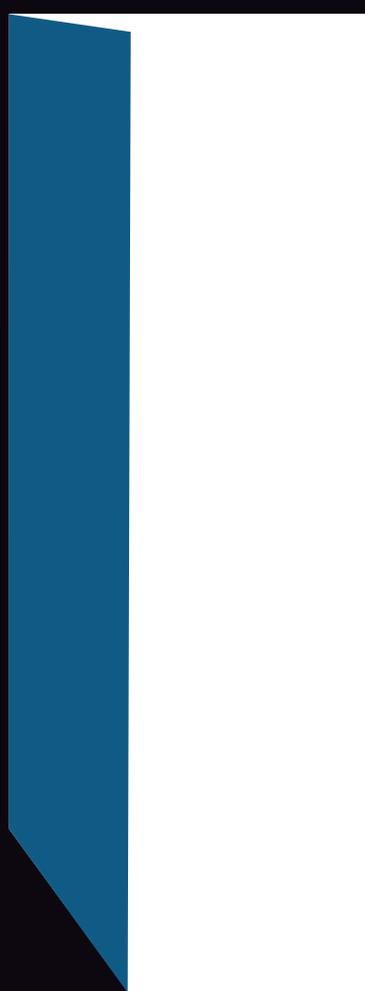




# Review of the Victims of Crime Assistance Act 1996

AUGUST 2017





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# Review of the Victims of Crime Assistance Act 1996

AUGUST 2017



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## Preface

On 22 December 2016, the Victorian Attorney General, the Hon. Martin Pakula MP asked the Victorian Law Reform Commission (the Commission) to review and report on the provision of state-funded financial assistance to victims of family violence under the *Victims of Crime Assistance Act 1996* (Vic) (the Act) (the first terms of reference).

In June 2017 the Commission released a consultation paper seeking stakeholder views on the issues raised by the first terms of reference (the first consultation paper).

On 7 July 2017, the Attorney-General, by supplementary terms of reference, asked the Commission to expand its review to consider the operation and effectiveness of the Act and the Victims of Crime Assistance Tribunal (VOCAT) for all victims of crime. The supplementary terms of reference ask the Commission to consider whether there are other models that would more effectively deliver assistance to victims of crime, for example an administrative or quasi-administrative model. The terms of reference also ask the Commission to bear in mind that a state-funded assistance scheme for victims should seek to achieve outcomes for victims that:

- are fair, equitable and timely
- are consistent and predictable
- minimise trauma for victims and maximise the therapeutic effect for victims

and that the scheme must also be efficient and sustainable for the state.

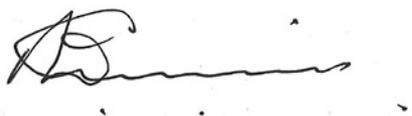
It is apparent that the supplementary terms of reference comprehend a significantly expanded set of issues from the original terms of reference. Accordingly it is appropriate that the Commission publish a supplementary consultation paper to consider these further issues, and to extend the submission period to comprehend both sets of terms of reference.

I warmly encourage anyone with an interest in any or all of the issues raised by the consultation papers to make a written submission to the Commission.

Submissions on both consultation papers are due by 31 October 2017.

Your submissions will inform the recommendations the Commission makes to the Attorney-General.

The Commission will report to the Attorney-General on both sets of terms of reference in the one report by 27 July 2018.



**The Hon. P. D. Cummins AM**  
Chair  
Victorian Law Reform Commission

August 2017

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# Call for submissions

The Victorian Law Reform Commission invites your comments on this supplementary consultation paper.

## What is a submission?

Submissions are your ideas or opinions about the law under review and how to improve it. This consultation paper contains a number of questions, listed at the beginning of the paper, that seek to guide submissions.

You do not have to address all of the questions to make a submission.

You may choose to answer some, but not all questions. Alternatively, you may wish to provide a response that does not address individual questions posed throughout the paper, but nonetheless relates to the issues outlined in the terms of reference.

Submissions can be anything from a personal story about how the law has affected you to a research paper complete with footnotes and bibliography. We want to hear from anyone who has experience with the law under review. Please note that the Commission does not provide legal advice.

## What is my submission used for?

Submissions help us understand different views and experiences about the law we are researching. We use the information we receive in submissions, and from consultations, along with other research, to write our reports and develop recommendations.

## How do I make a submission?

You can make a submission in writing, or verbally to one of the Commission staff if you need assistance. There is no required format for submissions, though we prefer them to be in writing, and we encourage you to answer the questions contained in each chapter and set out at the beginning of the consultation paper.

Submissions can be made by:

Completing the online form at [www.lawreform.vic.gov.au](http://www.lawreform.vic.gov.au)

Email: [law.reform@lawreform.vic.gov.au](mailto:law.reform@lawreform.vic.gov.au)

Mail: GPO Box 4637, Melbourne Vic 3001

Fax: (03) 8608 7888

Phone: (03) 8608 7800, 1300 666 557 (TTY) or 1300 666 555 (cost of a local call)

## Assistance

Please contact the Commission if you need an interpreter or other assistance to make a submission.

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## Publication of submissions

The Commission is committed to providing open access to information. We publish submissions on our website to encourage discussion and to keep the community informed about our projects.

We will not place on our website, or make available to the public, submissions that contain offensive or defamatory comments, or which are outside the scope of the reference. Before publication, we may remove personally identifying information from submissions that discuss specific cases or the personal circumstances and experiences of people other than the author. Personal addresses and contact details are removed from all submissions before they are published. The name of the submitter is published unless we are asked not to publish it.

The views expressed in the submissions are those of the individuals or organisations who submit them and their publication does not imply any acceptance of, or agreement with, those views by the Commission.

We keep submissions on the website for 12 months following the completion of a reference. A reference is complete on the date the Commission's report is tabled in Parliament. Hard copies of submissions will be archived and sent to the Public Record Office Victoria.

The Commission also accepts submissions made in confidence. Submissions may be confidential because they include personal experiences or other sensitive information. These submissions will not be published on the website or elsewhere. The Commission does not allow external access to confidential submissions. If, however, the Commission receives a request under the *Freedom of Information Act 1982 (Vic)*, the request will be determined in accordance with the Act. The Act has provisions designed to protect personal information and information given in confidence. Further information can be found at [www.foi.vic.gov.au](http://www.foi.vic.gov.au).

## Confidential submissions

When you make a submission, you must decide whether you want your submission to be public or confidential.

**Public submissions** can be referred to in our reports, uploaded to our website and made available to the public to read in our offices. The names of submitters will be listed in the Commission's report. Private addresses and contact details will be removed from submissions before they are made public, but the name of the submitter is published unless we are asked not to publish it.

**Confidential submissions** are not made available to the public. Confidential submissions are considered by the Commission but they are not referred to in our reports as a source of information or opinion other than in exceptional circumstances.

Please let us know your preference when you make your submission. If you do not tell us that you want your submission to be treated as confidential, we will treat it as public.

## Anonymous submissions

If you do not put your name or an organisation's name on your submission, it will be difficult for us to make use of the information you have provided. If you have concerns about your identity being made public, please consider making your submission confidential rather than submitting it anonymously.

More information about the submission process and this reference is available on our website: [www.lawreform.vic.gov.au](http://www.lawreform.vic.gov.au)

### Submission deadline: 31 October 2017

Please note this deadline is the closing date for submissions to both the first consultation paper on the first terms of reference and this supplementary consultation paper on the supplementary terms of reference.

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# Terms of reference

## First terms of reference

[Referral to the Commission pursuant to section 5(1)(a) of the *Victorian Law Reform Commission Act 2000* (Vic) on 22 December 2016.]

### ***Victims of Crime Assistance Act 1996* and Victims Assistance Program**

The Victorian Law Reform Commission is asked to review and report by 31 January 2018 on the provision of State-funded financial assistance to victims of family violence under the *Victims of Crime Assistance Act 1996*.

In conducting the review, the Commission should consider the following matters raised by Recommendation 106 of the Royal Commission into Family Violence:

1. The eligibility test and whether this should be expanded to include victims of family violence where a pattern of non-criminal behaviour results in physical or psychological injury
2. Within the total financial assistance currently available, have regard to the categories and quantum of awards with regard to the cumulative impact of family violence behaviour on victims
3. The requirement to notify a perpetrator, especially where the matter has not been reported to police, or no charges have been laid, or the prosecution is discontinued or the person is acquitted
4. The matters giving rise to refusal of an application except in special circumstances
5. Procedural matters to expedite the making of an award.

## Supplementary terms of reference

[Referral to the Commission pursuant to section 5(2)(a) of the *Victorian Law Reform Commission Act 2000* (Vic) on 7 July 2017.]

### **Supplementary terms of reference—Review of the *Victims of Crime Assistance Act 1996***

In November 2016, the Victorian Law Reform Commission was asked to consider the operation and effectiveness of the *Victims of Crime Assistance Act 1996* (VOCA Act) for family violence victims in response to recommendation 106 of the Family Violence Royal Commission (the first reference).

The Commission is asked to expand the first reference to consider the operation and effectiveness of the VOCA Act and the *Victims of Crime Assistance Tribunal* for all victims, including family violence victims in achieving the purposes set out in section 1 of the VOCA Act.

The Commission is asked to provide a single report incorporating the first reference and the expanded reference to the Attorney General no later than the 27 July 2018.

In conducting the review and making its recommendations, the Commission is asked to bear in mind that a state-funded assistance scheme for victims should seek to achieve outcomes for victims that:

- are fair, equitable and timely
- are consistent and predictable
- minimise trauma for victims and maximise the therapeutic effect for victims.

The state-funded scheme must also be efficient and sustainable for the state.

In particular, the Commission is asked to consider whether:

1. the VOCA Act can be simplified to make it easier for applicants to understand all their potential entitlements and quickly and easily access the assistance offered by the scheme without necessarily requiring legal support.
2. the VOCA Act recognises the appropriate people as victims.
3. the tests for eligibility for assistance and the evidence required to meet those tests can be simplified to avoid unnecessary or disproportionate costs being incurred
4. the definition of 'act of violence', the time limits, categories of assistance and structure and timing of awards are appropriate and are adequate to account for harm, including harm caused by multiple acts such as family violence, or where there is a significant delay in reporting a crime
5. the basis of the formula in section 8A of the VOCA Act used to quantify special financial assistance is the most appropriate way to calculate the amount payable by the state for harm arising from crime
6. it is appropriate and fair to award assistance to aid recovery in exceptional circumstances (as allowed by section 8 of the VOCA Act) and whether there are other ways to promote the recovery of victims from the effects of crime
7. it is appropriate in certain circumstances (as is currently the case) for alleged perpetrators of a crime to be notified of applications to VOCAT or to be called to give evidence
8. any processes, procedures or requirements under the VOCA Act cause unnecessary delay to the provision of assistance to victims of crime. In considering this, the Commission is asked to consider whether there are other models that would more effectively deliver assistance, for example an administrative or quasi administrative model.

---

# Glossary

<b>Aboriginal</b>	In this paper, used as a generic term to refer to both Aboriginal and Torres Strait Islander people, unless otherwise specified.
<b>Abuse of people with disability</b>	In this paper, physical, sexual, financial and psychological abuse and <b>neglect</b> perpetrated against people with physical and/or intellectual disability.
<b>Act of violence</b>	In this paper, has the meaning as defined in the <i>Victims of Crime Assistance Act 1996</i> (Vic). Refers to a <b>criminal act</b> or a series of <b>related criminal acts</b> , whether committed by one or more persons, that directly results in injury or death to one or more persons.
<b>Administrative</b>	In this paper, describes a system administered, or a decision made, by a government department or agency rather than the judiciary.
<b>Balance of probabilities</b>	The <b>standard of proof</b> in civil proceedings. Often described as 'more likely than not' or 'more probable than not'. This is a lesser standard than <b>beyond reasonable doubt</b> . The balance of probabilities is the standard of proof required under the <i>Victims of Crime Assistance Act 1996</i> (Vic).
<b>Beyond reasonable doubt</b>	The <b>standard of proof</b> in criminal proceedings. This is a higher standard than the <b>balance of probabilities</b> .
<b>Causation</b>	In this paper, describes the relationship of cause and effect between an <b>act of violence</b> and a <b>victim's</b> injury, death or <b>significant adverse effect</b> .
<b>Centres Against Sexual Assault (CASAs)</b>	Specialist support services for victims of sexual assault funded by the Victorian Department of Health and Human Services.
<b>Child</b>	A person under the age of 18 years.
<b>Child abuse</b>	In this paper, physical, sexual, financial and psychological abuse and <b>neglect</b> perpetrated against a <b>child</b> .
<b>Common law</b>	Law that derives its authority from decisions of the courts rather than from legislation.

<b>Compensation</b>	Monetary payment intended to compensate in part or in whole for an injury suffered as a result of the commission of a <b>criminal offence</b> . While this term is sometimes used to describe victims' financial assistance schemes in other jurisdictions, this paper uses the term <b>financial assistance</b> to refer to money that a victim may be eligible to receive under the <i>Victims of Crime Assistance Act 1996</i> (Vic).
<b>Criminal act</b>	In this paper, has the meaning as defined in the <i>Victims of Crime Assistance Act 1996</i> (Vic). Refers to an act or omission constituting a <b>relevant offence</b> , or which would constitute a relevant offence if the person had not been incapable of being criminally responsible for it on account of age, mental impairment or other legal incapacity preventing them from having a required fault element, or the existence of any other lawful defence.
<b>Criminal offence</b>	A crime against the state. Most criminal offences in Victoria are specified in the <i>Crimes Act 1958</i> (Vic). The main categories of criminal offences are <b>indictable offences</b> , <b>indictable offences triable summarily</b> , and <b>summary offences</b> .
<b>Directions hearing</b>	A brief hearing in front of a <b>judicial officer</b> in which orders are made about what should happen next in a case before a court or tribunal, such as how the case should be managed and the time frames to apply.
<b>Director of Public Prosecutions (DPP)</b>	The official who makes decisions about whether to prosecute serious criminal matters and is independent of government. The Victorian Director of Public Prosecutions is responsible for <b>criminal offences</b> under Victorian law. The <b>Office of Public Prosecutions</b> conducts criminal prosecutions on behalf of the Director of Public Prosecutions.
<b>Domestic partner</b>	In this paper, has the meaning as defined in the <i>Victims of Crime Assistance Act 1996</i> (Vic). Describes someone to whom a person is not married, but with whom they are in a relationship involving cohabitation and/or personal or financial commitment and support of a domestic nature. Includes people who are in a registered relationship under the <i>Relationships Act 2008</i> (Vic).
<b>Elder abuse</b>	In this paper, physical, sexual, financial and psychological abuse and <b>neglect</b> perpetrated against older people.
<b>Family member</b>	In this paper, refers to a person's child, parent, spouse, domestic partner or relative, including grandparents, grandchildren, brothers, sisters, aunts, uncles, nieces and nephews.
<b>Family violence</b>	In this paper, has the meaning as defined in the <i>Family Violence Protection Act 2008</i> (Vic). Refers to behaviour by a person towards a <b>family member</b> that is physically abusive, sexually abusive, emotionally abusive, psychologically abusive, economically abusive, threatening, coercive, or in any other way controls or dominates the family member and causes them to fear for their safety or that of someone else.

