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# What is Victims of Crime Compensation?

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In the early 1990s an international convention focused on victims of crime, resulting in international pressure on governments to implement corresponding legislation. Consequently, governments in each Australian State and Territory developed laws and procedures to render assistance to victims of crime.

Queensland implemented a statutory scheme, called 'Criminal Compensation', to assist victims of crime. Other schemes in Queensland include 'Workers Compensation' and 'Compulsory Third Party Motor Vehicle Insurance'. Such schemes are intended to provide a legal right to access monetary assistance/compensation for injury or loss where no other legal means may be available.

## Relevant Queensland legislation

Prior to 1995 there were legal avenues for victims to seek compensation; however they were often complex and expensive. Having just suffered serious injury and endured an often traumatic and lengthy criminal court process to see the offender convicted, victims may have little fortitude left to continue with further court proceedings to obtain compensation. Yet, such victims were forced to commence personal lawsuits against offenders with no guarantee of success. Frequently offenders came from a low socio-economic group and had no money or assets to satisfy any court-ordered payout even if the victims were successful. This rendered civil proceedings pointless.

In accordance with the international convention, the Queensland government implemented the *Criminal Offence Victims Act 1995 (Qld)* ('COVA'). COVA was a compensation-based scheme in which the government provided victims with a cash payout for injuries suffered, as a result of a criminal offence, when the offender was unable to personally pay. Unfortunately the State government underestimated the number of possible claimants and after a decade it became apparent that the scheme was too much of a drain on the public purse.

On 1 December 2009 the Queensland Government replaced COVA with the *Victims of Crime Assistance Act 2009 (Qld)* ('VOCA'). This is an assistance-based scheme where the State government offers different forms of assistance to victims, rather than merely a lump sum cash payout.

The first question that would likely leap to mind for any reader is, 'If I'm a victim one day, exactly what can I get under the new VOCA scheme and how can it help me?' To analyse the value of VOCA we must first understand the

COVA scheme that it replaced. Is VOCA better or has our government merely sold us an impractical substitute to suit political purposes?

## Overview of the COVA process

1. The defendant injures the applicant during a criminal act.
2. The defendant is convicted of the criminal offence.
3. The applicant's lawyer gathers evidence to prove the injuries and commences legal proceedings (Criminal Compensation Application).
4. The application is heard. The defendant may have legal representation. A judge awards a sum against the defendant, formulated using injury tables/schedules.
5. If the defendant has sufficient assets to satisfy the award, enforcement proceedings are commenced against him/her. This process is far less expensive than commencing a personal law suit directly against the offender.
6. If it is proved that the defendant does not have sufficient assets the applicant may then apply for an ex-gratia payment from the Attorney-General.

## What was compensable under COVA?

The COVA scheme allowed monetary compensation only for injury or death sustained as a result of a criminal offence. It did not provide for:

- *Loss/Damage*: Property loss or damage to clothing, damage to vehicles/homes/equipment and the like could not be claimed. These were personal losses that victims were forced to accept, no matter how great.
- *Loss of wages or economic loss*: Lost income from time off work or lost overtime/penalty rates could not be claimed.
- *Cost of medication, doctors or hospital costs*: All medical costs were non-claimable and victims had to provide for both past and future medical costs from their payout.
- *Legal costs*: The claim process involved further court proceedings requiring legal representation, however legal costs were not claimable and again were deducted from the victim's final payout.

The maximum amount claimable was capped at \$70 000 and reserved for only the most serious of injuries. At the end of the day many victims' awards of damages hardly covered their losses and costs, leaving them little to use personally as they got their lives back on line.

## Criticisms of COVA

COVA required a personal offence, defined under the Act as an indictable offence committed directly against someone's physical body.

This meant two things. First, offences such as stealing did not count. Rather, victims could only claim for direct physical injury. Second, even if victims suffered a severe personal injury, unless the matter was heard in the District or Supreme Court, victims were unable to claim criminal compensation. As most assault matters are heard in Magistrates Court, many victims were ineligible to claim. Finally, the offender had to be convicted or the victim had no claim at all. The only exceptions to this rule were if the offender was unfit to stand trial due to immature age or mental health.

There were often extensive delays in obtaining compensation, which is problematic for victims who need

assistance at the time of their injury as opposed to months or even years later. Often the criminal process takes over a year from arrest to conviction followed by further court proceedings regarding the criminal compensation application. Finally, when the offender had no money to pay a court-ordered award the applicant had to make a further application for an ex-gratia payment from the Attorney-General. Some criminal compensation proceedings could last up to three years from commencement of proceedings to the date of final payment, resulting in four years or more from the date of injury to receipt of financial assistance.

