

Response to Issues Paper 7 concerning Statutory Victims of Crime Compensation Schemes

Introduction

The Aboriginal Family Violence Prevention and Legal Service ('FVPLS Victoria') welcomes the opportunity to provide a response to Issues Paper 7 of the Royal Commission into Institutional Responses to Child Sexual Abuse concerning statutory Victims of Crime Compensation schemes.

FVPLS Victoria assists Aboriginal victim-survivors of family violence and sexual assault (including child sexual abuse) through providing legal advice, representation and support in relation to victims of crime assistance, family violence intervention orders, family law, child protection and associated civil law matters, as well as engaging in early intervention prevention activities and community legal education. FVPLS Victoria is an Aboriginal community controlled organisation that adopts a client-centred, culturally safe and holistic client service model.

FVPLS Victoria receives funding from various sources including the Commonwealth Government, the State Government of Victoria, Victoria Legal Aid, the Legal Services Board, and philanthropic trusts. Our head office is in Collingwood, Melbourne, and we have three regional offices in Mildura, Bairnsdale and Warnambool.

Ninety per cent of FVPLS Victoria's clients are Aboriginal women and children. Many of our clients have experienced child sexual abuse themselves or are otherwise impacted by the child sexual abuse of their children and/or the intergenerational trauma caused by the child sexual abuse of their parents or relatives.

FVPLS Victoria is part of the national Family Violence Prevention Legal Services program which provides culturally safe legal services and referrals to approximately 5000 clients annually in 31 rural and remote locations across Australia.

Response to Questions posed In Issues Paper Seven

(1) *What are the advantages and disadvantages of statutory victims of crime compensation schemes as a means of providing redress or compensation to those who suffer child sexual abuse in institutional contexts?*

Victoria does not have a statutory scheme with the explicit purpose of compensating victims of crime for the full extent of their loss and injury. Relevantly, the Victorian victims of crime assistance scheme does not purport to be a compensation or recognition scheme. Rather, as stated in section 1 of the *Victims of Crime Assistance Act 1996* ("the Act"), the purpose of the Victorian scheme is to provide 'assistance' to victims of crime. The Act explicitly states at sub-section 1(3) that awards of financial assistance "are not intended to reflect the level of compensation to which victims of crime may be entitled at common law or otherwise."

Under the Victorian scheme, 'special financial assistance' (SFA) is the amount payable in recognition of the pain, suffering and loss of enjoyment of life caused by the offence. According to the Act

(section 8A), SFA is payable where a claimant “experiences or suffers any significant adverse effect as a direct result of an act of violence committed against him or her”. A “significant adverse effect” is defined by section 3 of the Act as including “any grief, distress, trauma or injury experienced or suffered by the victim as a direct result of the act of violence but does not include any loss of, or damage to, property”. The highest amount of SFA available to be awarded in Victoria is \$10,000. This is considerably lower than the maximum amount in a number of other jurisdictions and markedly lower than what may be achieved through a successful common law compensation suit for institutional child sexual abuse. We note that Victorian claimants can receive up to an additional \$60,000 total award for specific items such as reimbursement of lost wages or medical expenses (see section 8), however all sums outside of SFA must be earmarked and paid by way of reimbursement of costs already incurred or paid directly to service providers upon receipt of invoice. By way of comparison, the maximum award payable in the Northern Territory’s victims of crime compensation scheme (which is provided as a lump sum cash payment to the claimant) is \$40,000; in South Australia the maximum is set to increase to \$100,000, and in Western Australia it is \$50,000 for offences occurring between 1 July 1991 and 31 December 2003, and \$75,000 for offences occurring after 1 January 2004.

Victims of institutional child sexual abuse, like all victims of family violence and sexual abuse, would benefit from access to a statutory redress scheme which offered awards of compensation that accurately reflected the seriousness of the offence and the magnitude of harm suffered. Raising statutory limits on such awards may also have a normative effect through demonstrating to the community at large the seriousness with which such offences are viewed and a restorative effect through signifying to the victim-survivor the gravity the wider community and government attaches to the offending.