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<b>Financial assistance</b>	In this paper, refers to money that a <b>victim</b> may be eligible to receive under the <i>Victims of Crime Assistance Act 1996</i> (Vic).
<b>Flexible support package (FSP)</b>	Victorian state-funded support package (of up to \$7000) administered by community organisations to assist <b>victims of family violence</b> by meeting expenses such as relocation costs or security measures to improve safety at home.
<b>Hearing de novo</b>	A review hearing in which the court or tribunal reviewing the original decision is not bound by that decision and considers the matter 'afresh' (that is, as if for the first time). The <i>Victims of Crime Assistance Act 1996</i> (Vic) uses the term 'hearing de novo' to describe a review of a final decision made by a Judicial Registrar, in which the <b>Victims of Crime Assistance Tribunal</b> considers the application afresh.
<b>Indictable offences</b>	Serious crimes which attract higher maximum penalties. Usually triable before a judge and jury.
<b>Indictable offences triable summarily</b>	Less serious <b>indictable offences</b> which can be heard before a magistrate.
<b>Judicial</b>	Describes a system administered, or a decision made, by a <b>judicial officer</b> .
<b>Judicial officer</b>	A judge or magistrate.
<b>Koori</b>	In this paper, used to describe the traditional inhabitants of Victoria.
<b>Lawyer</b>	Includes barristers (sometimes referred to as counsel) and solicitors.
<b>LGBTIQ</b>	Refers to lesbian, gay, bisexual, <b>trans*</b> , intersex and queer persons.
<b>Neglect</b>	In this paper, refers to the failure to provide someone with necessities such as food, shelter, medical care or other requisite forms of assistance.
<b>Offender</b>	Used to describe a person who has been found guilty or who has pleaded guilty to a <b>criminal offence</b> . The term 'alleged offender' is used to describe a person who is alleged to have committed a criminal offence, but who may not have been charged with or convicted of that offence.
<b>Office of Public Prosecutions (OPP)</b>	The independent statutory authority that institutes, prepares and conducts criminal prosecutions in the County and Supreme Courts on behalf of the <b>Director of Public Prosecutions</b> .

<b>Perpetrator</b>	In this paper, generally used to refer to any person who is alleged to have used violence or other forms of abusive behaviour, including <b>family violence, elder abuse, child abuse or abuse of people with disability</b> , whether or not the behaviours have been reported to police, whether or not there has been a criminal prosecution or conviction, and whether or not the behaviours constitute a <b>criminal offence</b> . It includes <b>offenders</b> , alleged offenders and respondents in family violence intervention order matters.
<b>Practice Direction</b>	A procedural guideline issued by a <b>judicial officer</b> to guide the practice of a court or tribunal.
<b>Primary victim</b>	In this paper, has the meaning as defined in the <i>Victims of Crime Assistance Act 1996</i> (Vic). Refers to a person who dies, is injured or suffers a <b>significant adverse effect</b> as a direct result of an <b>act of violence</b> committed against them or as a direct result of them intervening in an act of violence.
<b>Prosecutorial body</b>	In this paper, refers to either Victoria Police, which prosecutes less serious offences ( <b>summary offences</b> ) or the Victorian <b>Office of Public Prosecutions</b> , which prosecutes more serious offences ( <b>indictable offences</b> ).
<b>Quantum</b>	A specified amount. In this paper, used to describe the amount of financial assistance that a victim can receive under the <i>Victims of Crime Assistance Act 1996</i> (Vic).
<b>Quasi-judicial</b>	Describes an <b>administrative</b> body which exercises powers and procedures resembling those of a court or <b>judicial officer</b> , such as conducting hearings.
<b>Related criminal acts</b>	In this paper, has the meaning as defined in the <i>Victims of Crime Assistance Act 1996</i> . Refers to two or more <b>criminal acts</b> that share a common factor, including criminal acts that are committed against the same person which occur at the same time, and criminal acts that are committed against the same person over a period of time by the same person or group of persons.
<b>Related victim</b>	In this paper, has the meaning as defined in the <i>Victims of Crime Assistance Act 1996</i> (Vic). Refers to a person who is a close family member of, a dependant of, or a person who has an intimate personal relationship with, a person who dies as a direct result of an <b>act of violence</b> .
<b>Registrar</b>	In this paper, a staff member of the <b>Victims of Crime Assistance Tribunal</b> with specific powers to make decisions as delegated by the Chief Magistrate.

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<b>Relevant offence</b>	In this paper, a <b>criminal offence</b> that gives rise to eligibility for <b>financial assistance</b> for the <b>victim</b> under the <i>Victims of Crime Assistance Act 1996</i> (Vic). It is limited to offences against the person, including offences involving assault, an injury or a threat of injury to a person, certain sexual offences, and the offences of stalking, child stealing and kidnapping.
<b>Restitution</b>	In this paper, refers to restitution orders made under the <i>Sentencing Act 1991</i> (Vic). Restitution orders require a person convicted of a criminal offence to restore or return something lost or stolen, or its equivalent, to its rightful owner.
<b>Secondary victim</b>	In this paper, has the meaning as defined in the <i>Victims of Crime Assistance Act 1996</i> (Vic). Refers to a person who is injured as a direct result of witnessing an <b>act of violence</b> or as a direct result of finding out about an act of violence that has been committed against their <b>child</b> .
<b>Significant adverse effect</b>	In this paper, has the meaning as defined in the <i>Victims of Crime Assistance Act 1996</i> (Vic). Refers to any grief, distress, trauma or injury experienced or suffered by a <b>primary victim</b> as a direct result of an <b>act of violence</b> .
<b>Special financial assistance</b>	In this paper, a lump sum of <b>financial assistance</b> that may be awarded to a <b>primary victim</b> under the <i>Victims of Crime Assistance Act 1996</i> (Vic) as an expression of the state's sympathy if they suffered any <b>significant adverse effect</b> as a direct result of an <b>act of violence</b> perpetrated against them.
<b>Standard of proof</b>	The degree of certainty required to prove something.
<b>Support and safety hubs</b>	Services launched by the Victorian Government in 2017 to provide a range of information, services and support for <b>victims</b> and <b>perpetrators</b> of <b>family violence</b> in the one place.
<b>Trans*</b>	In this paper, an umbrella term to refer to all transgender, transsexual and gender non-conforming persons.
<b>Trauma-informed practice</b>	In this paper, a practice that involves modifying aspects of service provision to ensure a basic understanding of how trauma impacts the life of an individual seeking a service.
<b>Victim</b>	In this paper, refers to a person who has suffered harm as a result of a <b>criminal offence</b> or other form of abuse. Includes victims who may not constitute <b>primary victims</b> , <b>secondary victims</b> and <b>related victims</b> , as defined in the <i>Victims of Crime Assistance Act 1996</i> (Vic). See [1.23]–[1.28] for an explanation of victim-related terminology.
<b>Victim-centred</b>	Describes an approach that prioritises <b>victims'</b> wishes, safety and wellbeing in all matters and procedures.

- Victims Assistance Program (VAP)** A program coordinated by the **Victims Support Agency** through contracted community-based organisations which provides practical support, information, assistance and therapeutic interventions for **victims** of violent **criminal offences** in Victoria.
- Victims of Crime Assistance Tribunal (VOCAT)** The tribunal established under the *Victims of Crime Assistance Act 1996* (Vic) to provide **financial assistance** to **victims** of violent crime committed in Victoria. It is located within the Magistrates' Court of Victoria.
- Victorian Civil and Administrative Tribunal (VCAT)** The tribunal established under the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) that hears civil and administrative legal cases in the State of Victoria. It is empowered to review final decisions of the **Victims of Crime Assistance Tribunal**.
- Victims Support Agency (VSA)** An agency in the Victorian Department of Justice and Regulation which coordinates services for victims of crime, including the Victims of Crime Helpline, the **Victims Assistance Program** and the Victims Register.

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# Summary

## Introduction

- 1 On 22 December 2016, pursuant to section 5(1)(a) of the *Victorian Law Reform Commission Act 2000* (Vic), the Attorney-General, the Hon. Martin Pakula MP, asked the Victorian Law Reform Commission (the Commission) to review and report on the provision of state-funded financial assistance to victims of family violence under the *Victims of Crime Assistance Act 1996* (Vic) (the Act). The first terms of reference are set out at page ix of this paper.
- 2 On 7 July 2017, pursuant to section 5(2)(a) of the *Victorian Law Reform Commission Act 2000* (Vic), the Attorney-General asked the Commission to review and make recommendations on supplementary terms of reference in relation to the operation and effectiveness of the Act and the Victims of Crime Assistance Tribunal (VOCAT) for all victims of crime. The supplementary terms of reference are set out at page ix of this paper.
- 3 This consultation paper supplements the Commission's first consultation paper, *Family Violence and the Victims of Crime Assistance Act 1996*, published in June 2017. Although it builds on the first terms of reference, it introduces new considerations relevant to the broader operation of the Act and VOCAT for all victims of crime as required by the supplementary terms of reference.
- 4 There are three parts to this supplementary consultation paper. Key issues and options raised in each part are summarised below. Detailed discussion of these issues and options is set out in Parts Two and Three.
- 5 Part One considers victims' rights, the victim assistance system and the history of state-funded financial assistance schemes for victims of crime. It also provides a summary of recent relevant reviews and reforms and introduces the Act and VOCAT.
- 6 Part One provides background and contextual information only, and does not raise specific consultation questions.
- 7 Part Two discusses substantive issues with the Act and the current processes and procedures of VOCAT as raised by the supplementary terms of reference.
- 8 Part Three addresses broader questions in relation to the existing Act and scheme. In particular, and as required by the supplementary terms of reference, Part Three considers whether there are other models that would more effectively deliver assistance to victims, for example an administrative or quasi-administrative model.

## Matters addressed in Part Two

- 9 In addition to extending the first terms of reference to all victims of crime, the supplementary terms of reference specify eight matters for consideration. These matters are referred to below. This summary follows the structure of this supplementary consultation paper rather than the structure of the supplementary terms of reference.

### Eligibility for assistance by VOCAT

- 10 The second, third and fourth matters of the supplementary terms of reference ask the Commission to consider whether the Act recognises the appropriate people as victims, the tests for eligibility for assistance and the definition of ‘act of violence’ under the Act. This is discussed in detail in Chapter 5.
- 11 A person is eligible for financial assistance under the Act if they are the primary, secondary or related victim of an act of violence, and that act of violence directly results in injury, death or, for primary victims, a significant adverse effect.
- 12 Different categories of victims are eligible for different kinds of assistance. However, all categories require an act of violence. This is defined as a ‘criminal act’ or ‘a series of related criminal acts’ that occurred in Victoria that ‘directly resulted in injury or death to one or more persons’. Criminal acts include assault, injury, threats, sexual offences, stalking, child stealing, kidnapping, conspiracy and attempts of these offences.
- 13 In addition, the Act requires the act of violence to directly result in injury—that is, actual physical bodily harm, mental illness or disorder (or exacerbation of) and pregnancy. ‘Injury’ does not include injury arising from property loss or damage.
- 14 Additional special financial assistance can also be claimed if a primary victim has suffered a significant adverse effect, defined as ‘any grief, distress, trauma or injury’ as a direct result of the act of violence.

### Issues with eligibility

- 15 The main issues facing victims of crime with respect to the eligibility criteria are the victim categories, the definitions of act of violence and injury, and the causation requirement. The narrow definitions of victim, act of violence and injury in the Act can make it difficult for victims of crime to successfully claim for assistance.
- 16 The distinction between primary, secondary and related victims may not always reflect victims’ experiences of violent crime or account for their needs. Indeed it can sometimes operate to exclude people, such as:
- children who hear, witness or are otherwise exposed to violence
  - people who assist in the aftermath of an act of violence
  - family members who are injured by becoming aware of the act of violence
  - family members who do not constitute close family members under the related victims category.
- 17 Children who witness violence are classified as secondary victims rather than primary victims under the Act. This fails to acknowledge some victims’ lived experiences of crime and also impacts the categories and quantum of award for which they are eligible.
- 18 People who provide care and assistance to victims after an act of violence, such as family members, can also be excluded as the Act has been interpreted narrowly to require proactive and substantial aid at the time of the act of violence or immediately after.

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- 19 In addition, most family members of a primary victim are not considered secondary victims and the definition of ‘related victim’ excludes some family members, such as grandparents and aunts. Moreover, the Act does not explicitly include domestic partners as related victims. This means domestic partners must prove they have an ‘intimate personal relationship’ with a victim, which has been interpreted narrowly by VCAT.
- 20 The narrow definition of an act of violence under the Act also may not recognise the harm experienced by some victims of non-physical criminal offences including:
- forms of financial abuse and psychological abuse
  - causing a child to hear, witness or be exposed to forms of violence
  - non-contact sexual offences
  - property offences.
- 21 Some of these forms of abuse are most commonly experienced by vulnerable members of the community, including victims of family violence, children, the elderly and people with a disability.
- 22 The narrow definition of injury can also be a further barrier to assistance. In particular, the need to establish a mental illness or disorder means other psychological, behavioural, interpersonal and social effects are not recognised. Further, the requirement for psychiatric assessments to establish such injuries can also be a deterrent for some victims. Such assessments are a non-therapeutic assessment tool and may cause further distress to a victim.
- 23 The explicit exclusion of property loss or damage under the Act means that awards of financial assistance under the Act may not always meet victims’ needs following an act of violence. In addition, some victims of crime may encounter difficulties in establishing that their injury was a direct result of the act of violence.
- 24 To address the above eligibility issues, the Commission will consider how the victim categories should be amended to better accommodate broader classes of victims. Options include expanding the definitions of primary victim, secondary victim and related victim, and clarifying the meaning of rendering aid or assistance after an act of violence.
- 25 Additionally, the Commission will consider whether the definition of an act of violence under the Act should be expanded to accommodate broader classes of victims by, for example, including specific forms of violence and abuse in the definition. The Commission will also consider whether victims of non-criminal forms of family violence, non-contact sexual offences and some property offences should be able to access awards under the Act.
- 26 The Commission will consider whether the definition of injury in the Act should be expanded to make the scheme more accessible to victims of crime who do not suffer from a recognised mental disorder or illness. Related to this issue, the Commission will examine whether the requirement for proof of injury should be retained. The Commission will also consider ways in which the causation test could be reformed to overcome difficulties experienced by some victims in establishing a causal connection between the act of violence and their injury.

## Assistance available under the Victims of Crime Assistance Act

27 Matters four, five and six of the supplementary terms of reference ask the Commission to consider whether:

- the categories of assistance and structure of awards in the Act are appropriate and adequate to account for harm
- the formula used to quantify special financial assistance in the Act is appropriate
- whether it is appropriate and fair to award assistance to aid recovery in exceptional circumstances
- whether there are other ways to promote the recovery of victims from the effects of crime.