A primary question for lawyers when assessing a client's potential claim was to ask, 'is the compensation likely to be awarded sufficient to cover legal costs and still provide the client with a satisfactory return?' In many cases the answer was no, even though the victim's injuries may have been worth \$5000 on the injury scales used by judges.

Whilst the *COVA* system had many failings it was still very popular with victims who enjoyed the monetary payment at the end of the day. Victims were able to take a holiday, buy a car or pay off their mortgage. Most importantly, in the eyes of the victim, they were able to personally decide how they spent their award to assist them in getting on with their lives.

However, given the flaws of *COVA*, and the ever increasing demand on public funds, it was clear that *COVA* was unsustainable and failed to provide victims with a suitable form of recompense. After extensive consultation with many parties the government replaced *COVA* with the Victims Financial Assistance and Services Scheme, now commonly known as Victim Assist. The new scheme is regulated by *VOCA*.

## Victim Assist: financial assistance

Victim Assist provides for a financial assistance scheme rather than cash payouts. It focuses on victim recovery. Victim Assist will pay for or reimburse the costs of goods and services, both present and in the future, that the victim requires to recover from the physical and psychological effects of the crime. This includes all normal hospitalisation and specialist doctors' fees but also medical services such as physiotherapy, chiropractic and orthodontic services, etc, that may be required. It includes psychiatric treatment and any medication. It further includes an increased range of assistance not previously available, such as for loss of earnings and a Special Financial Assistance award (similar to previous monetary compensation) of up to \$10 000 in recognition of a victim's pain and suffering.

Financial assistance schemes provide a more tailored, needs-based response and provide for earlier intervention in the victim's recovery than compensation schemes, allowing victims to get on with their lives more quickly. The scheme includes an expanded and more coordinated Victim Assistance Unit, which helps victims access services and counselling. Furthermore, the new scheme provides financial assistance to a more comprehensive range of victims through interim and final payments for specific needs required to recover from the effects of crime.

## VOCA process

*VOCA* uses a Tribunal approach rather than a court-based system. Victim Assist uses a model that involves applications being assessed by a multidisciplinary team of government

assessors. In other words, to make an application a victim is required to fill out a few forms and submit them to the relevant government office, Victim Assist. It is anticipated that the Queensland Civil and Administrative Tribunal will hear reviews of decisions made by Victim Assist. Victims will also have their normal right to apply to the Supreme Court for the court to review the decision.

## VOCA eligibility

For a victim to be eligible to receive financial assistance it must be proven, on the balance of probabilities, that there was an act of violence that resulted in the injury or death of a person. An injury includes bodily harm, mental illness or disorder, intellectual impairment, disease, pregnancy, the adverse impacts of a sexual offence, or any combination of the above.

Unlike *COVA*, the general test under *VOCA* is that the matter has been reported to police and it is more likely than not that the victim was injured as a result of an act of violence. As government assessors now administer the system there is also no longer a requirement to make further application for compensation in a court after the criminal proceedings. Victims can now make application for assistance immediately after the injury is sustained.

Also abolished is the previous 'personal offence' rule that only victims suffering direct injury to their bodies could claim. Now *VOCA* has established a number of new categories whereby victims may be recognized and assisted as follows:

- i. *Primary victim*: A person who is injured or dies as a result of an act of violence committed against him or her.
- ii. *Related victim*: A person who, at the time the act of violence was committed, was a close family member of, or dependant of a primary victim who died as a result of an act of violence.
- iii. *Secondary victim*: A person who is injured as a direct result of witnessing any act of violence that resulted in injury or death of the primary victim. A secondary victim also covers a parent or guardian of a primary victim who is injured as a direct result of an act of violence having been committed against a primary victim who was under the age of 18 at the time of the act of violence.

## Other VOCA benefits

The initial application requires only two forms. An application form and a medical certificate to show the victim has actually suffered some sort of injury or illness. Applicants may be required to provide further documentary evidence, upon request from Victim Assist, in support of the various areas of assistance claimed.

Unlike the previous *COVA* system whereby victims incurred substantial court and legal fees, under *VOCA* there is no application fee. If a victim wanted to conduct their entire application themselves there is no cost involved.