(2) *What features are important for making statutory victims of crime compensation schemes effective for claimants?*

In addition to the inclusion of appropriate levels of financial awards as discussed above, ease of access and flexibility in procedure is important in making statutory schemes effective for claimants. Simple application processes and procedures are also important for claimants, such as ours, who may find it difficult to access overly complex or bureaucratic processes due to cultural barriers, limited literacy and/or education, geographical distance or lack of transport/freedom of movement, trauma and other barriers.

Clear information and access to independent legal advice is crucial to ensure claimants understand the role of victims of crime compensation schemes as well as their rights and the potential consequences of making a claim. Adequate funding for legal and allied support services to assist victims accessing victims of crime assistance schemes is fundamental. This is particularly important for claimants who continue to suffer from trauma and mental health symptoms associated with the offence and need help understanding and preparing for the potential adverse impacts on their mental health if required to undergo psychiatric assessment and re-tell their stories of abuse in a non-therapeutic setting.

It is also important that claimants receive quality, independent and culturally safe legal advice in relation to the possible financial, legal, social and safety implications of making a claim. For example, advice should extend to whether:

- receipt of an award will impact eligibility for social security payments or other forms of compensation to which the client may be entitled;
- the complaint could result in self-incrimination; and
- the complaint could result in disclosure or attempts by the relevant tribunal to recoup the cost of the award from the perpetrator in a way that may jeopardise the claimant's safety or expose the claimant to further violence from the perpetrator by way of retaliation.

The experiences of FVPLS Victoria' clients in attempting to claim assistance through VOCAT demonstrate significant barriers to access and a need to improve user-friendliness for claimants from disadvantaged backgrounds. To give one example, items awarded to assist recovery can be difficult to access for claimants from low socio-economic background as the scheme requires that the items are either paid for upfront or an invoice provided to the Tribunal to pay the service provider directly. This can raise delay and difficulty in accessing the award. For example FVPLS Victoria had carriage of a matter recently where our client was awarded an interim award for urgent removal costs required to ensure their safety. The removalist could not provide an invoice as the final cost was not determined until the removalist saw our client's house on the day of moving. As our client could not afford to pay upfront, our service paid for the removalist on our client's behalf. The removalist ended up charging more than the amount awarded by the Tribunal, and our service was not reimbursed the difference. This example highlights many issues with the VOCAT scheme, including lack of flexibility and difficulty claimants have in accessing awards if they cannot afford to pay upfront and do not have the support of services such as ours.

In July 2006, a Koori List was established within VOCAT in order to improve the Tribunal's accessibility for Aboriginal and Torres Strait Islander victims of crime, as well as the Tribunal's ability to respond to the unique needs and disadvantages of Aboriginal and Torres Strait Islander claimants in a culturally safe and respectful manner. Under the Koori List project, Tribunal members underwent specialised cultural awareness training and subsequently adopted approaches to interpreting relevant legislation, hearing and court processes, and dealing with claimants in a way that was culturally appropriate and cognisant of the complexity of their applications. A designated Koori List registrar was also appointed and equipped with appropriate skills and training. FVPLS Victoria collaborated with VOCAT in the initial implementation of the Koori List through membership of the working group established to improve Koori access to VOCAT convened by the Indigenous Issues Unit of the Victorian Department of Justice, under the Aboriginal Justice Agreement. During the Koori List's pilot period, FVPLS also assisted to improve the rates of understanding and access of VOCAT among Aboriginal and Torres Strait Islander communities in Victoria through conducting forums and community legal education in collaboration with Magistrate Susan Wakeling. In the initial years following its implementation, the Koori List resulted in a significant increase in applications made by Aboriginal and Torres Strait Islander claimants and achieved positive feedback from claimants, lawyers and support workers. [14] However, reports from FVPLS lawyers interacting with VOCAT over the last 1-2 years suggest that current resourcing restrictions are adversely impacting on the initiatives introduced and the efficiency with which our clients' matters are determined.

[14] For further details see: FVPLS Victoria, 'Improving accessibility of the legal system for Aboriginal and Torres Strait Islander victims/survivors of family violence and sexual assault'. Policy Paper Series June 2010, Paper 3 of 3. Available at <http://www.fvpls.org/images/files/FVPLS%20Policy%20Paper%203.pdf>.