These matters are discussed in detail in Chapter 6.

28 The maximum award for primary victims is \$60,000 plus \$10,000 of special financial assistance. The maximum award for secondary victims and any one related victim is \$50,000.

29 There are three main categories of award for primary victims:

- expenses actually incurred or reasonably likely to be incurred
- in exceptional circumstances, an amount for other expenses actually incurred or reasonably likely to be incurred to assist in recovery
- special financial assistance.

Expenses must be 'reasonable' or 'reasonably incurred'.

30 Primary victims can be awarded special financial assistance, which is a lump sum awarded as a symbolic expression by the state of the community's sympathy and recognition of harms suffered. Special financial assistance is classified into four categories, A, B, C and D, based on the severity of the act of violence, with Category A covering the most serious offences and Category D the least.

31 Awards can be reduced as a result of the 'related criminal acts' provision which enables such acts to be treated as a single act of violence. These include circumstances where they were committed against the same person and occurred at the same time or share some other common feature.

### Issues with financial assistance available

32 The main issues facing victims with respect to financial assistance available are:

- the quantum (amount) of awards, including the total financial assistance available to an applicant
- the categories of awards
- the reduction of awards for related criminal acts.

33 The maximum amount of financial assistance potentially available under the Act for primary victims (\$70,000) may no longer be adequate to meet victims' needs. Moreover, the average award granted by VOCAT (approximately \$7784) is much lower than the overall maximum available.

34 The Act also limits the maximum amount of financial assistance payable to a pool of related victims to \$100,000, which can result in some victims being adversely impacted by the cap. The related victims pool can also be reduced by an award being made in respect of funeral expenses, expenses which have dramatically increased since the amounts of assistance under the Act were set.

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- 35 While the categories of award available under the Act may appear to meet victims' needs, for example, through generous interpretations of 'medical expenses' and 'counselling', the exclusion of assistance for expenses incurred through loss or damage to property as well as childcare expenses can result in some awards being inadequate.
- 36 Furthermore, the requirement that expenses be reasonable can be problematic. This may be particularly the case for some victims who may not be able to overcome some injuries, such as psychological harm. Some expenses, such as counselling, may be deemed unreasonable because of a lack of improvement in an applicant's health.
- 37 While VOCAT has wide discretion to grant additional financial assistance to assist recovery in exceptional circumstances, such broad discretion can also result in inconsistency in awards. In addition, VCAT's interpretation of exceptional circumstances as 'out of the ordinary' means that only victims who suffer an unusual or uncommon reaction seem to be eligible for an award for recovery expenses. This means that awards for recovery expenses may not always be awarded to those who need them the most.
- 38 Currently, special financial assistance is only available to primary victims. Furthermore, the special financial assistance categories may not account for the impact of cumulative harm caused by persistent and protracted patterns of abuse. This is because the categories are based on the severity of a single offence, rather than the overall impact of a pattern of abuse. This may be particularly problematic for victims who experience protracted periods of repeat violence. Furthermore, under the Act, related criminal acts can be treated as a single act of violence, which can further disadvantage victims of long-term abuse.
- 39 To address the above issues, the Commission will consider whether the categories and quantum of awards under the Act are still appropriate to meet the needs of victims, including the maximum amounts for primary victims and the pool available for related victims.
- 40 Additionally, the Commission will consider whether the scheme should define 'reasonable' for the purposes of certain expenses, such as counselling, and consider whether the focus should be on assistance rather than recovery.
- 41 The Commission will also consider whether the Act should limit the discretion of the decision maker when making awards in exceptional circumstances, for example, by embedding guiding principles, defining 'exceptional circumstances' or removing this provision entirely.
- 42 The Commission will consider whether amendments should be made to the special financial assistance categories so that a higher award might be available for broader categories of victims, and consider whether eligibility should be expanded beyond primary victims. The Commission will also consider how the Act defines 'related acts' so that victims may not be disadvantaged where acts of violence share common factors.

### **Time limits for making an application to VOCAT**

- 43 The first, second and fourth matters in the supplementary terms of reference require the Commission to consider:
- whether the Act can be simplified to make it easier for applicants to understand all their potential entitlements and quickly and easily access the assistance offered by the scheme without necessarily requiring legal support
  - whether the Act recognises the appropriate people as victims
  - whether the time limits are appropriate and adequate to account for harm, including harm caused by multiple acts such as family violence, or where there is a significant delay in reporting a crime.

These matters are discussed in detail in Chapter 7.

- 44 Under section 29 of the Act, an application for financial assistance must be made within two years of the act of violence occurring. VOCAT must strike out applications made outside this time limit unless 'it considers that, in the particular circumstances, the application ought not to be struck out'. In making this decision, VOCAT must have regard to a number of prescribed factors, including:
- the age of the applicant when the act of violence occurred
  - whether the applicant is intellectually disabled or mentally ill
  - whether the perpetrator of the act of violence was in a position of power, influence or trust in relation to the applicant.

### Issues with time limits

- 45 The time limit requirements can create specific barriers for some classes of victims, who may take more than two years to identify, disclose and report violence and abuse. Additionally, the time limit for making an application can be a barrier for more vulnerable groups of the community who face other barriers to disclosing and reporting abuse. Although VOCAT may frequently grant extensions of time, the mere existence of the time limit may be a barrier for some victims.
- 46 In addition, the factors VOCAT must have regard to when considering whether the application ought not be struck out have been interpreted narrowly in some circumstances.
- 47 Furthermore, while VOCAT must have regard to 'whether the applicant was a child at the time of the occurrence of the act of violence and the application was made within a reasonable time after he or she reached the age of 18', this provision is unlikely to assist child victims who may not identify or disclose abuse until later in life. For some victims, some acts of violence may not be disclosed until much later in life. Recent research found some victims of child sexual abuse took an average of 33 years to disclose the abuse.
- 48 To address the above issues with the application time limit, the Commission will consider whether the two-year time limit should be increased, either generally or specifically for certain crime types. The Commission will also consider whether the application time limit should be removed entirely for some victim groups or whether additional factors should be prescribed in the Act to account for particular vulnerabilities. The Commission will also consider whether there should be time limits for some components of assistance, like special financial assistance, but not for others, like medical expenses.
- 49 Additionally, the Commission will consider ways in which the transparency of decision making under section 29 of the Act could be improved, for example, through publication of decisions and data.

### Making a VOCAT award to victims of crime

- 50 The first, second and fourth matters in the supplementary terms of reference require the Commission to consider:
- whether the Act can be simplified to make it easier for applicants to understand all their potential entitlements, and quickly and easily access the assistance offered by the scheme without necessarily requiring legal support
  - whether the Act recognises the appropriate people as victims
  - whether the structure and timing of awards are appropriate and are adequate to account for harm, including harm caused by multiple acts such as family violence, or where there is a significant delay in reporting a crime.

These matters are discussed in detail in Chapter 8.

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- 51 VOCAT may award financial assistance to a victim of crime where it is satisfied:
- that an act of violence has occurred
  - that the applicant is a victim of that act of violence
  - that the applicant is eligible to receive the assistance.
- 52 However, under section 52 of the Act the Tribunal must, unless there are special circumstances, refuse to make an award of assistance if VOCAT is satisfied that:
- an act of violence was not reported to police within a reasonable time, or
  - the applicant failed to provide reasonable assistance to any person or body engaged in the investigation, arrest or prosecution of the perpetrator (the investigatory or prosecutorial body).
- 53 In determining whether an act of violence was reported to police within a reasonable time the Act provides that VOCAT ‘may have regard to any matters that it considers relevant’. This includes some factors specified in the Act such as the age of the victim at the time of the act of violence, whether the victim has an intellectual disability or mental illness, whether the perpetrator was in a position of power, influence or trust in relation to the victim, and whether the victim was threatened or intimidated by the perpetrator.
- 54 In addition, section 54 of the Act requires VOCAT to consider a number of further matters before determining whether or not to make an award, or in determining the amount of the award. These include ‘the character, behaviour (including past criminal activity and the number and nature of any findings of guilt or convictions) or attitude of the applicant at any time, whether before, during or after the commission of the act of violence’, ‘whether the applicant provoked the commission of the act of violence and, if so, the extent to which the act of violence was in proportion to that provocation’, ‘any condition or disposition of the applicant which directly or indirectly contributed to his or her injury or death’, and ‘whether the person by whom the act of violence was committed will benefit directly or indirectly from the award’.

### Issues with sections 52 and 54 of the Act

- 55 The main issues in relation to section 52 of the Act relate to what constitutes a reasonable time for reporting, what might result in special circumstances mitigating an unreasonable delay, and what might constitute reasonable assistance to police or prosecution. There is also some uncertainty about what actions a victim must take in order to report a matter to police.
- 56 Case law reveals varying interpretations of what circumstances might give rise to an unreasonable delay as well as what might subsequently be interpreted as special circumstances mitigating an unreasonable delay. ‘Special circumstances’ is not defined in the Act. However, case law indicates it must be something ‘out of the ordinary’.
- 57 In addition, there are no prescribed positive actions a victim must undertake to satisfy reporting a matter to police or in providing reasonable assistance to police or prosecution. However, VOCAT usually expects victims to make a formal report and sworn statement to police. Due to the nature and dynamics of some types of crime, such as family violence and sexual assault, these requirements can be problematic. Such requirements may be more applicable to one-off acts of stranger violence rather than acts of violence that involve multiple incidents over a period of time and no single crime scene.
- 58 Moreover, it can be common in circumstances where perpetrators of violence exercise power and control over a victim, for victims to report a matter to police, then fail to assist with prosecution by withdrawing the complaint or refusing to give evidence in court.

- 59 The main issues with respect to section 54 of the Act relate to character and behaviour considerations which require a victim's character and behaviour to be scrutinised, particularly with respect to prior criminal offending, current or previous drug and alcohol use, and other lifestyle factors interpreted as problematic, as well as the victim's 'contributory conduct' or 'provocation'.
- 60 The broad discretion afforded to VOCAT to consider the character, behaviour or attitude of the applicant 'at any time, whether before, during or after the commission of the act of violence' under section 54 can lead to inconsistencies in determinations. Some victims with past criminal records and/or who use drugs and alcohol may find it difficult to secure an award of assistance. This illustrates that a victim's eligibility for financial assistance is not solely based on the act of violence. The Act requires consideration of broad discretionary factors in relation to the character and behaviour of the victim to inform decision making. These factors appear to be a reflection of community expectations that the victim must be an appropriate recipient of sympathy. 'Provocation' or 'contributory conduct' clauses may also be problematic because of their potential for victim blaming.
- 61 To address the above issues with the requirement to report to police within a reasonable time, and provide reasonable assistance to police and prosecution, the Commission will consider whether more guidance should be provided in the Act about what constitutes a report to police. The Commission will also consider whether the requirement to report to police should be removed entirely for all or some victims, or be replaced with a requirement to make a report to either police or other recognised professionals.
- 62 Additionally, the Commission will consider whether the Act should be amended to remove the requirement to provide reasonable assistance to police and prosecution for some categories of victims, or specify additional factors the Tribunal must consider in determining whether the applicant has provided reasonable assistance.
- 63 The Commission will also consider whether some of the discretion under the Act with regard to character and behaviour considerations should be limited. Additionally, the Commission will consider whether some considerations should be removed entirely, such as broad character and behaviour considerations, provocation provisions, or limiting such considerations to whether the applicant was committing an offence at the time of the act of violence.

### **Review, variation and refund of awards by VOCAT**

- 64 The first, fourth and eighth matters in the supplementary terms of reference require the Commission to consider:
- whether the Act can be simplified to make it easier for applicants to understand all their potential entitlements and quickly and easily access the assistance offered by the scheme without necessarily requiring legal support
  - whether the time limits and structure and timing of awards are appropriate
  - whether any processes, procedures or requirements under the VOCA Act cause unnecessary delay to the provision of assistance to victims.
- These matters are considered in Chapter 9.
- 65 Any person whose interests are affected can apply to the Victorian Civil and Administrative Tribunal (VCAT) for review of a final VOCAT decision. There are relatively few reviews, with only 11 applications for review made to VCAT in the 2015–2016 financial year.
- 66 The Act also enables VOCAT to require applicants to refund some or all of the financial assistance awarded to them if they later receive other payments. Limited data is available on how often refunds are required.

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67 VOCAT has broad discretion to vary awards ‘in any manner that the Tribunal thinks fit’. VOCAT must have regard to any fresh evidence, any change of circumstances, any other payments received by the applicant and any other relevant factors. VOCAT must not vary an award if the application for variation is made more than six years after the original award, unless the applicant was then under 18 years of age.

### Issues with respect to variations

- 68 The main issues with respect to variations are:
- The variation process—most variations require the applicant to file additional paperwork via lawyers and other professionals, increasing delays and limiting flexibility and continuity in provision of services such as counselling.
  - The variation window—the Tribunal must not vary an award if the application for variation is made more than six years after the original award was made, unless the applicant was then under 18 years of age, reducing assistance available to victims over a longer period of time.
- 69 To address the above issues with the variation process, the Commission will consider whether variations should be made simpler for certain types of assistance, such as counselling or medical expenses. Consideration will also be given to whether variation processes should be supported by other broader reform options such as implementing case ‘triage’ or case management functions, and whether a state-funded financial assistance scheme should provide assistance for longer periods of time.

### Timeliness of awards made by VOCAT

- 70 The first, third and eighth matters in the supplementary terms of reference require the Commission to consider:
- whether the Act can be simplified to make it easier for applicants to understand all their potential entitlements and quickly and easily access the assistance offered by the scheme without necessarily requiring legal support
  - whether the evidence required to meet eligibility tests can be simplified to avoid unnecessary or disproportionate costs being incurred
  - whether any processes, procedures or requirements under the Act cause unnecessary delay to the provision of assistance to victims, having regard to other models that would more effectively deliver assistance, for example an administrative or quasi administrative model.

These matters are considered in Chapter 10.

- 71 VOCAT applications commence by way of a written application accompanied by documentary evidence. There are significant supporting documentation requirements, such as providing medical or psychological reports. Each category of assistance has different supporting documentation requirements and VOCAT requests that all such documentation be provided within four months.
- 72 VOCAT may determine an application without conducting either a directions hearing or a final hearing depending on the preference of the applicant as well as the Tribunal’s need for a hearing. In practice, many straightforward applications are decided without the need for a hearing.

- 73 While the Act requires VOCAT to act ‘expeditiously’ (that is, promptly) to determine applications, VOCAT must also have regard to matters that can sometimes affect the time it takes to finalise an application, such as awaiting the outcome of a criminal trial. VOCAT is guided by section 32(3) of the Act, which enables VOCAT to make awards even if there is a pending civil trial, or if a court is going to decide a matter concerning compensation or restitution under the *Sentencing Act 1991* (Vic), as well as section 41 of the Act, which empowers VOCAT to adjourn consideration of an application if a related trial is likely to be decided within six months.
- 74 In practice, the operational effect of sections 32 and 41 is that a VOCAT application will often be adjourned until related matters in the civil and criminal courts have been decided.