*VOCA* has substantially reduced applicable time frames by removing restrictions on eligibility and introducing interim payments. Applications may be submitted and assistance obtained at the time of need rather than years down the line.

The government has established 'Victim Linkup' as a one stop shop where victims may obtain all the information and services provided by Victim Assist Queensland and referral to support services.

## VOCA restrictions

It is important to note that time limits do apply and generally a victim must apply within three years of the act of violence occurring, or if he/she is a related victim, within three years of the death of the primary victim. An exception to this for younger victims is if the applicant was under 18 years of age at the time of the act of violence, then they have until they turn 21 to apply.

Finally, any other available avenues of compensation will be taken into account. The guide to completing the financial assistance application advises that 'financial assistance is a complementary scheme.'<sup>1</sup> The scheme will only help cover the costs of recovery from an act of violence where victims are ineligible for other schemes or other schemes have not already made a payment. Applicants must declare on the application form if they are eligible for assistance from other sources (such as workers' compensation, compulsory third party insurance, civil claims, Centrelink, mediation, health insurance, Medicare, life insurance, income protection insurance, funeral insurance or a victim trust fund). Applicants must attach copies of any claims, benefits or rebates, if they have them, to their application form.

Now we return to a slightly different version of the initial question posed: 'If I'm a victim one day exactly what can I get under the new *VOCA* scheme and how do I maximise my chances of getting it?' Remember, the right to assistance is not automatic and will be determined and authorised on a need-by-need basis by assessors at Victim Assist.

## Primary areas of assistance

### 1. Legal expenses

Whilst the application process has been simplified, Victim Assist realises that having suffered so much already many victims are too overwhelmed to undertake the process themselves. Accordingly, for any victims using legal representation to conduct their application, Victim Assist will pay the first \$500 of any associated legal fees. As many claims do not require more than this, the process effectively means a fee-free application for most applicants. Lawyers simply forward their invoice directly to Victim Assist for payment.

### 2. Counselling

Victim Assist will pay for any counselling required as a result of an act of violence. Counselling extends to full psychiatric services for victims suffering from conditions such as post traumatic stress disorder or severe depression. Victims may have already attended a professional of their choice prior to the application and if so Victim Assist will reimburse those costs already incurred. For future visits Victim Assist will pay the professional directly for a predetermined number of necessary consultations. Victims need to keep a diary as soon as possible after the crime recording times, dates and places of all communications and/or contact with counselling professionals. If they have not seen anyone they should record their own feelings and experiences in detail. Such information may later be used by assessors at Victim Assist to justify the need for later counselling.

### 3. Medical expenses

Victim Assist will also cover all medical expenses, past,

present and anticipated, from initial consultation through all treatment stages as required. It includes hospitalisation, theatre/anaesthetist fees and medication expenses. Often specialist medical services are required for particular injuries. Each case will be assessed on an individual needs basis.

If a victim has not commenced seeing a particular doctor, Victim Assist may require them to attend a professional of their nomination to avoid victims using high end practitioners and incurring unnecessary, extreme costs. If a victim wishes to use a particular doctor it may be beneficial to commence treatment prior to making application with Victim Assist to maximise the possibility of remaining with the person for the entire treatment program.

### 4. Report expenses

Often victims will be required to attend specialist medical services to determine the exact nature and extent of the relevant physical/psychological injuries prior to Victim Assist determining funding for an appropriate treatment plan. Victim Assist funds specialist reports from such professionals.

In some cases, such as psychiatric injury, an eligible condition may not even be identifiable until diagnosed by a professional. A victim may have already attended such services of their own accord to establish an injury before initiating a claim. In such cases Victim Assist will reimburse victims of related consultation and report expenses but not if a condition is not diagnosed.

### 5. Incidental travel

Victims may claim incidental travel, such as travel to and from medical appointments, during their recovery. Victims should commence a vehicle log recording dates and times of travel, vehicle travelled in and relevant distances of such travel.

### 6. Other expenses - exceptional circumstances

Exceptional circumstances may exist due to the victim's personal circumstances, the nature of the act of violence, or if the act has had an unusual or special or out of the ordinary effect on the victim. Other expenses covered for eligible victims with exceptional circumstances might include crime scene clean up after the death of a close relative, overnight accommodation bills for victims from remote areas, or expenses incurred through improving security on a home after an armed robbery. Again the victim needs to keep detailed records/invoices of any such expenses that have been incurred.