(3) *Are there elements of statutory victims of crime compensation schemes, as they currently operate, that raise particular difficulties for claims by people who suffer child sexual abuse in institutional contexts?*

The current Victorian scheme presents a number of difficulties for claimants seeking compensation or redress in relation to institutional child sexual abuse.

3.1. Time limits

The current time limit for making a VOCAT application in Victoria is two years from the date of the most recent act of violence (see section 29). However, applications for extension can be made by those seeking to make a claim out of time. The time limit and additional burden of making an application for extension presents an obstacle to be overcome by adults seeking redress for child sexual abuse. In our experience, VOCAT typically exercises its discretion in favour of such applications, usually granting applications for extensions of time. However the decision is at the member's discretion contingent on the facts of each case so there is no legislative guarantee the Tribunal will always exercise this discretion in favour of victim-survivors of past child sexual abuse.

3.2. Cap on payments

The cap on cash lump sum awards is substantially lower in Victoria than other Australian States and Territories as noted above. This means that Victorian victim-survivors of child sexual abuse stand to receive significantly less than equivalent claimants interstate, providing a further incentive for Victorian victim-survivors to pursue common law actions where possible.

In addition, due to the technical and administrative complexity of the Victorian scheme, the financial and time costs to legal and support services assisting claimants can outweigh the financial award achievable meaning claimants may find it difficult to access support to make their claims or to obtain the full benefit of the awards they receive.

3.3. Limitations on claims for acts of violence committed prior to 1 July 2000 and 1 July 1997

Pursuant to section 77 of the Act, acts of violence committed prior to 1 July 2000, even when a proven injury was sustained, are not eligible for SFA. Exceptions are made if the primary victim was under the age of 18 at the time of the offence and the act of violence occurred on or after 1 July 1997. If the violence occurred prior to 1 July 1997, the victim must have been under 18 at the time of the act occurring and the offender must have been charged, committed or directly presented for trial on or after 1 July 1997 (see section 77). This creates significant barriers to adults seeking redress for child sexual abuse, even where the abuse resulted in a permanent injury which continues to plague that person in the present. It also operates to restrict redress for claimants where the perpetrator was not charged or where a prosecution did not proceed to trial, regardless of the level of harm suffered or the wishes of the claimant. The discrepancy between the requisite burden of proof for a successful criminal prosecution (proof beyond reasonable doubt) in comparison to VOCAT matters (proof on the balance of probabilities) means that there will be a significant number of cases in which police may justifiably decide there is insufficient evidence to prosecute the offender, notwithstanding that there is ample evidence to support an award of victims of crime assistance.

By way of example, FVPLS have assisted a client who was placed by child protective services in a group home as a young child and suffered repeated sexual abuse while in that institution. While

police investigated the matter, the client was ineligible for SFA as no one was charged. Multiple applications were originally lodged with VOCAT. The Tribunal has made a formal finding in relation to one application that the act of violence occurred, however the client has been waiting over five years for an outcome in the other applications. Given the time spent on these matters, the amount of assistance the client will receive under her one resolved VOCAT application was minimal. The Tribunal have requested the client's permission to obtain a copy of her statement to the Royal Commission to assist with their final decision. We have had difficulty obtaining a copy of our client's statement from the Royal Commission, which was an oral statement given at a private session. We are concerned about the potential implications for our client if she raised something with the Commission which may prejudice in any way her VOCAT claim, particularly if we do not have an opportunity to read the statement before advising the client.

In cases where the offence occurred prior to 1 July 1997 and the claimant is not eligible for SFA, the only way to obtain financial assistance for them into the future is to claim costs for counselling under sub-section 8(2)(a) or to establish "exceptional circumstances" in order to claim for items to assist recovery under sub-section 8(3) of the Act. This is far from adequate as claiming for items to assist recovery under the Act can be difficult in cases where the injuries were sustained many years earlier and therapeutic evidence of a causal link to likely recovery is unclear due to the elision of time.

