

BENDIGO OFFICE
337 HARGREAVES STREET
PO BOX 1292 BENDIGO 3552
DX 55054 BENDIGO
TEL: 03 5445 9200
FAX: 03 5441 4424

MELBOURNE OFFICE
2/389 LONSDALE STREET
DX 512 MELBOURNE
TEL: 03 9670 9066
FAX: 03 5441 4424

**ECHUCA, CASTLEMAINE
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FREE CALL: 1800 242 588
EMAIL: info@ardmc.com.au
www.admlaw.com.au
ABN 80 297 162 244

Submission to the Victorian Law Reform Commission Consultation: The Role of Victims of Crime in the Criminal Trial Process

1. Background

Arnold Dallas McPherson is a law firm servicing the needs of Central and Northern Victorians. Based in Bendigo, with offices in Melbourne, Castlemaine, Shepparton and Echuca, Arnold Dallas McPherson provides expert advice in personal injury law and has a number of specialists accredited by the Law Institute of Victoria. Arnold Dallas McPherson has represented the needs of injured people in our region for over 20 years.

The firm represents victims of crime through Victims of Crime Assistance Tribunal (**VOCAT**) applications, applications under section 85B of the Sentencing Act 1991(Vic) and actions in tort at common law. We draw upon our broad experience, and the experience of our clients, in making this submission.

Through our work with victims of crime we have come to acquire an understanding of victims' experiences of the criminal trial process. Specifically, we understand the complexity of the system (and interaction of the civil and criminal justice systems) which must be navigated by victims who seek an order for compensation or restitution under the Sentencing Act. Knowledge of the Sentencing Act Compensation and Restitution Order provisions and how they apply in the context of a criminal trial is useful if not necessary when seeking to take action against a defendant in common law.

2. Scope of this submission

The scope of this submission is narrow. It predominantly addresses point (g) in the Terms of Reference, being 'the making of compensation, restitution or other orders for the benefit of victims against offenders as part of, or in conjunction with, the criminal trial process'. This submission also compares compensation orders available under the Sentencing Act with how

victims might otherwise recover financial compensation, through VOCAT and under the civil law.

We recognise that the Commission “does not propose reviewing the quantum of awards made by VOCAT¹”. In our view the limitation is disappointing given that the financial compensation scheme for victims is more restrictive than other Victorian statutory schemes which seek to compensate injured persons and more parsimonious than schemes in other states. Furthermore, it will be difficult for the Commission to make recommendations about how victims of crime might be recompensed through the criminal justice trial process without considering the interaction with the current statutory victims’ compensation scheme, including its limitations.

We consider that it is worth reflecting upon the inequity of the statutory compensation schemes if only for the purpose of ensuring that any proposed amendments to the compensation orders made as part of the criminal trial process guard against:

- focusing on restitution and compensation measures through the criminal trial process at the expense of better resourcing the VOCAT scheme;
- further entrenching a system that disadvantages victims of crime where the offender cannot be found, there is insufficient evidence to convict the alleged offender, or where by virtue of a capacity defence a prosecution will either not proceed or fail for want of *mens rea*; and
- creating greater complexity and confusion about Sentencing Act compensation orders and common law actions for damages.

We also acknowledge that financial compensation for victims of crime will in many cases only be part of the process of assisting in their recovery and restoration. We note the recommendations made in the Victorian Law Reform Commission’s 2004 Report into Sexual Offences regarding improving the responsiveness of the criminal justice system to the needs of complainants in sexual offending matters. We also note the work of RMIT’s Centre for Innovative Justice in its report on Responses to Sexual Offending which makes a number of recommendations about the provision of restorative remedies for victims of sexual offences but, in addition, some comments about the limitations of the compensation schemes and actions available to victims of sexual offending². We support those observations and ask that the Commission consider the relevant recommendations made in those reports.

3. The Victorian statutory victims compensation scheme

The statutory compensation scheme in Victoria provides primary victims of crime with capacity to claim for up to a total maximum of \$60,000 which can include:

- reasonable medical expenses;
- counselling expenses;
- safety related expenses;
- in exceptional circumstances, other reasonable expenses that will assist an applicant in their recovery;
- in exceptional circumstances, lost earnings up to a maximum of \$20,000.

¹ Victorian Law Reform Commission Terms of Reference, The Role of Victims in the Criminal Trial Process

² ‘Innovative Justice Responses to Sexual Offending’, RMIT Centre for Innovative Justice, 2014.

In addition, in some circumstances, an award of special financial assistance, up to a maximum of \$10,000 for the most serious crimes, may be made.