### 7. Loss of earnings

Victims are often off work for extended periods due to injuries sustained and/or on light duties during a recovery period. As such Victim Assist will compensate for both lost and/or decreased earnings during recovery.

Loss of earnings claims can amount to up to \$20 000 to cover lost earnings as a direct result of the act of violence, within a period of two years from the act of violence. It is available to the victims and also to parents and witnesses of a more serious act of violence where exceptional circumstances exist.

Many workers have no wage at all or, even if working on restricted duties during recovery, lose overtime and/or penalty rates during that period. Victims are advised to obtain

and keep payslips for a minimum of 20 weeks both prior to, and even after, the recovery period to show the decrease in earnings during the actual recovery phase.

## 8. Damage to clothing

Victim Assist will compensate for damage to clothing, which in the modern high fashion world can be quite considerable. Ideally an applicant would produce purchase receipts or alternatively would obtain written/advertised documentary evidence of value for the same or a similar item. Clothing does not extend to accessories such as jewellery or watches, etc.

## 9. Special assistance

Special assistance is a lump sum available to primary victims in recognition of the act of violence committed against them. This ranges from \$130 to \$10 000, depending on the seriousness of the act and the resulting injury to the victim. Legal representatives are usually able to give an estimate of what may be sought/expected in this area.

## 10. Interim assistance

This covers urgent or emergency expenses applicants have paid or are likely to have to pay before the application is decided. This may include crime scene clean up, relocation expenses or medical expenses. It is available for amounts up to \$6000.

## 11. Funeral expenses

Funeral expense assistance can be paid before the full application is decided as an interim payment. This is in addition to other interim assistance available. Funeral expense assistance must be claimed within three years from the victim's death.

## Criticisms of VOCA and Victim Assist

Unlike *COVA*, where the amount paid out was determined by an independent court system, Victim Assist has full control in determining eligibility, services and amount. In effect, the authority that provides the funding and has a vested interest in minimising expenditure also has direct control over its distribution.

Often victims may be referred to government nominated service providers, removing choice for some victims. As a result questions are raised regarding the quality of the services provided.

One of the strongest criticisms (warranted or not) of Victim Assist relates to political considerations as to why the new system was implemented in the first place. It has been suggested that the *COVA* scheme was simply too expensive to maintain given the large volume of claims being made. It raises the question as to how a new system providing more services to a wider range of victims could be more commercially viable.

The government's position may be that better management of the funds available enables wider distribution. There is some merit in this argument given that research has shown that many people who are given large lump sum payouts tend to squander the amount in a short period of time and do not receive any long-term benefit. The alternative argument is that, given human nature, most people prefer a cash payout with the unfettered ability to determine how it may be spent. As such the idea of being offered five free visits to a

psychologist to discuss their suffering is not attractive to many victims, even though in reality it may be what they need the most. Thus some may argue that many victims do not take up assistance, as offered by Victim Assist, and then at the end of the day get nothing at all. It may also be argued that further down the line when their suffering catches up with them, these people may be a drain on the health system and welfare services due to compounding life difficulties.

## Conclusion

*VOCA* is due for review on 1 Dec 2012, three years after its implementation. It is likely that many of the concerns that have been voiced here may well be addressed at that review.

## Reference

- <sup>1</sup> *Financial Assistance* (22 June 2011) Queensland Government <<http://www.justice.qld.gov.au/justice-services/victims-of-crime/victim-assist-queensland/financial-assistance>>.

### Further things to do:

1. *What legislation exists in your State to assist victims of crime?*
2. *Do you think it is an effective system?*
3. *Investigate the Tribunals in your State. What Tribunal does a person go to if they want a decision by a government body to be reviewed?*

## DID YOU KNOW?

### Legal Terminology

**Confession** – A statement admitting an offence or admitting some factual circumstance or conduct which constitutes one or more elements of an offence.

**Discretion** – The power, particularly of a judge or the trustee of a discretionary trust, to make a choice or decide a question autonomously, in the absence of determinate rules, using judgment rather than rules.

**Indictment** – The formal written document charging an accused with one or more indictable offences and presented in a court other than a court of summary jurisdiction.

**International Treaty** – An international agreement concluded between subjects of international law (typically states but also international organisations), usually in written form, with the intention to create obligations under international law. Treaties take many different forms. They include bilateral treaties (between two parties) and multilateral treaties (between three or more parties).

(Source: *Oxford Australian Law Dictionary* (Oxford University Press, 2010))