### Issues with timeliness

- 75 In June 2017, the Victorian Community Safety Trustee released an interim report on the implementation of the Victorian Government’s Community Safety Statement. It considered delays of nine months to finalise an application as warranting a review of the VOCAT process.
- 76 VOCAT has implemented a number of initiatives to improve timeliness. However, VOCAT has also observed an increase in the complexity and number of applications being made. Increased complexity affects the Tribunal’s timeliness because more information may be required and the Tribunal may decide a hearing is necessary to determine the matter.
- 77 Lawyers cite obtaining relevant supporting documentation for VOCAT applications as one of the principal difficulties of running a VOCAT case and one of the primary reasons for delays and cost increases. The documentation and evidentiary requirements can also be potential sources of re-traumatisation for victims, and increase the scheme’s vulnerability to fraudulent claims by external parties.
- 78 To address the above issues, the Commission will consider whether initiatives such as application triaging and co-location of victim support workers could improve timeliness. The Commission will also consider whether a Practice Direction would provide more guidance about when expediting a VOCAT application is preferable. Consideration will be given to whether VOCAT matters should be heard at the same time as other related civil and criminal hearings, and whether the evidentiary and documentary evidence requirements of the Act should be amended.
- 79 Additionally, consideration will be given to broader reforms such as specialist streams, specialist decision makers and whether other models might provide increased efficiency and timeliness.

### VOCAT hearings and evidentiary processes

- 80 The first, seventh and eight matters raised in the supplementary terms of reference require the Commission to consider:
- whether the Act can be simplified to make it easier for applicants to understand all their potential entitlements and quickly and easily access the assistance offered by the scheme without necessarily requiring legal support
  - whether it is appropriate in certain circumstances (as is currently the case) for alleged perpetrators of a crime to be notified of applications to VOCAT or be called to give evidence
  - whether any processes, procedures or requirements under the Act cause unnecessary delay to the provision of assistance to victims.

These matters are considered in Chapter 11.

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- 81 VOCAT may determine an application without conducting a hearing where the applicant consents and VOCAT does not require a hearing. Where a hearing is requested or required, VOCAT may inform itself in relation to the application in any manner that it thinks fit. While VOCAT hearings are less formal than court hearings and VOCAT is not bound by the rules of evidence, VOCAT’s procedures remain a legal process bound by the provisions of the Act.
- 82 Under the Act, VOCAT may give notice of the time and place for a hearing to any other person whom it considers to have a legitimate interest in the matter. This can include the alleged perpetrator. Before doing so, VOCAT must allow the applicant an opportunity to be heard on whether this should occur.
- 83 The Act also identifies people who are entitled to appear at a hearing, including the alleged perpetrator. VOCAT is able to direct that alternative arrangements be made for the giving of evidence by a witness, direct the hearing be closed to members of the public and restrict the publication of VOCAT material. However, VOCAT records can be subpoenaed and used by the defence in criminal hearings.
- 84 Where VOCAT determines an application without conducting a hearing, this is referred to as making a determination ‘on the papers’. Applications are determined on the papers in the majority of VOCAT matters—approximately 75 per cent in 2015–2016.
- 85 While all hearings conducted by VOCAT are digitally recorded, there is no such process for determinations on the papers. Therefore the only decisions available to the public relate to VOCAT review decisions, which are rare (there were only 11 reviews in 2015–2016). This lack of transparency in the decision-making process results in a high degree of uncertainty.

### Issues with VOCAT hearings and evidentiary processes

- 86 The main issues raised with VOCAT hearings and evidentiary processes relate to:
- perpetrator notification and right to appear
  - evidentiary and procedural protections for victims
  - the therapeutic effect of Tribunal hearings
  - the use of VOCAT documentation in criminal proceedings
  - the transparency and consistency of decision making.
- 87 The perpetrator notification provisions raise questions about victim safety and the therapeutic effect of VOCAT hearings. Alleged perpetrators are more likely to be notified when the applicant has not reported the incident to the police or where there is little evidence to support an applicant’s claim. Victims of certain types of crimes associated with low reporting rates, such as sexual assault, may therefore be more vulnerable to the perpetrator notification requirements. However, these victims are often more vulnerable to intimidation, threats to their safety, or re-traumatisation through contact with an alleged perpetrator.
- 88 Even if perpetrator notification occurs rarely, the fact that it exists at all can be a deterrent for some victims.
- 89 Evidentiary and procedural protections for protected witnesses in criminal proceedings and intervention order matters do not explicitly extend to VOCAT hearings. While the Act gives VOCAT the discretion to put in place these kinds of evidentiary protections, such protections are not explicitly articulated in the Act. Accordingly, this may lead them to be underused or used inconsistently.
- 90 Victoria is one of the few Australian jurisdictions that enables victims to elect to attend a hearing and utilises judicial decision makers. This provides a unique opportunity for victims to be heard and acknowledged. However, some victims may not want to participate

in a VOCAT hearing. Moreover, research indicates that some victims can be distressed by having to recount details of the crime and can be traumatised by Tribunal member comments.

- 91 In its 2016 report *The Role of Victims of Crime in the Criminal Trial Process* the Commission recommended that VOCAT documentation should be inadmissible as evidence in criminal legal proceedings. As the Act's purpose is to assist victims, the Commission concluded that it is not appropriate for such materials to be used to discredit a victim in a criminal trial.
- 92 Given the practical operation of the section 33 process, when decisions are made by VOCAT on the papers, there is neither the transparency afforded by the usual open court process, supplemented by the publication of judicial decisions, nor a clear administrative decision-making framework as would be the case if the decision making was embedded within government service delivery. This raises questions about the consistency in practice, approach and the quantum of awards being made.
- 93 To address the above issues, the Commission will consider whether the perpetrator notification provision should be removed either entirely or specifically for vulnerable victims. The Commission will also consider whether safety considerations should be enhanced under the Act, for example, by including a legislative presumption against perpetrator notification unless required to reach a fair decision, as well as extending evidentiary and procedural protections for vulnerable victims and witnesses.
- 94 Consideration will be given to whether it is appropriate for hearings to remain as an available option, and to how the therapeutic effect of hearings could be improved if they are to be retained.
- 95 The Commission will consider ways to improve the transparency and consistency of the VOCAT process, including consideration of written decisions, limiting some broad discretion under the Act, as well as options to streamline VOCAT decision making, for example, by requiring all applications to be determined the same way.

### **Awareness and accessibility of VOCAT**

- 96 The first matter specified in the supplementary terms of reference requires the Commission to consider whether the Act can be simplified to make it easier for applicants to understand all their potential entitlements and quickly and easily access the assistance offered by the scheme without necessarily requiring legal support. These matters are discussed in Chapter 12.
- 97 Analysis of Crimes Statistics Agency data suggests approximately nine per cent of all potentially eligible victims of crimes against the person are resulting in applications for financial assistance.
- 98 Research suggests that there may be a general lack of awareness and understanding of VOCAT and the financial assistance process in Victoria.

### **Issues with awareness and accessibility**

- 99 The relatively low numbers of VOCAT applications compared to victims of crimes against the person raise questions regarding awareness and accessibility of the scheme. Research suggests a low awareness of VOCAT and state-funded financial assistance. This is consistent with findings in other jurisdictions regarding awareness of comparable financial assistance schemes.
- 100 Accessibility issues have been linked to the legalistic nature of the VOCAT scheme and its inaccessibility as part of the justice system rather than the victim support system.

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- 101 Accessibility issues include practical matters such as the application form and documentation requirements, including that the form does not account for varying victim experiences and a lack of information in accessible formats.
- 102 To address issues associated with victims' awareness of, and access to, VOCAT, the Commission will consider whether improved awareness and accessibility of the scheme could be achieved through combining the victim support and financial assistance system. This option will also be considered, within the context of reducing reliance on legal representation, by improving victim case management to incorporate financial assistance through the victim support system.
- 103 Consideration will be given to whether a hybrid administrative and judicial system should be implemented, with the victim support system administering payments for expenses incurred such as counselling or medical expenses, while retaining the provision of special financial assistance—or 'recognition payments'—as a judicial decision. These broader issues about a model to more effectively deliver assistance are also considered in Part Three.
- 104 The Commission will also consider whether the suite of forms and information available for victims making an application should be improved for accessibility.

### **Part Three: options for broader reform**

- 105 Part Three begins by considering victim needs. Chapter 13 considers the impact of crime on victims, the needs of victims following an act of violence, and the importance of financial assistance as a component of victim support. This places victim needs at the centre of any reform considerations.
- 106 Chapters 14 and 15 then pose two overarching approaches for reform:
- Approach 1: Reforming the existing scheme
  - Approach 2: Is there a need for a different model?

#### **Approach 1: Reforming the existing scheme**

- 107 The purpose of the Act is to provide assistance to victims of crime. The Act also has a number of further objectives, discussed in detail in Chapter 14.
- 108 The first stated objective of the Act is 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'. The Commission considers that a number of provisions of the Act can make it difficult for the Act to assist victims to recover from crime. These include the eligibility criteria, application time limit, the ability of VOCAT to refuse and reduce awards, the quantum of awards, the flexibility afforded to VOCAT in making awards, as well as VOCAT delays.
- 109 The second stated objective of the Act is 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'. The Commission considers that certain provisions of the Act narrowly conceptualise who may be certain victims under the Act, this includes by limiting payments only to primary victims who are 'appropriate' or 'deserving' victims, such as victims that report to police in a timely way, assist police and prosecution, do not contribute to the circumstances of victimisation and do not have a criminal history.
- 110 The Act also states that victims should have recourse to financial assistance where compensation for the injury cannot be obtained from the offender or other sources. The Act presumes that compensation or financial assistance is available to victims from the offender or other sources. However, in practice, it appears that VOCAT is often the only

source of compensation for many victims, rather than being a supplement to other forms of compensation.

- 111 A further object of the Act is to ‘complement other services provided by government to victims of crime’. However, VOCAT sits separately to other victim support services and it appears that there are limited referral pathways. Victims often need to engage a lawyer to access VOCAT. The fragmented nature of the victim support system can cause victims frustration and may be limiting the scheme’s ability to complement the other support services available to victims of crime.

### Discussion of Approach 1

- 112 The Commission will consider options to improve the current model and approach through legislative and procedural reform. This includes possible changes to the Act’s eligibility requirements and the availability of awards to better meet the purpose and objectives of the current Act.
- 113 The Commission will consider whether the focus of the Act should be on supporting victims rather than only assisting recovery, to better reflect victims’ lived experiences of crime and assist with longer term needs.
- 114 The Commission will consider whether the Act should be amended to better recognise appropriate people as victims. This could involve reducing some of the differential treatment under the Act by amending eligibility requirements and relevant considerations of the decision maker. It will also consider whether the Act should recognise the changing nature of violence by recognising family violence, some forms of psychological and financial abuse and non-contact sexual offences. The Commission will also consider options to reform the Act’s focus on ‘certain victims of crime’ to ensure the Act recognises appropriate people as victims.
- 115 In addition, the Commission will consider whether the Act should distinguish between financial assistance (for expenses incurred, or likely to be incurred) and lump sum payments which acknowledge and recognise the harm caused to victims by crime.
- 116 Finally, the Commission will consider whether victims’ levies should be introduced to supplement the funding of Victoria’s financial assistance scheme.

### Approach 2: Is there a need for a different model?

- 117 Chapter 15 discusses whether there is a need for a different model to more effectively deliver assistance to victims of crime.
- 118 The supplementary terms of reference ask the Commission to bear in mind that a state-funded financial assistance scheme should seek to achieve outcomes for victims that:
- are fair, equitable and timely
  - are consistent and predictable
  - minimise trauma for victims and maximise the therapeutic effect for victims.
- 119 The supplementary terms of reference also state that a financial assistance scheme must also be efficient and sustainable for the state.
- 120 With respect to the extent to which the current scheme is fair, equitable and timely, it is noted that current eligibility requirements mean that some victims’ experience of crime may not be adequately recognised under the Act and that some victims may be excluded, although they may be appropriate recipients. This may be because of the narrow victim categories or because of the narrow definition of act of violence or injury. In some cases, the broader harms of violence suffered by victims may not be recognised under the Act or may be difficult for victims to prove. The categories and quantum of awards, and the ways in which these are determined under the Act, may also result in outcomes that do not sufficiently recognise the harms suffered by certain victims.

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- 121 Furthermore, the strict time limits for making an application under the Act may not recognise that the effects of crime can contribute to delayed applications. VOCAT can also refuse to make an award of assistance due to character and behaviour considerations even where a victim is otherwise eligible.
- 122 Current concerns about delays and increased application numbers also impact on the timeliness of assistance provided to victims.
- 123 With respect to the extent to which the current scheme is consistent and predictable, varying approaches of Tribunal members can result in different decisions in areas of the scheme with broad discretion. Combined with a lack of access to written decisions, this can result in a lack of transparency and uncertainty. This raises concerns about the current scheme's consistency and predictability for victims.
- 124 With respect to the extent to which the current scheme minimises trauma and maximises therapeutic effect for victims, delays in securing awards can operate so as to impact victims' recovery time and worsen distress. Furthermore, the Act does not provide for assistance to victims with longer term injuries, even if they continue to incur expenses directly related to the act of violence. Questions arise as to whether some considerations, such as the mandatory character and behaviour considerations, may re-traumatise victims and lead to some victims feeling shame, or that they are undeserving of compensation. The legal approach of the Tribunal can re-traumatise some victims, for example, through having to re-tell their story or as a result of Tribunal members' comments.
- 125 With respect to the extent to which the current scheme is efficient and sustainable for the state, the fragmented nature of the victim and witness support system raises questions about duplication and inefficiency. In particular, some components of financial assistance and victim support are provided through the victim support system, while other components are available through VOCAT. Many supports—practical and financial—provided by generalist or specialist victim support services can overlap with the assistance available through VOCAT, such as financial assistance for security measures or counselling.
- 126 Further aspects of the current scheme's design may be creating inefficiencies, such as the significant costs associated with obtaining medical reports to support applications and award variations. From a funding perspective, it is also possible the scheme could be supplemented by other revenue streams, such as a victims' levy, to help ensure its longer term sustainability.

## Discussion of Approach 2

- 127 The Commission will consider whether alternative models, or components of alternative models, would better meet the outcomes specified in the supplementary terms of reference.
- 128 Consideration will include whether financial assistance should be part of the victim support system through an administrative model. The Commission will also consider whether a hybrid administrative and judicial system should be implemented. For example, the victim support system could administer awards for assistance through a case management approach, with lump sum awards remaining a judicial decision with the option of hearings should a victim elect to do so.
- 129 The Commission will consider whether judicial decision making remains appropriate and sustainable, and will consider models like a decision maker independent of government and the courts, such as a victims' commissioner or a victims' compensation commissioner.
- 130 The Commission will also consider whether a financial assistance scheme should incorporate restorative justice opportunities, either within its scheme design, or through appropriate referral pathways, and whether victim compensation or financial assistance should be a specialised field.