Primary victims of the most serious crimes who suffer the most severe injuries cannot receive an award under the scheme for greater than \$70,000. Where a person has died as a result of a crime, close relatives can also apply for financial assistance for their loss and distress. In some circumstances, persons who are injured as a result of witnessing a crime, or parents who are injured as a result of learning that their child has been injured due to the commission of a crime, can apply for assistance as Secondary Victims.

The scheme in Victoria is comparable to schemes in other states in Australia, but, along with Queensland, could be described as the most meagre and proscriptive of all.

Limitations for special financial assistance (a payment akin to pain and suffering damages) apply to a person depending on the type of crime committed against them. Even the maximum amounts which can be awarded as special financial assistance are small when compared with damages which might be awarded for pain and suffering in a comparable common law action.

Unlike any common law claim, the scheme does not enable a broadly subjective consideration of how a crime has impacted upon the victim, and a commensurate calculation of an award. We accept that this enables the scheme to operate efficiently and allows the State to retain a measure of control over the amount of compensation awarded to victims.

The objectives of the Scheme are described in the *Victims of Crime Assistance Act*³ as:

- a) to assist victims of crime to recover from the crime by paying them financial assistance for expenses incurred, or reasonably likely to be incurred, by them as a direct result of the crime; and
- b) to pay certain victims of crime financial assistance (including special financial assistance) as a symbolic expression by the State of the community's sympathy and condolence for, and recognition of, significant adverse effects experienced or suffered by them as victims of crime; and
- c) to allow victims of crime to have recourse to financial assistance under this Act where compensation for the injury cannot be obtained from the offender or other sources.

People who are injured through the commission of a crime are less likely to successfully recover damages from a Defendant they sue under common law for an intentional tort than people injured in a transport accident, at work or in a public setting. Actions in tort against offenders can be costly, complex and are only practically enforceable against a small minority of offenders who have the assets or ability to pay any award of damages⁴. Most other tortious actions do not rely entirely upon the assets of an individual defendant to pay

³ 1996 (Vic), section 2.

⁴ Forster, Christine --- "Good Law or Bad Lore? The Efficacy of Criminal Injuries Compensation Schemes for Victims of Sexual Abuse: A New Model of Sexual Assault Provisions" [2005] UWA Law Review 8; (2005) 32(2) University of Western Australia Law Review 264.

damages. Drivers, employers, occupiers and local councils are, as a general rule, insured against claims made by people who are injured as a result of their negligence. Criminals hold no such insurance. The Government should be concerned to ensure that the quantum of awards in victims' compensation schemes reflect the limitations of common law actions for the overwhelming majority of victims.

We do not seek to dwell on the point of quantum, needless to say that we think that the current statutory maximum for special financial assistance is insufficient not only as compared to other types of statutory compensation schemes in Victoria but also as compared to other victims compensation schemes nationally. The South Australian Parliament, for example, has just introduced a Bill to double the statutory maximum of special financial assistance payable to victims who sustain the most serious of injuries⁵. If a review of quantum of damages in VOCAT is not within the scope of this inquiry, then we ask the Commission to recommend that a review of the VOCAT scheme, including the quantum of awards, be undertaken.

The deficiencies of the current Victorian victims' compensation scheme are not limited to the maximum quantum of awards, but also include the system through which victims' claims are assessed.

Currently, VOCAT members are Magistrates. It is less than ideal to have the same Magistrates presiding over criminal law and family violence proceedings as well as applications for compensation by victims for injuries caused by the commission of those crimes. This issue is, in our view, especially apparent in regional Courts where, commonly, the same Magistrates preside over the criminal law hearing and sentencing as well as determining the VOCAT award. Some of the issues relating to this approach are touched upon below in relation to the appropriateness of compensation orders made under the Sentencing Act.

In our experience, most victims are more concerned with the manner in which they are treated by Tribunal Members than the ultimate award they receive. While this consultation is not a review of VOCAT processes, the VOCAT scheme, its processes and limitations are relevant to a review of the role of victims in the criminal trial process. Victims view the VOCAT process as a part of the justice system. Their treatment by it, just like their treatment in the criminal trial process, can have a significant impact upon a victim's recovery and sense of justice. Unlike the criminal trial process or a common law application, the VOCAT scheme can provide to victims a unique opportunity to tell their story and have it acknowledged by a figure of authority without the presence of the offender⁶.