3.5. Requirement to cooperate with police

Section 52 of the Act requires the mandatory refusal of claims where the matter has not been reported to police, or the applicant is deemed not to have cooperated with a police investigation. To overcome this hurdle, the claimant must prove that there are 'special circumstances' to justify the failure to report or cooperate. In FVPLS Victoria's experience this burden is substantial. It can operate to unduly preclude victim-survivors from redress in circumstances where they failed to report due to fear of reprisal, trauma and/or fear of not being believed or otherwise alienated from their community (this may be especially so in cases of child sexual abuse occurring in religious or community operated institutions, as well as families). Similarly, victim-survivors may be reluctant to testify in criminal prosecutions where to do so would require them to face the offender and relive traumatic experiences, potentially compounding ongoing adverse mental health difficulties. Under the Victorian scheme, refusal to testify could be deemed a failure to cooperate with police thereby precluding victim-survivors from accessing assistance under the Victorian scheme.

Aboriginal and Torres Strait Islander victim-survivors may also be reluctant to seek help from police for socio-historical reasons relating to the legacy of colonialism, institutionalised racism and the Stolen Generations, as well as ongoing mistrust of police and State authorities given the over-representation of Aboriginal and Torres Strait Islander peoples in the child protection and criminal justice systems. In this context, specialist, culturally safe services such as FVPLS Victoria are essential to ensure that Aboriginal and Torres Strait Islander victim-survivors can access their rights and entitlements.

3.5. Reduction of awards where another form of compensation has been obtained

If the victim has received compensation from another scheme in Victoria, such as WorkCover, this will be taken into account. Given the low cap on awards under the Act, this can operate to negate any benefit to a claimant of making an application for victims of crime assistance and create an incentive to pursue common law relief if available.

(4) *What changes should be made to address the elements of statutory victims of crime compensation schemes that raise particular difficulties for claims by people who suffer child sexual abuse in institutional contexts?*

On the basis of the issues outlined above, FVPLS Victoria recommends that:

- proof and evidence requirements be changed to better respond to the challenges and lived experiences of victim-survivors of child sexual abuse, and indeed all forms of family violence. In circumstances where a police report has not been made, claimants should be able to produce other forms of evidence such as, for example, contemporaneous medical records, witness statements, or records of counsellors, schools, child protective services or other reputable sources;
- Special exemptions to time limits should be made for claims made by victim-survivors of child sexual abuse to ensure they are not unduly precluded from necessary redress; and
- caps placed on awards should be increased in all categories and, most especially, for the category of SFA. The comparatively low \$10,000 cap on SFA under the Victorian scheme can hardly be said to be a proportionate measure of the grief, distress and trauma suffered by victim-survivors of child sexual abuse, for whom the course of their entire lives can be altered and impaired by the abuse. In order to adequately assist victim-survivors and demonstrate community understanding and condemnation of serious offences such as child sexual abuse, the Victorian cap must be increased.

(5) *What forms of redress, including services and payments, should be offered through statutory victims of crime compensation schemes?*

Victims of child-sexual abuse should be able to access SFA, even where the offence occurred prior to 1997 or was not reported to police. That assistance should be available in lump sum payments commensurate with the magnitude of pain and suffering, loss of enjoyment of life, grief and trauma incurred.

In addition, the maximum allowable award for SFA should be increased for claimants in all categories to recognise the magnitude of impact and life-long legacy of child sexual abuse.

Consideration should also be given to special services, hearings and training for Tribunal members and staff in relation to matters of child sexual abuse to lessen the adverse psychological and emotional toll on victim-survivors applying for victims of crime assistance. Similarly, claimants may benefit from a mechanism permitting them to access copies of transcripts and/or statements they have made to the Royal Commission for production as evidence to the Tribunal (or any other body administering a redress scheme as may be so appointed). Such a mechanism may prevent victim-survivors being repeatedly retraumatised by having to tell their story on multiple occasions. However protections in regard to confidentiality and access to appropriate legal advice are required to ensure that any such information sharing processes do not prejudice claimants.

Should you have any queries about this submission, please do not hesitate to contact Antoinette Braybrook, Chief Executive Officer, or Laura Vines, Senior Policy Officer, at FVPLS Victoria on (03) 9244 3333. Further information about FVPLS Victoria can be found at www.fvpls.org.