment or little or no speech.

The remainder of this submission reflects the diverse experience of community legal centres in working with victims, and also with offenders, and is structured according to the questions in the suggested template.

## Introduction and guiding principles

### **Do you think these principles are appropriate? Are there any other principles that should be considered when reviewing Victoria's victim compensation scheme?**

The Federation endorses the submission of our member centre, Youthlaw, that the principles underpinning a victim compensation scheme should be based on the principles of the United Nations *Declaration of Basic Principles of Justice for Victims of Crime and the Abuse of Power*,<sup>1</sup> and the Victims' Charter.<sup>2</sup>

Some of these key principles are:

- Victims are entitled to access to the mechanisms of justice and to prompt redress;
- A scheme should assist victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible; and
- Victims should be informed of their rights in seeking redress through such mechanisms.

In accordance with the UN Declaration and the Victims' Charter, we believe that the following proposed core principles in the Discussion Paper are particularly important:

- 1. Fair to victims
- 2. Effective
- 4. Non-traumatising
- 5. Specific
- 7. Timely and responsive

## State funded victim assistance

### **Apart from hearings, are there other ways of acknowledging a victim's experience of crime?**

Our centres express general support for hearings as validating for the victim, provided there are certain protections in relation to the potential for offender participation, and there is victim equity and consistency in relation to compensation awards (see further detail below). We also acknowledge that some victims would prefer to have applications dealt with "on the papers". We believe that victims should be given the option of requesting to have the matter dealt with in the manner they prefer.

### **Given VOCAT's focus on the needs of victims, do magistrates sitting as VOCAT tribunal members require particular training when conducting hearings?**

The quality of the interaction of victims with the justice system is critically important in terms of helping with the healing process following victimisation, and preventing re-victimisation through justice processes. The way a VOCAT hearing is conducted, can have significant positive, or negative impacts on a victim. Accordingly, we strongly believe VOCAT members should receive regular training, including about the social context and demographics of victimisation. Training provision could benefit from work currently under way on a Family Violence bench book, and from other resources and specialist networks already available concerning the impact of violence on victims.

Consideration should also be given to victims of sexual assault or family violence having the option of a female Tribunal member to hear their application.

## Offender funded compensation orders

### **What is the appropriate role of the OPP in compensation order applications?**

At a minimum, the OPP should provide legal information to a victim about their rights to apply for a compensation order application, and should provide information about legal services that can assist them to apply for an order.

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<sup>1</sup> [www2.ohchr.org/english/law/victims.htm](http://www2.ohchr.org/english/law/victims.htm)

<sup>2</sup> [www.justice.vic.gov.au/victimsofcrime](http://www.justice.vic.gov.au/victimsofcrime)

### **How could the enforcement of compensation orders be improved?**

There must be adequately funded, accessible and free legal assistance for victims to enable them to pursue compensation (see Appendix). This is consistent with our proposed principles (above) underpinning a victim compensation scheme.

### **Some ideas for reform**

#### **In your opinion, what are the main advantages of the VOCAT system? What are the main disadvantages?**

The main advantages of the VOCAT system include:

- the experiences of victims encountering the VOCAT system can be very positive, in terms of feeling heard, understood and receiving some practical acknowledgment of the harm done to them;
- the financial assistance provided by the Tribunal can make a real difference to victims' lives, in terms of the acknowledgment, but also to improve their quality of life and to assist in their recovery;
- because the standard of proof is civil rather than criminal, the process can be less of an ordeal for the victim;
- the informality and flexibility of proceedings (section 38 of the VOCAT Act) is helpful to make the application and hearing process less stressful for victims; and
- the availability of legal costs increases the support available to victims through the process, helps to ensure that victims do not miss out on entitlements, and increases the efficiency of application processes.

However, as our member centres, Youthlaw and Fitzroy Legal Service explain, there can be substantial difficulties in proving some forms of crime, such as police/ticket inspector assaults, especially if the victims are young people from a CALD or Aboriginal background, or who are homeless or have a disability, or have a criminal record.

We also endorse the submissions of Youthlaw and Fitzroy Legal Service that the application and payment processes, including interim applications, often take far too long, particularly in some Tribunal locations. Better systems and processes are also needed for obtaining information necessary for a successful claim, such as police records. As Fitzroy Legal Service submits, delays in payment of medical fees can cause particular difficulties for victims.