Given the particular vulnerabilities of victim applicants, it is critical that Tribunal Members display the requisite empathy and sensitivity in dealing with their applications. We submit that designated Magistrates or Tribunal Members, who are appropriately trained to deal with victims, and do not determine related criminal or civil applications, are best placed to be able to handle these applications appropriately and to ensure that victims are protected from further trauma or distrust in the legal system.

⁵ *Victims of Crime (Compensation) Amendment Bill 2015 (SA)*.

⁶ *Innovative Justice Responses to Sexual Offending*, RMIT Centre for Innovative Justice, 2014, page 91.

Recommendations:

- *That the VLRC recommend that the Victorian Government conduct an inquiry into the scope and operation of the victims of crime assistance scheme, including quantum of awards and the forum in which applications are heard.*
- *That the role of VOCAT Member be a dedicated role, attracting specialised training for dealing with victims. It should not be open to Magistrates who also hear criminal and family violence proceedings.*

4. Common Law actions

As discussed above, actions brought by victims under the common law against offenders are rare, because even if a person's action would succeed, in the majority of cases, the compensation order would be enforceable only against the Defendant and entirely dependent on his or her assets or income.

The result is a society whereby the compensation awarded to an injured person can vary immensely depending upon the way in which they were injured. Take for example a woman who is the victim of years of physical and sexual assault at the hands of her partner. Putting to one side what we know about victims' reluctance to report crimes of this nature, if the crime was reported and substantiated, in Victoria, the statutory victims compensation scheme, overseen by VOCAT, will pay for medical expenses, counselling expenses and lost earnings (up to a maximum of \$20,000) up to a maximum total of \$60,000, and special financial assistance of up to a maximum of \$10,000. Even if she suffered the most severe ongoing physical and psychological injuries as a result of the acts of violence, limiting her capacity to earn a wage and causing the loss of independence and enjoyment of life, she will only be recompensed under the VOCAT scheme up to a maximum of \$70,000. Only if the perpetrator of those crimes has assets or substantial income would the victim be able to pursue and recover damages from the perpetrator through an action in tort (assault and battery).

If we compare that situation to someone who is injured in a transport accident because of someone's negligent driving, an entirely different outcome is possible. In that circumstance, under the Transport Accident Act, a no fault scheme, the TAC would pay for the injured person's reasonable medical expenses (uncapped), up to three years of lost wages and, in circumstances where there is ongoing impairment, a lump sum payment if the person's impairment is greater than a 10% whole person impairment. The person, if 'seriously injured'⁷, would also be able to sue in tort under the common law. In transport accidents, the assets of the Defendant are irrelevant, as in such applications the TAC indemnifies all licenced drivers of Victorian registered vehicles. A person who suffers the most serious ongoing physical and psychological injuries in this situation could be awarded a lump sum impairment benefit of between \$10,000 and \$60,000 and common law damages for hundreds of thousands of dollars, possibly more.

⁷ Section 93 of the *Transport Accident Act 1986* (Vic) requires a person to have a "serious injury" in order to commence an action for damages.

While some may say such is the lottery of life, it seems wholly unfair that those who have been victims of crime who society purports to have a desire to protect and console are provided such limited compensation for their suffering.

Although a common law action may only be a worthwhile pursuit for a limited number of victims, in a circumstance where the perpetrator has assets, it is preferable, in our view, to an application for a compensation order under the Sentencing Act. For victims of crimes which are notoriously difficult to prosecute, such as sexual assault and family violence, a common law action against a perpetrator who has assets, in which the civil standard of proof applies, has a greater chance of success than any criminal prosecution and subsequent compensation orders. In our view, while the institution of compensation orders was doubtless well-intentioned, their value is very limited.

This is discussed in more detail below.

5. Compensation Orders made under the Sentencing Act 1991

Compensation orders were introduced with the intent to provide a simpler avenue for victims to seek redress from an offender rather than through actions for damages at common law⁸. While Justice Bell in *RK v Mirik & Mirik*⁹ remarks that compensation orders “saves the victim the time, expense, inconvenience and possible additional trauma of having to institute a civil proceeding” we do not agree that they have been the panacea for victims that the legislature anticipated. The orders are not automatic, usually require the involvement of lawyers¹⁰, potentially still require viva voce evidence from the victim, and face similar limitations to actions in tort in circumstances where the offender is effectively judgment proof¹¹.