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# Questions

## Chapter 5 Eligibility for assistance

### The victim categories

- 1 How do the victim categories in the Act impact on people applying to VOCAT for financial assistance?
- 2 Should the victim categories in the Act be amended? If so, what changes should be made to the Act?

### The definition of an 'act of violence'

- 3 How does the definition of 'act of violence' in the Act impact on people applying to VOCAT for financial assistance?
- 4 Should the definition of 'act of violence' in the Act be amended to include other offences? If so, what offences should be included?
- 5 Should the definition of 'act of violence' in the Act be amended to include non-criminal behaviour? If so, what forms of non-criminal behaviour should be included?

### The definition of 'injury'

- 6 How does the definition of 'injury' in the Act impact on people applying to VOCAT for financial assistance?
- 7 Should the definition of 'injury' in the Act be amended to include other forms of harm? If so, what forms of harm should be included?
- 8 Should the requirement for injury in the Act be removed for victims of certain crimes? If so, for which categories of victim should the requirement be removed?

### The causation requirement

- 9 How does the requirement for victims to establish that their injury was the 'direct result' of the act of violence impact on people applying to VOCAT for assistance? Should this causation requirement be amended? If so, what changes should be made to the causation requirement?

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## Chapter 6 Assistance available

### Quantum of awards

#### Total financial assistance available

- 10 Are the maximum amounts of financial assistance available under the Act adequate to meet the needs of victims? If not, what should the maximum amounts be?

#### Cap on quantum available for related victims

- 11 Should the Act be amended to remove the pool of assistance for related victims? If not, should the total maximum cumulative amount of assistance available for a pool of related victims be increased?
- 12 Should the Act be amended to reflect the rising cost of funerals? If so, what amendments should be made? Should funeral expenses be excluded from the total maximum cumulative amount of assistance available under the Act for a pool of related victims?

### Categories of award

#### Are the current categories of award under the Act still appropriate?

- 13 Are the current categories of award under the Act still appropriate to meet the needs of victims of crime? If not, how should the categories of award under the Act be amended and what should be included?

#### Requirement for certain expenses to be 'reasonable'

- 14 Is it appropriate for the Act to require that the costs for certain expenses, such as counselling services, be reasonable? If not, what changes should be made to the Act?

#### Additional awards to assist recovery and the need for 'exceptional circumstances'

- 15 Is it appropriate for the Act to limit awards for recovery expenses to 'exceptional circumstances'? If not, what changes should be made to the Act?
- 16 In addition to the financial assistance available under the Act, are there other ways to promote the recovery of victims from the effects of crime? If so, is there a need for these other ways to be supported by the Act?

### Interim awards

- 17 Are the interim awards available under the Act adequate to meet victims' needs including with respect to quantum and timeliness? If not, how should they be improved?

### Limitations of the special financial assistance provision

#### Recognising cumulative harm

- 18 Should the special financial assistance formula be amended to take into account the cumulative harm of a series of related criminal acts? If so, how should the formula be amended?

## Recognising vulnerability

- 19 Should the special financial assistance formula be amended to take into account the experiences of vulnerable victims, including child victims, elderly victims, victims with disability and victims of an act of violence perpetrated by someone in a position of power, trust or authority? If so, how should the special financial assistance formula be amended?
- 20 Who should be eligible for special financial assistance under the Act?

## VOCAT discretion and the prescribing of minimum and maximum amounts for each category of special financial assistance

- 21 Should the prescribed maximum and minimum amounts of special financial assistance be removed and replaced with one amount for each category? If so, what changes should be made to the Act and what should the amounts be?

## The adequacy of amounts of special financial assistance available

- 22 Should the amounts of special financial assistance in the Act be increased? If so, what should the amounts be?

## Treatment of 'related criminal acts'

- 23 Should the definition of 'related criminal acts' be amended to have regard to the cumulative harm of long-term abuse? If so, what should the definition be?
- 24 Should the Act be amended to give victims an opportunity to object if claims are to be treated as 'related'?
- 25 Should there be a higher maximum for awards of financial assistance under the Act for victims of a series of related criminal acts? If so, what changes should be made to the Act?

## Chapter 7 Time limits for making an application

### Is the time limit a barrier for victims of crime?

#### Increasing the application time limit

- 26 Is the two-year time limit to make an application to VOCAT under section 29 of the Act still appropriate? If not, what would be an appropriate application time limit? Alternatively, should different application time limits apply for different types of crime?

#### Removing the application time limit

- 27 Should some types of crime be excluded from application time limit provisions entirely? Should some time limits start after a victim turns 18? Alternatively, should some components of victim support and financial assistance not have a time limit?

#### Granting an extension of time—is there a need for additional considerations?

- 28 Are the factors VOCAT may currently consider in determining whether to hear an application out of time sufficient? Should other factors be included in the Act? If so, what additional factors should be included?

#### Improving transparency in the decision-making process

- 29 Should VOCAT be required to publish data and reasons for decisions made in relation to section 29 of the Act? If yes, what data should be provided and how should it be published?

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## Chapter 8 Making an award

### Requirement to report to police within reasonable time

#### Removing the requirement to report to police entirely

- 30 Should the requirement to report incidents to police be explicitly excluded for some types of crime? Alternatively, should reports made by victims to other professionals or agencies be recognised? If so, how would this work in practice?

### Requirement to provide reasonable assistance to police and prosecution

#### Removing the requirement to provide reasonable assistance for some victims

- 31 Should the requirement to provide reasonable assistance to police and prosecution be explicitly excluded for some categories of victim? If yes, what categories?

#### Specifying additional factors for consideration in determining reasonable assistance

- 32 How do the 'reasonable assistance' requirements impact on victims of crime?
- 33 Should the Act be amended to improve the operation of the 'reasonable assistance' provisions for victims of crime? If so, what changes should be made to the Act?

### Character and behaviour considerations

#### Providing more guidance in the Act about relevant section 54 factors

- 34 What are the effects of the section 54 considerations for victims? Are they operating fairly and appropriately? Should the Act continue to consider the 'character and the behaviour' of the victim 'at any time' as currently required under section 54 (a) of the Act, or at all? If not, what changes should be made to the Act to address this?

#### Removing consideration of some section 54 factors

- 35 Are there some section 54 factors, such as whether the applicant provoked the act of violence or the applicant's past criminal record, which should no longer be relevant for the consideration of award applications?

#### Removing the perpetrator benefit provisions

- 36 How do the perpetrator benefit provisions under section 54 of the Act currently affect some categories of victim? Are these provisions operating fairly and appropriately? If not, what changes should be made to the Act to address this?

## Chapter 9 Review, variation and refund of awards

### Amending the variation 'window'

- 37 Should the six-year time period for variation of an award be extended to account for victims of crime with long-term needs? If yes, how long should the time limit be extended and should this be for specific crimes or specific types of award only?

### Reducing the administrative burden and delay in seeking variations

- 38 How does the variation process impact on victims of crime?
- 39 Is there a need to make the variation process more accessible and timely for victims? If so, what changes should be made to the Act and/or VOCAT processes?

## Review and refund provisions

- 40 In what circumstances are VOCAT awards refunded? Is it appropriate for the Act to require the refund of awards in certain circumstances and if so, in what circumstances?
- 41 When might victims seek review of a VOCAT award? Are there any barriers to seeking a review of an award? If so, how should these barriers be addressed?

## Chapter 10 Timeliness of awards

### Practice Direction to expedite decision making

- 42 Is there a need to amend section 32(3) and section 41 of the Act to clarify the need for speedy determinations? Alternatively, would an appropriate Practice Direction provide sufficient guidance?

### Triaging, co-location or specialist streams

- 43 What benefits would be achieved for victims if initiatives such as triaging, co-location or specialist streams were introduced?

### An administrative model

- 44 As an alternative approach, should an administrative model be adopted? If yes, what benefits would be achieved for victims through the adoption of an administrative model? How would this work in practice? What would be the disadvantages of an administrative model?

### Hearing VOCAT matters during other civil and criminal hearings

- 45 What benefits would be achieved by enabling all magistrates to make interim VOCAT awards at the same time as hearing other matters? How would this work in practice? Would there be disadvantages?

### Evidentiary requirements for counselling and medical expenses

- 46 Should applicants be able to support their applications with documentary evidence other than medical and psychological reports? If so, what other documentation should applicants be able to provide?
- 47 Should more assistance be provided by VOCAT to help victims satisfy the evidentiary requirements?

## Chapter 11 VOCAT hearings

### Perpetrator notification and right to appear

#### Removing the perpetrator notification provision

- 48 How do the rights of perpetrators—to be notified or appear—fit with the purpose of the Act, which is to provide assistance to victims of crime?
- 49 Should the Act be amended to include a legislative presumption against perpetrator notification? If so, how should the Act be amended?

#### Enhancing safety considerations in the Act

- 50 Should the notification provision be amended to recognise the safety concerns of victims more specifically? If so, what changes should be made to the Act?
- 51 Given the aim of the Act is to assist victims of crime, should the Act be amended to include a guiding principle protecting victims from undue trauma, intimidation or distress during VOCAT hearings?

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## **Evidentiary and procedural protections for vulnerable witnesses**

- 52 Should the Act be amended to include increased protections for victims during VOCAT hearings? If so, what procedural and evidentiary protections should be provided?

## **Restricting access to and the use of VOCAT records**

- 53 Should VOCAT application materials be admissible as evidence in criminal or family law proceedings? If not, how should the Act be amended?

## **Improving the transparency and consistency of VOCAT processes and decision making**

- 54 How could transparency and consistency in VOCAT processes and decision making be improved?

## **Chapter 12 Awareness of VOCAT and accessibility**

### **Combining victim support and the financial assistance scheme**

- 55 How do victims learn about the availability of VOCAT? When, how and by whom should victims be informed of their potential eligibility under the Act?
- 56 Should the provision of state-funded financial assistance be integrated with victim support services? If so, how should financial assistance be integrated with victim support?

### **Reducing reliance on lawyers**

- 57 Is the VOCAT system easy to navigate without legal representation? If not, why? Should the system be changed to make it more accessible for victims without legal representation? If so, what changes should be made to the Act and/or VOCAT processes?

### **Providing victim-friendly and accessible information**

- 58 Is there a need to make VOCAT more accessible for victims? If so, what changes should be made to the Act and/or VOCAT processes to make VOCAT more accessible for victims, including those speaking languages other than English?

## **Chapter 13 Victim needs**

- 59 Having regard to the impacts of crime on victims, what are victims' needs and how should they be met through a state-funded financial assistance scheme?

## **Chapter 14 Approach 1: Reforming the existing scheme**

### **The purpose and objectives of the Act**

- 60 Is the Act achieving its purpose and objectives? If not, in what respects?

### **Amend the Act to focus on support**

- 61 Should the focus of the Act be on supporting victims of crime rather than on assisting their recovery? If so, what changes should be made to the Act?

### **Recognising appropriate people as victims**

- 62 Does the Act recognise appropriate people as victims? If not, what changes should be made to the Act to better recognise appropriate people as victims? Are there circumstances where some victims should not be recognised by the scheme? If so, in what circumstances?

## **Amend the Act to remove the focus on ‘certain victims of crime’**

- 63 Is it appropriate under the Act that only ‘certain victims of crime’ are entitled to financial assistance as a symbolic expression of the community’s sympathy, condolence and recognition? If so, how should this be expressed in the Act?

## **Reconceiving ‘financial assistance’ and ‘special financial assistance’**

- 64 Would ‘special financial assistance’ be better classified as a ‘recognition payment’ as in the New South Wales and Australian Capital Territory schemes?

## **Requiring offenders to contribute**

- 65 What is the practical operation of section 51 of the Act which enables a victim to assign their rights to the state to recover from the offender? Should a State-funded financial assistance scheme retain ‘offender recovery’ provisions as a parallel process to other reparation mechanisms?
- 66 Should Victoria’s state-funded financial assistance scheme be amended to include a victims’ levy payable by offenders? If so, how and on whom should the levy be imposed?

## **Chapter 15 Approach 2: Is there a need for a different model?**

### **Is the current scheme meeting the outcomes specified in the supplementary terms of reference?**

- 67 Is the current scheme meeting the outcomes for victims specified in the supplementary terms of reference, namely, does it achieve outcomes for victims that:
- (a) are fair, equitable and timely
  - (b) are consistent and predictable
  - (c) minimise trauma for victims and maximise the therapeutic effect for victims?
- 68 Is the current scheme efficient and sustainable for the state?
- 69 Are there other models that would deliver assistance more effectively? If so, which?

### **Financial assistance as part of case management /victim support**

- 70 Is state-funded financial assistance to victims of crime better provided as part of victim support case management? If so, why, and how should this operate?
- 71 Alternatively, should some components of Victoria’s state-funded financial assistance scheme for victims of crime be provided as part of victim support case management and others by a judicial or other independent decision maker? If so, what components, and how should this operate?

### **Financial assistance as a restorative justice opportunity**

- 72 Should restorative justice principles be further considered as a voluntary component of a state-funded financial assistance scheme? Alternatively, should a victims’ financial assistance scheme provide a more direct pathway to restorative justice practices constituted elsewhere in the justice system?

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### **A new decision maker?**

- 73 What are the benefits and disadvantages of retaining judicial decision making for the provision of state-funded financial assistance for victims of crime? Are there alternative decision-making models that should be considered? If so, which?
- 74 Should hearings remain an available option, either at the request of the victim or the decision-maker?

### **Victim financial assistance as a specialist field of expertise**

- 75 Should state-funded financial assistance to victims of crime be undertaken by other specialised decision makers, to improve knowledge and awareness of victim needs and to enable a trauma-informed approach? If so, how should this operate?



## PART ONE: BACKGROUND AND CONTEXT

# Background

- 2** Introduction
- 2** First terms of reference
- 2** Supplementary terms of reference
- 3** The Commission's approach

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# 1. Background

## Introduction

- 1.1 This paper contains supplementary consultation material prepared by the Victorian Law Reform Commission (the Commission) as part of its review of the *Victims of Crime Assistance Act 1996* (Vic) (the Act). It relates to supplementary terms of reference received from the Attorney-General on 7 July 2017.
- 1.2 The supplementary terms of reference expand the first reference to consider the operation and effectiveness of the Act and the Victims of Crime Assistance Tribunal (VOCAT) for all victims of crime in achieving the purpose and objectives of the Act. The supplementary terms of reference also ask the Commission to consider whether there are other models that would more effectively deliver assistance, for example an administrative or quasi-administrative model. This consultation paper supplements the Commission's *Family Violence and the Victims of Crime Assistance Act 1996: Consultation Paper* (the first consultation paper) published in June 2017.<sup>1</sup>

## First terms of reference

- 1.3 On 22 December 2016 pursuant to section 5(1)(a) of the *Victorian Law Reform Commission Act 2000* (Vic), the Attorney-General, the Hon. Martin Pakula MP, asked the Commission to review and report on the provision of state-funded financial assistance to victims of family violence under the Act. The first terms of reference are set out at page ix of this paper.