#### **What improvements might be made to Victoria's model for state-funded victim compensation?**

##### *Evidence base*

We believe that consistent with best practice of basing policy and law reform on a sound evidence base, that there is a need for improved data collection and analysis in order to ensure that the compensation system is fulfilling its legislative objectives.

For example, detailed information must be made available on the number of unsuccessful as well as successful compensation claims, correlated against the types of crimes, the amount of award made and victim demographics. In order to fulfil state obligations to victims, it is also important to gain an idea of the proportion of victims who pursue compensation in comparison with avenues such as criminal prosecution.

##### *Victims' access to assistance*

Victims need to be able to access comprehensive and free legal assistance for VOCAT matters. We believe this is best provided via increased funding for community legal centres (see Appendix).

Victims also need to be able to access thorough and more timely advice at all points of contact (eg police, child protection) about their right to victims compensation, in accordance with proposed core principle #7.

We endorse the submission of Fitzroy Legal Service that VOCAT should make a Practice Direction defining its interaction with the Medicare GP Mental Health Care Plan, for reasons outlined in the submission.

#### *Victim equity*

We support the submission of Fitzroy Legal Service that irrelevant/unrelated criminal history of the victim should not be a factor in determining an award. The current approach is contrary to proposed core principle #1 (equity between victims) and to the human right of equality before the law (*Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8). Discounting or denying VOCAT applications on the grounds of past unrelated criminal history, can act as systemic indirect discrimination against groups such as Victorians from lower socioeconomic backgrounds and the Koori community, who due to structural disadvantage, are more likely to have criminal histories (see for example pages 7 and 12 of the Koori VOCAT List Pilot Review and Recommendations Report, February 2010).

#### *Broadening the availability of expenses to assist in recovering from the crime*

VOCAT awards to cover expenses to help the victim recover from the crime, in our experience, can greatly assist victims. Yet these expenses are only available in “exceptional circumstances” (section 8(3) of the VOCAT Act). We believe the VOCAT Act should be amended to increase the availability of these expenses. For example, the Act could provide for the award of “reasonable safety expenses” (eg: to pay for an alarm system, better lighting, a self-defence course etc).

#### *Tailored support for victims*

The Federation endorses the submissions of Fitzroy Legal Service and Youthlaw that some victims, such as children, victims of sexual assault and of family violence need more tailored approaches and assistance. For example, Fitzroy Legal Service suggests that there should be scope for greater tailoring of the process to make it victim-centred. This might mean that, for instance, an extension of the principle that a particular kind of award might be made to a victim depending on their particular circumstances.

Examples include: special financial assistance being extended to be made available to victims who have experienced assaults or sexual abuse prior to 1997; special financial assistance awards becoming more oriented to the effect of the crime on the victim rather than based centrally on the classification category of the offence. We note that all of these changes would be consistent with proposed core principles #5 & #2.

#### **Should Victoria consider payments to victims based on the offence done rather than requiring proof of injury or other adverse effects?**

There is some support among our members for the availability of a baseline award without having to prove injury, particularly in cases of family violence and sexual assault, with options for increased awards via supply of medical/psychological evidence. This could simplify some VOCAT applications, reducing the costs and time associated with obtaining medical/psychological reports.

#### **What are your comments on the current category caps and global caps in relation to the different categories of victims?**

Our victim advocates believe that the current caps are unreasonably low in some contexts, such as serious crimes including sexual assault and domestic violence, especially where there have been related offences and/or multiple victimisation over time.

A related concern is that the Tribunal does not always apply the upper range of payments in circumstances where this would appear appropriate, and there is not always consistency among awards.

**How could this system be improved or expanded?**

Other than changes already discussed, there is a need for more transparency concerning how compensation is determined, so that equity among primary victims can be accurately assessed.

**Could a database of compensation order cases assist judges with these applications and promote consistency?**

Yes, and this should supplement specialist training.

**Is it appropriate to reduce compensation awards because of the offender's means?**

No. In our view this undermines equity among victims (proposed core principle #1). The offender's means are however, relevant in determining whether, and how, compensation awards can be enforced (eg: *Judgment Debt Recovery Act 1984* (Vic), *Bankruptcy Act 1966* (Cth)).