For the reasons outlined below, we maintain that Compensation Orders under the Sentencing Act are not a suitable option for compensating victims of crime:

(i) The Procedure is neither simple nor clear

The intention of the legislature was to create a simple alternative for victims to commencing separate civil law applications. As a result, a flexible approach to compensation orders has developed. This flexible approach however means that there is little understanding by victims, the Police, the Court and lawyers about how applications for compensation orders should be made and prosecuted. There are no forms for making applications of this nature, and little if any procedural guidance provided by the Court. Consequently, this uncertainty has the effect of increasing legal costs for a victim as solicitors must navigate their way through the process unguided, and potentially engage Counsel to appear in such applications, due to this uncertainty as to procedure. In our experience, the costs to a client of pursuing a compensation order can exceed the costs of a common law action.

⁸ Section 22, Sexual Assault Manual, Judicial College of Victoria, 2009-2014.

⁹ (2009) VSC 14 at 11

¹⁰ Although applications can also be made by the DPP or the Police, in our experience, they rarely are.

¹¹ Section 85H of the *Sentencing Act 1991* provides that “a compensation order, including costs ordered to be paid by the offender on the proceeding for that order, must be taken to be a judgment debt due by the offender to the person in whose favour the order is made and payment of any amount remaining unpaid under the order may be enforced in the court by which it was made”.

(ii) Police/DPP rarely make applications for compensation orders

While the Sentencing Act provides that an order may be applied for by the victim¹², the DPP or the Police, in our experience, the Police and the DPP rarely make such applications. More commonly, victims must engage lawyers to make an application for a compensation order.

(iii) Costs not recoverable

The costs of applying for compensation orders under the Sentencing Act are not recoverable and must be borne by the victim. In our experience, the total costs of these applications can range from \$10,000 to \$25,000. These costs can exceed the costs borne by a plaintiff in a common law action for damages, where procedures are clear and party/party costs and disbursements can be recovered from the Defendant.

(iv) Sentencing Act orders only relevant where there is a conviction

Compensation orders under the Sentencing Act can only be made in matters where a person is convicted is made. Victims of crimes where there is insufficient evidence to criminally convict an accused beyond reasonable doubt in no way benefit from the Sentencing Act provisions for compensation orders.

(v) VOCAT awards must be deducted from the amount ordered to be paid

Section 85I of the Sentencing Act provides that the Court must reduce compensation payable by the defendant by the amount of any VOCAT award. We consider this to be a particularly peculiar provision. As it currently stands, the amount that a convicted offender has to pay may be reduced by a taxpayer funded scheme. We understand that the Parliament is concerned to avoid a “doubling up” of payments to a victim. However, where a Defendant has assets, we believe that it would be in the interests of victims and the State if the Court were instead able to make an order that the Defendant repay to VOCAT any award made to the victim by VOCAT. In order to avoid a situation where the interests of a victim and the VOCAT scheme might conflict, repayment to VOCAT should only occur *after* the victim’s compensation has been paid by a Defendant.

(vi) Victims cannot be awarded compensation for economic loss

Finally, compensation orders under the Sentencing Act cannot comprise amounts for economic loss experienced by the victim. Section 85B(2) sets out the types of compensation available:

A compensation order may be made up of amounts-

- a. for pain and suffering experienced by the victim as a direct result of the offence;
- b. for some or all of any expenses actually incurred, or reasonably likely to be incurred, by the victim for reasonable counselling services as a direct result of the offence;

¹² Section 85C, *Sentencing Act 1991* (Victoria).

- c. for some or all of any medical expenses actually and reasonably incurred, or reasonably likely to be incurred, by the victim as a direct result of the offence;
- d. for some or all of any other expenses actually and reasonably incurred, or reasonably likely to be incurred, by the victim as a direct result of the offence, not including any expense arising from loss of or damage to property.

(vii) Sentencing judges may take into account the Defendant's assets when making an order
Section 85H of the Sentencing Act provides that a Court when making a compensation order may take into account the financial circumstances of the offender and the nature of the burden that its payment will impose. If the primary purpose of a compensation order is to 'restore' or compensate the victim, rather than "additional punishment" for the offender¹³, the financial assets of the offender should not, in our view, be a consideration of the Court.

(viii) Sentencing judges are not experienced in quantifying a victim's pain and suffering
Using compensation orders as a means to compensate victims places the sentencing judge, usually experienced in criminal law and sentencing, in a position to assess the pain and suffering of the victim and determine the appropriate quantum of damages. Respectfully, these are may not be matters in which criminal trial judges are trained, unlike judges in the County and Supreme Court Common Law divisions, who are able to determine the appropriate quantum of damages by reference to the quantum of damages awarded to Plaintiffs injured through acts of negligence as well as crime.