## Supplementary terms of reference

- 1.4 On 7 July 2017, pursuant to section 5(2)(a) of the *Victorian Law Reform Commission Act 2000* (Vic), the Attorney-General asked the Commission to review and make recommendations on supplementary terms of reference in relation to the operation and effectiveness of the Act and VOCAT for all victims of crime.
- 1.5 The Attorney-General has requested the Commission to provide a single report on both the first and supplementary terms of reference by no later than 27 July 2018. The supplementary terms of reference are set out at page ix of this paper.

## The Commission's approach

- 1.6 The first terms of reference require the Commission to consider how the purpose and objectives of the Act are realised for family violence victims, having regard to the issues raised by Recommendation 106 of the Victorian Royal Commission into Family Violence. The Commission's approach to the first terms of reference is detailed in the first consultation paper.<sup>2</sup>
- 1.7 As a result of the supplementary terms of reference, the Commission's approach is now broader, requiring consideration of the overall operation and effectiveness of the Act and VOCAT for all victims of crime. The supplementary terms of reference require the Commission to consider whether:
- 1) the Act can be simplified to make it easier for applicants to understand all their potential entitlements and quickly and easily access the assistance offered by the scheme without necessarily requiring legal support
  - 2) the Act recognises the appropriate people as victims
  - 3) the tests for eligibility for assistance and the evidence required to meet those tests can be simplified to avoid unnecessary or disproportionate costs being incurred
  - 4) the definition of 'act of violence', the time limits, categories of assistance and structure and timing of awards are appropriate and are adequate to account for harm, including harm caused by multiple acts such as family violence, or where there is a significant delay in reporting a crime
  - 5) the basis of the formula in section 8A of the VOCA Act used to quantify special financial assistance is the most appropriate way to calculate the amount payable by the state for harm arising from crime
  - 6) it is appropriate and fair to award assistance to aid recovery in exceptional circumstances (as allowed by section 8 of the VOCA Act) and whether there are other ways to promote the recovery of victims from the effects of crime
  - 7) it is appropriate in certain circumstances (as is currently the case) for alleged perpetrators of a crime to be notified of applications to VOCAT or to be called to give evidence
  - 8) any processes, procedures or requirements under the VOCA Act cause unnecessary delay to the provision of assistance to victims of crime. In considering this, the Commission is asked to consider whether there are other models that would more effectively deliver assistance, for example an administrative or quasi-administrative model.
- 1.8 In addition, and consistent with the Commission's approach to the first terms of reference, the supplementary terms of reference expressly require the Commission to consider how the purpose and objectives of the Act are realised for all victims of crime. This requires the Commission to consider the extent to which the Act and VOCAT:
- assist victims of crime to recover from crime, by paying financial assistance for expenses incurred or reasonably likely to be incurred as a direct result of the crime<sup>3</sup>
  - 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<sup>4</sup>

2 Ibid 2–7.  
 3 *Victims of Crime Assistance Act 1996* (Vic) s 1(2)(a).  
 4 Ibid s 1(2)(b).

- allow victims of crime to have recourse to financial assistance where compensation for the injury cannot be obtained from the offender or other sources,<sup>5</sup> noting that awards of financial assistance (including special financial assistance) are not intended to reflect the level of compensation to which victims of crime may be entitled at common law or otherwise<sup>6</sup>
  - complement other services provided by government to victims of crime.<sup>7</sup>
- 1.9 In considering these matters, the Commission is guided by the objectives specified in the supplementary terms of reference—namely, that a state-funded financial assistance scheme for victims should seek to achieve outcomes for victims that:
- are fair, equitable and timely
  - are consistent and predictable
  - minimise trauma and maximise the therapeutic effect for victims.
- 1.10 The supplementary terms of reference specify that a state-funded financial assistance scheme must also be efficient and sustainable for the state.
- 1.11 The Commission has been asked to consider ways to improve the operation and effectiveness of Victoria’s state-funded financial assistance scheme for all victims of crime, including whether there are other models that would more effectively deliver such assistance. Accordingly, while the purpose and rationale for such schemes is discussed to provide historical context, the Commission does not consider the question of whether or not Victoria should continue to have a state-funded financial assistance scheme for victims of crime.<sup>8</sup> This is outside the scope of the Commission’s terms of reference.

### Consultation paper on first terms of reference

- 1.12 In June 2017 the Commission published the first consultation paper responding to the first terms of reference.<sup>9</sup> This followed preliminary consultations with representatives of key stakeholders from the courts and judiciary, government departments, family violence advocacy and service providers, legal services and victim support agencies.
- 1.13 The first consultation paper considered the findings of the Royal Commission into Family Violence, matters raised during preliminary consultations and preliminary analysis of relevant case law, academic literature, government reviews and inquiries. The first consultation paper did not present any final conclusions.
- 1.14 The first consultation paper sought the views of victims, persons affected, professionals, stakeholders and the community on key aspects of the Act and the operation of VOCAT as they relate to victims of family violence. The first consultation paper posed 66 questions for consideration. Many of these questions are relevant to the supplementary terms of reference and are posed again in this paper.
- 1.15 A summary of issues and options raised in the first consultation paper is provided at Appendix A.
- 1.16 To enable stakeholders to provide a single submission addressing both consultation papers, the Commission has extended the closing date for submissions on the first consultation paper to 31 October 2017 and has set the same date for submissions on this supplementary consultation paper.

5 Ibid s 1(2)(c).

6 Ibid s 1(3).

7 Ibid s 1(4).

8 For discussion on the purpose and rationale of such schemes see, eg, Michael Kirby, ‘Compensation For Victims of Criminal Injuries in Australia’ (Paper presented at the British Institute of International and Comparative Law Conference, Windsor Great Park, United Kingdom, 27 March 1981) 6–7.

9 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017).

## Consultation paper on supplementary terms of reference

- 1.17 This supplementary consultation paper builds on the first terms of reference and introduces new considerations relevant to the broader operation of the Act and VOCAT for all victims of crime. Therefore, new questions are raised consistent with the supplementary terms of reference.
- 1.18 Part One (Chapters 1–4) outlines Victoria’s broader victim support system and introduces the financial assistance options available to victims of crime. Part One also provides the background to statutory state-funded financial assistance and introduces the scheme in Victoria governed by the Act and VOCAT. Part One provides background information only, and does not raise any questions for community or stakeholder consideration.
- 1.19 Part Two (Chapters 5–12) addresses substantive issues with the Act as raised by the supplementary terms of reference, including the operation of specific provisions as well as VOCAT processes and procedures necessitated by the Act. Part Two discusses options for reforms and poses questions for community and stakeholder consultation.
- 1.20 Part Three (Chapters 13–15) considers whether there is a need for a different approach and if so, whether there are models other than the Act and VOCAT that would more effectively deliver assistance, such as an administrative or quasi-administrative model. Part Three discusses options for reform and poses questions for community and stakeholder consultation.
- 1.21 This paper does not present any final conclusions or views on the matters raised.

### Terminology

- 1.22 The next section explains why the Commission has used particular terminology in this consultation paper, noting there is not universal agreement about the use of particular terms.

### ‘Victims’ and ‘family violence’

- 1.23 The first terms of reference use the words ‘victims of family violence’ and ‘victims’ to describe people affected by family violence. The supplementary terms of reference use the term ‘family violence victims’ to describe people affected by family violence and the term ‘victims’ to describe people affected by crime.
- 1.24 To ensure consistency with both the first and supplementary terms of reference, and the legislative framework in Victoria providing for victim support and rights,<sup>10</sup> this paper uses the terms ‘victim’, ‘victims’ and ‘victims of family violence’. While the Commission acknowledges that there are some concerns about the use of the term victim, maintaining this terminology ensures consistency with the terms of reference and victim-related legislation in Victoria, including the *Victims of Crime Assistance Act 1996* (Vic) and the *Victims’ Charter Act 2006* (Vic).
- 1.25 Neither the first nor supplementary terms of reference define the terms victim or family violence. It is beyond the scope of this reference to consider or review definitions of either victim or family violence.
- 1.26 The Commission therefore uses the term victim as defined in the Act and the Victims’ Charter Act, the meanings of which are discussed in detail in Chapters 2 and 3.

10

See *Victims of Crime Assistance Act 1996* (Vic) and *Victims’ Charter Act 2006* (Vic). The Commission notes the government’s use of ‘victim survivors’ and discussion of terminology in Department of Premier and Cabinet (Vic), *Ending Family Violence: Victoria’s Plan for Change* (2016) v.

- 1.27 The Commission also uses the term family violence as defined in the *Family Violence Protection Act 2008* (Vic).<sup>11</sup> Family violence means any behaviour that:
- is physically, sexually, emotionally, psychologically or economically abusive
  - is threatening, coercive, controlling, dominating and causes a family member to fear for the safety or wellbeing of themselves or another family member
  - causes a child to hear, witness or otherwise be exposed to the effects of the above behaviours.<sup>12</sup>
- 1.28 Accordingly, for the purposes of both this and the first consultation paper, the Commission defines a victim of family violence as any person who has been the victim of any of the above behaviours, whether or not there has been a criminal prosecution or conviction in relation to them.<sup>13</sup> Not all behaviours captured by the definition of family violence constitute criminal offences. The Royal Commission into Family Violence also used the definition of family violence from the *Family Violence Protection Act*.<sup>14</sup>

### Perpetrators of violence

- 1.29 Both the first and the supplementary terms of reference use the term ‘perpetrator’ to describe someone who uses violence, including family violence.
- 1.30 For the purposes of this paper and consistent with the first consultation paper, the Commission defines perpetrator to mean any person who is alleged to have used violence, whether or not the behaviours have been reported to police or whether or not there has been a criminal prosecution or conviction. This approach is consistent with the terminology used in the first terms of reference and the legislative framework under the *Family Violence Protection Act*.<sup>15</sup> In some instances, the term ‘alleged perpetrator’ or ‘alleged offender’ is also used.

### Formal consultation on first and supplementary terms of reference

- 1.31 The next stage of the reference will involve consulting with key stakeholders, interested organisations and individuals to further examine the issues raised by both the first and supplementary terms of reference as discussed in both the first consultation paper and this supplementary consultation paper.
- 1.32 Consultations will be conducted in September and October 2017.
- 1.33 The Commission will seek views on the questions posed and test options for reform.
- 1.34 The Commission intends to consult with the judiciary, victim support and advocacy organisations (government and non-government), family violence support and advocacy organisations, government departments, legal services and key academics.
- 1.35 In particular, the Commission seeks the views of individuals with direct experience of VOCAT processes, victim support workers who assist victims to access VOCAT, and members of the legal profession whose work interacts with VOCAT. The Commission also welcomes submissions from members of the broader community.
- 1.36 The feedback and information the Commission receives from submissions and formal consultations, combined with additional research, will inform its recommendations to the Attorney-General.

11 *Family Violence Protection Act 2008* (Vic) s 5.

12 *Ibid* s 5(1).

13 Other terms such as ‘domestic violence’ and ‘intimate partner violence’ used in some reports and literature will be accepted as encompassing the range of behaviours outlined in the *Family Violence Protection Act 2008* (Vic). See, eg, The Lookout, *Fact Sheet 7—Family Violence Statistics* (2016) 1.

14 Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) 2.

15 ‘Perpetrator’ is intended to include: people who use violence; offenders (people who have been criminally prosecuted for violent crimes); alleged offenders (people who are alleged to have committed violence); as well as respondents in intervention order matters, whether or not criminal matters have proceeded.

**Final report**

- 1.37 A single report setting out the Commission's recommendations relating to both the first and supplementary terms of reference will be provided to the Attorney-General by the revised reporting date of 27 July 2018.
- 1.38 Within 14 sitting days of receipt of the report, the Attorney-General must table the report in the Victorian Parliament. The Victorian Government will then decide whether to implement the Commission's recommendations. Legislative change will be decided by the Victorian Parliament.



# Victim support and financial assistance available for victims of crime

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- 10** Victims' rights in Victoria
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## 2. Victim support and financial assistance available for victims of crime

### Introduction

- 2.1 This chapter provides an overview of recent reforms relating to victims of crime in Victoria. This chapter also outlines the support and financial assistance options available in Victoria for victims of crime, including at common law and under statute.
- 2.2 The broader history and purpose of state-funded financial assistance schemes is summarised to provide context for the operation of the scheme as provided for by the *Victims of Crime Assistance Act 1996* (Vic) (the Act) and the Victims of Crime Assistance Tribunal (VOCAT).
- 2.3 Finally, this chapter provides an overview of recent reviews relevant to victims of crime and statutory financial assistance, to inform broader consideration of the operation of the Act and VOCAT.

### Victims' rights in Victoria

- 2.4 The past decade has seen an increased focus on the needs and rights of victims of crime in Victoria, in terms of their assistance and support needs as well as their rights in the criminal justice system:

the landscape has changed dramatically for victims of crime. The welfare of victims is now a central concern to governments, as reflected in the enactment of victims' rights charters, victims' compensation schemes and victim support services.<sup>1</sup>
- 2.5 These needs and rights are reflected both in legislation and government policy.
- 2.6 The *Victims' Charter Act 2006* (Vic) sets out principles for how Victoria's criminal justice system and victim service agencies should respond to victims of crime.<sup>2</sup> These principles include the right of victims to information,<sup>3</sup> respectful treatment<sup>4</sup> and some participatory rights, such as the right to make a victim impact statement during the sentencing phase of a criminal trial.<sup>5</sup>
- 2.7 The *Victims' Charter Act* reaffirms the right of victims to apply for compensation under the Act and to apply to a court for an order under the *Sentencing Act 1991* (Vic) that the offender pay them compensation.<sup>6</sup>
- 2.8 The *Victims of Crime Commissioner Act 2015* (Vic) establishes the Victims of Crime Commissioner and the Victims of Crime Consultative Committee.<sup>7</sup>

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1 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Information Paper 4: *Victims' Rights and Human Rights: the International and Domestic Landscape* (2016) 22.

2 *Victims' Charter Act 2006* (Vic) s 1.

3 *Ibid* ss 7–11.

4 *Ibid* s 6.

5 *Ibid* s 13.

6 *Ibid* s 16.

7 *Victims of Crime Commissioner Act 2015* (Vic) s 1.