**Do you think that VOCAT material should be used by the court to assist in the consideration of a compensation order at the time of conviction?**

We believe that this would be inappropriate, with the only possible exception being if the victim was to request this and they had received legal advice of all the possible consequences of doing so. However even in this scenario a Victim Impact Statement would probably serve the purpose.

**Should therapeutic and restorative justice processes play a greater role within the victim compensation system?**

The Federation believes that while restorative justice processes may have a useful role to play in the victim compensation system, issues of violence and power imbalances mean that there must be extensive stakeholder consultation and discussion before such approaches can be considered to be applicable to serious violent crimes.

**Should the state seek to recover VOCAT award amounts, or compensation order amounts, from offenders? If so, how and on what basis?**

This strategy would be of concern if it were to be applied in situations such as family violence, given the potential for retaliation against the victim by the offender.

# Appendix

## Improving access to justice for victims of crime

It is becoming increasingly difficult for victims of crime to access justice through VOCAT applications. This is occurring because of the increasing reluctance of the legal profession to conduct VOCAT work, due to its unprofitability.

Victims of crime do not themselves have to pay for legal costs associated with the VOCAT claim because lawyers can only recover fees for VOCAT work through an award of costs from the Tribunal, and cannot otherwise charge clients for preparing VOCAT applications.

The low level of costs being awarded by the Tribunal, compared with the amount of work involved in a VOCAT application, is resulting in lawyers increasingly withdrawing from this area of practice.

From 2003-2005, Women's Legal Service Victoria (WLSV) surveyed around 150 private practitioners who had received VOCAT training through the Victims Support Agency and/or who were on the referral lists of the VACPs. WLSV is a state-wide specialist community legal centre that provides legal services to women with a focus on relationship breakdown and violence against women.

The results of the telephone surveys confirmed anecdotal evidence that private practitioners felt there was a lack of balance between the amount of work required to properly prepare a VOCAT case and the legal costs ultimately awarded by the Tribunal. The surveys revealed that this was causing practitioners to either withdraw from doing VOCAT work altogether or to reduce their VOCAT work so as to only take on a very few files as a 'community service.'

WLSV also analysed three of its own VOCAT cases, to compare the legal costs that were awarded by the Tribunal against the costs that would have been awarded had the case files been assessed under the Magistrates' Court scale. The results were as follows:

Case	Activity on the File	Costs assessed on Magistrates' Court Scale	Costs awarded by VOCAT
1.	15+ months (20/11/03 – 4/3/05)	\$7,455.30	\$1,320.00
2.	38+ months (12/4/02 – 21/6/05)	\$9,066.70	\$1,700.00
3.	37+ months (21/11/00 – 14/1/04)	\$13,820.90	\$1,200.00

Source: Women's Legal Service Victoria, 2007

The low level of cost awards also increases the likelihood of lawyers avoiding complex cases or clients with complex needs, and increases the prospect of poorly prepared applications.

There have been concerns expressed by the Tribunal that the reduced quality of applications being brought before the Tribunal can mean that victims may not receive their full entitlements under the legislation. There are also needs for:

- the development of a body of knowledge and best practice resources for VOCAT matters;
- law reform around victims of crime legal issues; and
- better community legal education on victims of crime issues.

The Federation believes that these issues can be addressed by providing funding to establish specialist community legal services to improve access to justice for victims of crime. The funding would be



used to provide a range of services in relation to VOCAT applications, but also to more broadly address legal issues relevant to victims, including: the implementation of the *Victims Charter Act 2006* (Vic); support in relation to criminal justice processes and rights to compensation under the *Sentencing Act 1991* (Vic); and advice about civil law.

*Outcomes:*

- Greater assistance for victims of crime;
- Improved recovery by victims from the effects of crime;
- Improved confidence in the justice system; and
- Improved awareness of victims' rights.

*Cost:*

The cost of this initiative would depend on the model chosen. Recurrent funding of around \$520,000 per year would provide the minimum core funding needed to effectively implement the CLC strategic service delivery model for a new service, potentially colocated with an existing CLC. Alternatively, a pilot of four lawyers supported by 0.5EFT administration positions, would cost \$150,000 per position annually. The lawyers would be placed in existing CLCs in regions where victims experience particular difficulties accessing legal assistance for compensation claims and other services.