In our experience, where a defendant has assets, a victim will be better served, with respect to both the range of matters for which compensation is payable and quantum, by commencing an action in tort.

The application, in most instances¹⁴, would be heard by judges who assess the injuries and pain and suffering of injured persons every day and they can claim for economic loss in addition to pain and suffering, and expenses actually incurred or reasonably likely to be incurred. There is also clear procedural direction which can assist the parties in reaching a settlement of an application for damages before it proceeds to a final hearing.

For all the reasons outlined above, improving the outcomes for victims of crime with respect to financial compensation will not, in our view, best be achieved by simply seeking to amend the way in which compensation orders are made as part of the criminal trial process. Compensation orders have been an option available to victims since the introduction of compensation orders into the Sentencing Act¹⁵. In 15 years, compensation orders have failed to become an attractive or well-utilised alternative to civil law actions.

We consider that more effective improvement could be achieved by developing a more robust statutory scheme and providing some efficiency for victims who seek to make applications for damages under civil law. In relation to the statutory scheme we consider that this may be achieved by:

¹³ *R K v Mirik & Mirik* (2009) VSC 14. Justice Bell states at 14 "Though compensation is thus ordered as part of the criminal justice process, it is civil compensation, not additional punishment."

¹⁴ Parties have the right to request that the matter be heard and determined by a jury rather than a judge.

¹⁵ *Victims of Crime Assistance (Amendment) Act 2000*

- undertaking a review of the current VOCAT scheme;
- developing the skills and expertise of those who assess victims' applications; and
- increasing the quantum which can be awarded.

In relation to improving civil law applications for victims, we consider that amendments could be made to the Confiscation Act 1997¹⁶ so that, in addition to the DPP or a police officer, victims and/or their representatives may apply to have the assets of the offender, who has been charged with an indictable offence, restrained in anticipation of an award for common law damages.

In addition, we make the following recommendations to improve the way in which compensation orders are made under the Sentencing Act:

- (a) There should be no requirement for the Sentencing Court to deduct any VOCAT award from the amount ordered to be paid;
- (b) The Sentencing Court should not take the assets of the offender, nor the nature of the burden on the offender of paying the award, into account when determining the amount to be paid;
- (c) That the applicant should be able to recover the costs of making an application for a compensation order from the criminal offender;
- (d) Clear procedural guidelines and standard forms should be produced by the Court to provide victims and their representatives with greater clarity about how applications should be made, and the information that is required to be included with any such application;
- (e) Victims should be able to make a claim for any economic loss that they have suffered, as they would be able to if they pursued an action at common law.

Recommendations:

- *That Parliament focuses upon making improvements to the processes available to victims under the statutory scheme (VOCAT) and under the common law.*
- *That the VLRC recommend that the Victorian Government conduct an inquiry into the scope and operation of the victims of crime assistance scheme, including quantum of awards and the forum in which applications are heard.*
- *That the role of VOCAT Member be a dedicated role, attracting specialised training for dealing with victims. It should not be open to Magistrates who also hear criminal and family violence proceedings.*
- *That the Confiscation Act 1997 be amended so as to include victims and their representatives in the list of persons who may apply to have the assets of the offender, who has been charged with an indictable offence, restrained in anticipation of an award for common law damages.*
- *That amendments to the procedure and scope of compensation orders as outlined above, be made to the Sentencing Act.*

¹⁶ Section 15 1(e) provides that a restraining order may be made by a Court on the application of to satisfy any order for restitution or compensation that may be made under the *Sentencing Act 1991* (Vic).

6. Conclusion

There are, without doubt, improvements which could be made the way in which victims are treated in the criminal trial process. The experiences of our clients indicate that the criminal trial process fails to vindicate their experiences and they often look to other forums, such as VOCAT, for such purpose.

The criminal trial is not, in our view, the most appropriate forum to deal with the compensation of victims of crime. While compensation orders made under the Sentencing Act were intended to provide 'easy access to civil justice', there is little evidence to indicate that they do. In any event, for the reasons outlined in our submission, in the limited number of cases where perpetrators have assets, we do not consider sentencing judges or Magistrates to be best placed to quantify the amount of compensation which should be paid to a victim.

The vast majority of victims of crime are limited to the compensation awards available under VOCAT. In our view, this consultation on the Roles of Victims in the Criminal Trial Process will have little impact on the experience of most victims unless it is followed by an inquiry into the role of VOCAT and the quantum of awards it can make to victims. We appeal to the VLRC to make such a recommendation to the Victorian Parliament.