- 2.9 The functions of the Victims of Crime Commissioner are to advocate for the recognition, inclusion, participation and respect of victims of crime by government departments and agencies, carry out inquiries and report on systemic victim of crime matters to the Attorney-General, and to provide the government with advice on improvements to the justice system to meet the needs of victims.<sup>8</sup>
- 2.10 The Victims of Crime Consultative Committee functions as a forum for victims of crime, justice agencies and victim services to discuss improvements to the criminal justice and victim support system and to promote the interests of victims of crime.<sup>9</sup>
- 2.11 In May 2017, the Victorian Government announced a range of initiatives aimed at improving responses to victims of crime.<sup>10</sup> As part of this package, the government announced it would ask the Victorian Law Reform Commission (the Commission) to extend its reference regarding the Act and victims of family violence to consider how to improve the experience of all people who engage with VOCAT.<sup>11</sup> This announcement was formalised by the Attorney-General providing the Commission with supplementary terms of reference on 7 July 2017.
- 2.12 At the same time, the government also announced its intention to request the Sentencing Advisory Council to examine current arrangements for restitution and compensation orders made for the benefit of victims under the Sentencing Act.<sup>12</sup> This announcement was formalised with a request to the Sentencing Advisory Council from the Attorney-General on 15 June 2017.<sup>13</sup> This review is discussed further below at [2.57]–[2.58] among a range of relevant reviews and reforms in Victoria and other Australian jurisdictions.

## Victoria's victim assistance system

- 2.13 Access to financial assistance under the Act and through VOCAT is only one aspect of a victim's path to recovery. Victims are unlikely to interact only with VOCAT.
- 2.14 In practice, most victims also engage with the victim and witness support system and/or with broader community or health system supports. This may include government-funded victim and witness services, as well as specialised support services such as family violence or sexual assault services. In some cases, victims may be involved with a number of different government and non-government support agencies. Victims may also use other general support services, such as their local health centre or general practitioner. The figure below shows Victoria's victim and witness support system.

8 Ibid s 13(1).

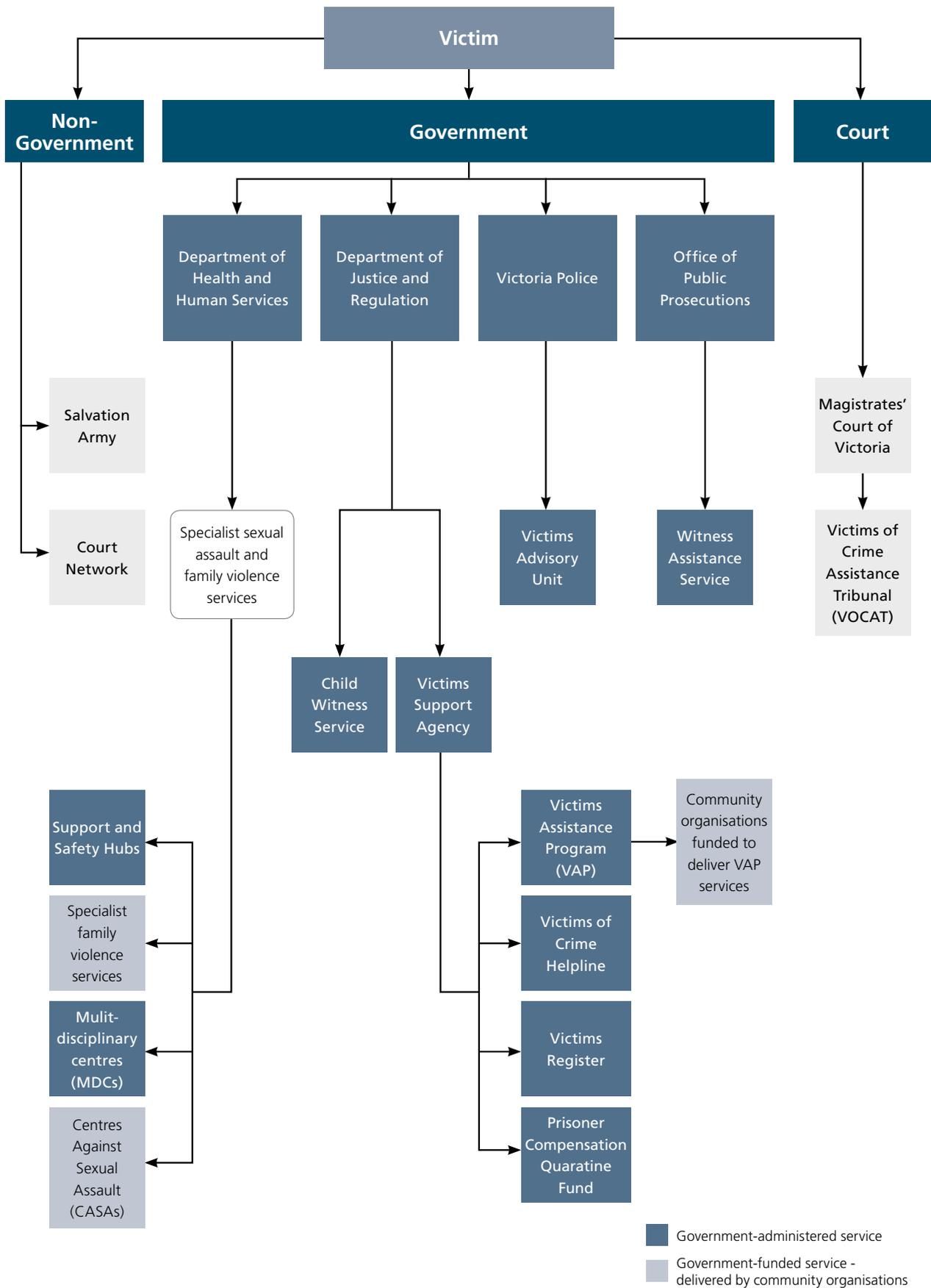
9 Ibid s 32.

10 Office of the Premier (Vic), 'Supporting Victims of Crime in the Justice System' (Media Release, 7 May 2017).

11 Ibid.

12 Ibid.

13 Sentencing Advisory Council, *Restitution and Compensation Orders* (2017) <[www.sentencingcouncil.vic.gov.au/projects/restitution-and-compensation-orders](http://www.sentencingcouncil.vic.gov.au/projects/restitution-and-compensation-orders)>.



**Figure 1: Victoria’s victim support framework**

- 2.15 As evident from Figure 1, the current victim and witness service scheme is fragmented, with different services delivered through multiple government and non-government entities. For example, generalist victim and witness support is provided by the Department of Justice and Regulation, while specialist victim responses, such as for family violence and sexual assault, are funded through the Department of Health and Human Services.
- 2.16 The Department of Justice and Regulation coordinates the delivery of:
- the Victims of Crime Helpline
  - the Victims Assistance Program (VAP)
  - the Victims Register
  - the Prisoner Compensation Quarantine Fund
  - the Child Witness Service.<sup>14</sup>
- 2.17 With the exception of the Child Witness Service, these programs and initiatives are coordinated by the Victims Support Agency (VSA) within the Department of Justice and Regulation.
- 2.18 The VSA coordinates delivery of the Victims Assistance Program (VAP) through contracted community-based organisations which provide victim case management services including practical support or therapeutic interventions for victims of violent crime. VAPs provide a range of practical support, information and assistance, including assistance with VOCAT applications and victim impact statements for use in sentencing hearings.
- 2.19 Victoria Police's Victims Advisory Unit provides 24-hour assistance to Victoria Police members attending crime scenes. Victim Liaison Officers within the Victims Advisory Unit assess victim needs, provide psychological 'first aid', coordinate crime scene clean-up, provide referrals to support services and organise travel arrangements for family members.<sup>15</sup> Victim liaison officers do not provide long-term case management services like VAPs.
- 2.20 Witness assistance in Victoria is provided by the Child Witness Service (also part of the Department of Justice and Regulation) and the Office of Public Prosecutions' Witness Assistance Service (WAS). However, the WAS only provides assistance in prosecutions pursued by the Director of Public Prosecutions.<sup>16</sup>
- 2.21 The non-profit organisation Court Network Victoria provides court support for victims and witnesses as part of a broader volunteer-based model and assists all court users on a non-partisan basis. The Salvation Army also provides some court-based support services and may assist some victims and witnesses as well as other court users.<sup>17</sup>
- 2.22 In addition to the above, more specialised support and assistance exists for specific types of crime. For example, support for victims of family violence is available through Victoria's specialist family violence system.<sup>18</sup> This includes:
- specialist family violence services (including specialist women's and children's services)
  - police, courts and legal services
  - child protection and family services

14 Victims Support Agency, Department of Justice and Regulation (Vic), *Victims of Crime* (2017) <[www.victimsofcrime.vic.gov.au/](http://www.victimsofcrime.vic.gov.au/)>.

15 Victoria Police, *Meeting the Needs of Victims within a Policy Context* (2011) <[www.aic.gov.au/media\\_library/conferences/2011-victim/presentations/green.pdf](http://www.aic.gov.au/media_library/conferences/2011-victim/presentations/green.pdf)>.

16 The Witness Assistance Service receives referrals in matters prosecuted by the Director of Public Prosecutions. In specific types of cases, referral is mandatory.

17 Magistrates' Court of Victoria, *Salvation Army Court and Prison Services* (2012) <<http://www.magistratescourt.vic.gov.au/court-support-services/support-and-assistance-services>>.

18 The family violence 'system' is comprised of a number of separate, yet interconnected, support components. See, eg, Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) 19.

- housing and homelessness services
  - health services (including mental health, drug and alcohol services).<sup>19</sup>
- 2.23 As recommended by the Royal Commission into Family Violence, and to better coordinate family violence victims access to this support, the Victorian Government through the agency, Family Safety Victoria, is currently establishing support and safety hubs. Linkages between victims, victim and family violence support services and the justice system, including VOCAT, are expected to improve once these hubs are established.<sup>20</sup> By the end of 2017 support and safety hubs will operate in five sites around Victoria.
- 2.24 Victims of sexual assault can access specialist services through the Victorian Centres Against Sexual Assault (CASAs), funded by the Department of Health and Human Services. There are 15 CASAs across Victoria. They provide:
- 24-hour emergency or crisis care for victims/survivors of sexual assault
  - crisis counselling
  - provision of information and referral to other agencies
  - practical assistance and advocacy
  - coordination of service provision, including police, forensic, child protection and medical personnel.<sup>21</sup>
- 2.25 Additional specialised responses are also available through six multi-disciplinary centres (MDCs) across Victoria, which bring together specialised services including police, child protection, nursing and counselling services at the one location.<sup>22</sup>
- 2.26 Some of these specialist services also provide victims with information about VOCAT.
- 2.27 VOCAT sits independently and separately to the above organisations, as part of the court system. VOCAT has emphasised its close links with victim support services.<sup>23</sup>

## Statutory financial assistance for victims of crime

### History and purpose of statutory financial assistance and compensation schemes

- 2.28 The provision of financial assistance and compensation for victims of crime is not new. As far back as ancient Babylon, legal systems enabled the provision of financial restitution to victims of crime.<sup>24</sup>
- 2.29 In Victoria, the *Crimes Act 1958* (Vic) as originally enacted could order offenders to pay compensation to victims.<sup>25</sup> This provision is now reflected in Part 4 of the Sentencing Act, which enables victims to apply for a compensation or restitution order against the offender as part of the sentencing process.<sup>26</sup> However, these systems are dependent on offenders having the means to pay. Where an offender has no means to pay, as is often the case, the victim will receive nothing.

19 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 1, 75.

20 Department of Premier and Cabinet (Vic), *Support and Safety Hubs: Statewide Concept* (2017) 53.

21 Department of Health and Human Services (Vic), *Sexual Assault Support Services* (2010) <[www.dhs.vic.gov.au/for-individuals/children,-families-and-young-people/sexual-assault/support-services](http://www.dhs.vic.gov.au/for-individuals/children,-families-and-young-people/sexual-assault/support-services)>.

22 Office of the Minister for Families and Children (Vic), 'One-Stop Support Centre For Sexual Assault Victims In Gippsland' (Media Release, 18 February 2016) 1.

23 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 39.

24 Robert Francis Harper, *The Code of Hammurabi King of Babylon—About 2250 BC* (University of Chicago Press, 1904) 19. See also Ian Freckelton, *Criminal Injuries Compensation: Law, Practice and Policy* (LBC Information Services, 2001) 12–14.

25 *Crimes Act 1958* (Vic) s 83(1), as repealed by *Crimes (Amendment) Act 1970* (Vic) s 5.

26 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Consultation Paper (2016) 131. See also Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report No 34 (2016) 230–2.

- 2.30 Accordingly, and with what Professor Ian Freckelton described as ‘the dawning of awareness of the impact of criminal offences ... upon victims’,<sup>27</sup> arrangements for state-funded and statute-based compensation for crime victims began to emerge in the 1960s and 1970s. The first scheme appeared in New Zealand in 1963, followed by Britain, Canada and the United States.<sup>28</sup>
- 2.31 The first Australian scheme was introduced in New South Wales in 1967.<sup>29</sup> Five years later, in 1972, Victoria’s first scheme was established by the *Criminal Injuries Compensation Act 1972* (Vic).<sup>30</sup>
- 2.32 Such schemes remain a feature of many common law countries today.<sup>31</sup>
- 2.33 Despite the prevalence of such schemes, their justifications are not well defined, or uniform. Indeed, Freckelton described these schemes as having ‘evol[ed] under ... significant “intellectual confusion”’.<sup>32</sup> A variety of rationales are offered for the establishment of victim compensation or financial assistance schemes. These include that such schemes:
- are an extension of the welfare state
  - formalise state liability for breach of its social contract with the community by failing to prevent crime
  - redistribute the costs of crime across the community
  - increase victim cooperation with the criminal justice system by encouraging the reporting of crime.<sup>33</sup>
- 2.34 In addition, these schemes can also be viewed as a response to the victims’ rights movements and advocacy for better recognition of victims’ needs.<sup>34</sup>
- 2.35 However, some academics suggest such justifications are ‘unconvincing’, concluding that such schemes are often established because of public controversy regarding violent crime and vocal public campaigns demanding the state assist victims of crime.<sup>35</sup> As a consequence, Matthew Hall concluded that most schemes merely contain ‘vague statements of their theoretical justification’.<sup>36</sup>
- 2.36 Nevertheless, as Freckelton noted in the Australian context, the emergence of these schemes in the late 1960s and early 1970s marked a new phase in the provision of support for victims of crime, involving the introduction of specialist bodies and tribunals to assess victim compensation claims.<sup>37</sup>
- 2.37 However, by the 1990s, the operational costs of these schemes were beginning to be questioned. The number of claims lodged and the amounts of compensation paid had grown enormously, raising concerns about long-term sustainability. Freckelton described this phase as ‘increasingly legalistic and expensive’, and described the schemes as plagued with technical difficulties and delays.<sup>38</sup>

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27 Ian Freckelton ‘Compensation for Victims of Crime’ in Hendrik Kaptein and Marijke Malsch (eds), *Crime, Victims and Justice: Essays on Principles and Practice* (Ashgate, 2004) 31.

28 Christine Forster and Patrick Parkinson, ‘Compensating Child Sexual Assault Victims within Statutory Schemes: Imagining a More Effective Compensatory Framework’ (2000) 23(2) *University of New South Wales Law Journal* 172, 174.

29 *Criminal Injuries Compensation Act 1967* (NSW).

30 *Criminal Injuries Compensation Act 1972* (Vic).

31 David Miers, ‘Offender and State Compensation for Victims of Crime: Two Decades of Development and Change’ (2014) 20(1) *International Review of Victimology* 145, 147.

32 Ian Freckelton, *Criminal Injuries Compensation: Law, Practice and Policy* (LBC Information Services, 2001) 53.

33 Matthew Hall, *Victims and Policy Making: A Comparative Perspective* (Willan Publishing, 2010) 170. See also Ian Freckelton, *Criminal Injuries Compensation Law: Law, Practice and Policy* (LBC Information Services 2001) 54–62.

34 David Miers, ‘Offender and State Compensation for Victims of Crime: Two Decades of Development and Change’ (2014) 20(1) *International Review of Victimology* 145, 147. See also Matthew Hall, *Victims and Policy Making: A Comparative Perspective* (Willan Publishing, 2010) 171 and 174.

35 Matthew Hall, *Victims and Policy Making: A Comparative Perspective* (Willan Publishing, 2010) 171.

36 *Ibid.* 174.

37 Ian Freckelton, ‘Compensation for Victims of Crime’ in Hendrik Kaptein and Marijke Malsch (eds) *Crime, Victims and Justice: Essays on Principles and Practice* (Ashgate, 2004) 42.

38 *Ibid.*

- 2.38 In response to concerns about scheme sustainability, some jurisdictions introduced ‘tariffs’ to quantify the amount payable for various injuries or redefined the types of injury that were compensable.<sup>39</sup> Other jurisdictions tightened scope and compensation levels.<sup>40</sup> Accordingly, this period represented a ‘backlash against the expenditure involved in state funding of criminal injuries compensation schemes’.<sup>41</sup> In Victoria, this was demonstrated by the introduction of the *Victims of Crime Assistance Act 1996* (Vic) which removed the provision of state-funded compensation for ‘pain and suffering’ for victims.
- 2.39 However, the end of the 1990s saw what Freckelton described as a ‘re-adjustment’ phase. In Victoria, this was demonstrated by the *Victims of Crime Assistance (Amendment) Act 2000* (Vic), which introduced awards of ‘special financial assistance’ for primary victims ‘who suffer significant adverse effects as a direct result of an act of violence’.<sup>42</sup> However, this amending legislation did not go so far as to reinstate compensation for pain and suffering.

### Contemporary statutory financial assistance and compensation schemes

- 2.40 As a consequence of the various waves of reform, there is now a ‘remarkably disuniform’ victim compensation landscape across Australia.<sup>43</sup> While all Australian states and territories have state-funded financial assistance or compensation schemes for victims of crime, the way they are administered differs across the jurisdictions.<sup>44</sup> A comparative summary is provided at Appendix B.
- 2.41 However, as discussed in this paper, many Australian schemes are beginning to recognise broader notions of ‘violence’ and ‘victimisation’, and to acknowledge different types of crime and their effects. Some Australian schemes have recently been reformed to recognise:
- that there are new forms of violence not previously identified or acknowledged by the community and the justice system that should be recognised by relevant compensation schemes
  - that trauma-informed processes and therapeutic outcomes might not be compatible with legal processes
  - that impacts on victims of crime are varied, as are victims’ needs.<sup>45</sup>
- 2.42 For example, in Queensland, non-criminal family violence behaviours including psychological and emotional abuse, economic abuse and threatening behaviours are now considered an act of violence for the purposes of that state’s victim compensation scheme.<sup>46</sup>
- 2.43 There has also been a shift away from court- or tribunal-based systems to the provision of case management and therapeutic interventions alongside financial assistance. This is the approach used in the Australian Capital Territory, Queensland and New South Wales. This approach recognises that victims’ needs vary and that having victims’ needs assessed by specialist victim support workers as part of the broader provision of victim support may be better than making lump-sum payments through a legal process. Victim needs are discussed in further detail in Part Three of this paper.

39 See, eg, *Criminal Injuries Compensation Scheme 2012* (UK) Annex E.

40 David Miers, ‘Offender and State Compensation for Victims of Crime: Two Decades of Development and Change’ (2014) 20(1) *International Review of Victimology* 145, 159.

41 Ian Freckelton, ‘Compensation for Victims of Crime’ in Hendrik Kaptein and Marijke Malsch (eds), *Crime, Victims and Justice: Essays on Principles and Practice* (Ashgate, 2004) 31.

42 See the Second Reading Speech for the Victims of Crime Assistance (Amendment) Bill 2000 (Vic): Victoria, *Parliamentary Debates*, Legislative Assembly, 26 May 2000, 1911 (Rob Hulls, Attorney-General).

43 Ian Freckelton, ‘Criminal Injuries Compensation for Domestic Sexual Assault: Obstructing the Oppressed’ in Chris Sumner et al (eds), *Victimology* (Australian Institute of Criminology, 1996) 241.

44 *Victims of Crime Assistance Act 1996* (Vic); *Victims’ Rights and Support Act 2013* (NSW); *Victims of Crime (Financial Assistance) Act 2016* (ACT); *Victims of Crime Assistance Act 2009* (Qld); *Victims Financial Assistance Scheme 2010* (NT); *Victims of Crime Act 2001* (SA); *Victims of Crime Assistance Act 1976* (TAS); *Criminal Injuries Compensation Act 2003* (WA).

45 See, eg, amendments to the *Victims of Crime Assistance Act 2009* (Qld) which enable non-criminal family violence behaviours including psychological and emotional abuse, economic abuse and threatening behaviours to fall within the definition of an act of violence for the purposes of that state’s victim compensation scheme.

46 ‘Domestic violence’ as defined by the *Domestic and Family Violence Protection Act 2012* (Qld) s 8.

2.44 In Victoria, and with the exception of amendments in 2000 introducing special financial assistance to primary victims for significant adverse effects, the state-funded statutory financial assistance scheme for victims of crime has not been significantly changed since before the introduction of the Act and the establishment of VOCAT in 1996.

### Financial assistance for victims of crime in Victoria

2.45 In Victoria, victims of crime can:

- seek compensation or restitution under the Sentencing Act
- pursue a civil action against an offender for an award of damages
- apply for state-funded financial assistance under the Act.<sup>47</sup>

2.46 Restitution and compensation orders can be made under Part 4 of the Sentencing Act.<sup>48</sup> Orders are made as part of the sentencing process and can be made for loss or injury caused as a direct result of the offence where an offender has pleaded guilty or been found guilty.<sup>49</sup> Restitution orders relate specifically to restoration of stolen goods connected to theft. A compensation order can be made against the offender for the value of any loss or damage as a result of an offence. Compensation orders can also be made for any injury directly caused, as well as for pain and suffering and some expenses incurred (or likely to be incurred).<sup>50</sup>

2.47 Victims of crime can also sue the offender for damages in a civil action. Civil action can be a significant financial and procedural burden for victims of crime, and the Sentencing Act's provisions were intended to be a faster and cheaper alternative to pursuing civil proceedings.<sup>51</sup>

2.48 Compensation orders under the Sentencing Act can result in much higher awards, particularly where an offender has the means to pay, which is a consideration of the court in making orders under the Act.

2.49 Table 1 below shows some recent decisions made under the Sentencing Act provisions, compared with the VOCAT awards made in the same case.

**Table 1: Awards made under section 85B of the *Sentencing Act 1991* (Vic) compared to VOCAT awards**

Case and crime type	Award under section 85B of the <i>Sentencing Act 1991</i> (Vic)	VOCAT award
<i>Cheng v Zhuang</i> [2016] VSC 24  Murder	\$125,000 to mother of deceased victim	\$15,000 to mother of deceased victim
<i>Kaori Asana v Grima</i> [2015] VCC 655  Intentionally cause serious injury, contravene family violence intervention order (family violence-related)	\$80,000 to primary victim (former partner of offender)	\$10,000 to primary victim (former partner of offender)

47 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process, Consultation Paper* (2016) 131.

48 *Sentencing Act 1991* (Vic) pt 4. See also Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process, Consultation Paper* (2016) 130–1.

49 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process, Consultation Paper* (2016) 130–1.

50 Ibid 132.

51 Ibid 133–4.

Case and crime type	Award under section 85B of the <i>Sentencing Act 1991</i> (Vic)	VOCAT award
<i>Brooks v Meade</i> [2017] VSC 172 Murder	\$600,000 to primary victim's sister (and now guardian to victim's daughters)  \$100,000 to each of primary victim's daughters.	\$25,792 to primary victim's sister  \$24,736 to primary victim's daughters
<i>Hunt v Akkus</i> [2017] VSC 79 Murder	\$45,000 to primary victim's sister	\$10,000 to primary victim's sister

- 2.50 Nonetheless, pursuing a civil action against an offender, or a restitution and compensation order under the Sentencing Act, is often not available or practical for victims. Some victims may be too fearful to pursue these orders. Offenders may not always have the financial means to fulfil such obligations. Enforcing orders often require significant time and effort, and can be costly to pursue.<sup>52</sup>
- 2.51 Accordingly, the Act gives victims of violent crime an avenue for state-funded financial assistance where they cannot obtain financial assistance from other sources.<sup>53</sup>
- 2.52 As discussed in the first consultation paper, Victoria's family violence service system now also provides additional state-funded financial assistance for victims of family violence through family violence flexible support packages (FSPs). FSPs enable family violence services to access funds to provide victims with urgent and critical support tailored to their specific needs.<sup>54</sup> Flexible support packages can be made up to \$7000, with an average cost of \$3000.<sup>55</sup> Financial assistance can be sought for safety expenses, housing, medical costs and a broad range of social, economic and community connectedness activities.
- 2.53 FSPs are intended to assist victims to stabilise and improve their safety in a crisis or post-crisis situation. In this respect, there are parallels with VOCAT's awards of financial assistance for safety-related expenses. However, the case management framework for provision of FSPs requires case managers to identify the ways in which the package will support the long-term health and wellbeing of the victim.

## Recent reviews and reforms

### Victorian reviews and reforms

#### Community Safety Trustee report

- 2.54 In June 2017, the Victorian Community Safety Trustee released an interim report on the implementation of the Victorian Government's *Community Safety Statement 2017*.
- 2.55 *The Community Safety Statement 2017* identifies five priority reform areas aimed at reducing the harm caused by crime and improving community safety. One of these is 'putting victims first'.

52 In June 2017, the Sentencing Advisory Council was asked to provide advice to the Attorney-General about whether restitution and compensation orders made for the benefit of victims under divs 1 and 2 pt 4 of the *Sentencing Act 1991* (Vic) should become a sentencing option to improve the operation of these provisions for victims of crime.

53 *Victims of Crime Assistance Act 1996* (Vic) s 1(2)(c).

54 Department of Health and Human Services (Vic), *Program Requirements for the Delivery of Family Violence Flexible Support Packages* (2016) 1; Women's Health West, *Annual Report 2015–16* (2016) 24.

55 Department of Health and Human Services (Vic), *Program Requirements for the Delivery of Family Violence Flexible Support Packages* (2016) 1.

2.56 The interim report raised concerns regarding delays in relation to VOCAT applications:

Currently, on average, it takes around nine months to finalise an application and some matters span more than two years. If the approach is ‘victims first’, then the current process warrants review in the interests of quick resolution for victims.<sup>56</sup>

### Sentencing Advisory Council review of restitution and compensation orders

2.57 In June 2017, the Sentencing Advisory Council was asked to provide advice to the Attorney-General about whether restitution and compensation orders made for the benefit of victims under divisions 1 and 2 of part 4 of the Sentencing Act should become a sentencing option.<sup>57</sup> This review is in response to a recommendation by the Commission in its report *The Role of Victims of Crime in the Criminal Trial Process*.<sup>58</sup>

2.58 The Sentencing Advisory Council’s review will consider whether the purposes of sentencing should include financial reparation for victims, whether there should be a presumption in favour of courts making such orders and whether such orders should be enforced by the state in the manner of a fine. The Sentencing Advisory Council has been asked to report to the Attorney-General by 1 September 2018, two months after the Commission is to report to the Attorney-General.<sup>59</sup>

### Victorian Law Reform Commission review—*The Role of Victims of Crime in the Criminal Trial Process*

2.59 The Commission’s 2016 report *The Role of Victims of Crime in the Criminal Trial Process* made recommendations to improve victim experiences during the criminal trial process. A number of these recommendations are in the process of being implemented as part of a broader victims’ initiatives package announced by the Victorian Government in May 2017.<sup>60</sup>

2.60 Of particular relevance to this reference, the Commission made recommendations about improving the legislative framework and practical operation of restitution and compensation orders against offenders.<sup>61</sup> As outlined above, these matters are currently being considered by the Sentencing Advisory Council.<sup>62</sup>

2.61 The Commission also made recommendations relating to the restriction of access to, and use of, VOCAT records to protect victims of crime during the VOCAT and criminal trial process.<sup>63</sup> The Commission also identified some concerns with access to VOCAT for victims. However, full consideration of these issues was beyond its terms of reference. These recommendations are revisited in this paper in Chapter 11.

### Victorian Royal Commission into Family Violence

2.62 The Victorian Royal Commission into Family Violence (the Royal Commission into Family Violence), established in February 2015, comprehensively assessed all components of the government’s and community’s response to family violence. On 29 March 2016, the Royal Commission into Family Violence delivered its final report which concluded that, despite a sustained effort to address family violence in the community through structural and procedural reform, serious limitations to the existing approach remained.<sup>64</sup>

56 Community Safety Trustee (Vic), *Community Safety Trustee: First Progress Report—June 2017* (2017) 14.

57 Sentencing Advisory Council, *Restitution and Compensation Orders* (2017) <[www.sentencingcouncil.vic.gov.au/projects/restitution-and-compensation-orders](http://www.sentencingcouncil.vic.gov.au/projects/restitution-and-compensation-orders)>.

58 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report No 34 (2016) xxviii.

59 Sentencing Advisory Council, *Restitution and Compensation Orders* (2017) <[www.sentencingcouncil.vic.gov.au/projects/restitution-and-compensation-orders](http://www.sentencingcouncil.vic.gov.au/projects/restitution-and-compensation-orders)>.

60 Office of the Premier (Vic), ‘Supporting Victims of Crime in the Justice System’ (Media Release, 7 May 2017) 1.

61 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report No 34 (2016) xxvii–xxviii.

62 Sentencing Advisory Council, *Restitution and Compensation Orders* (2017) <[www.sentencingcouncil.vic.gov.au/projects/restitution-and-compensation-orders](http://www.sentencingcouncil.vic.gov.au/projects/restitution-and-compensation-orders)>.

63 Recommendations 50 and 51 recommended that documentation in VOCAT proceedings should be inadmissible as evidence in criminal proceedings except in certain circumstances, and that such documents must not be subpoenaed. See Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report No 34 (2016) 247.

64 Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) 1.

- 2.63 The Royal Commission into Family Violence made 227 recommendations, encompassing significant reforms to:<sup>65</sup>
- risk assessment and management, pathways to services and information sharing
  - specialist family violence services and creating a safe home
  - responses to children and young people’s experience of family violence (including the child protection system) as well as to adolescents who use family violence
  - sexual assault and family violence responses
  - police operations and leadership
  - court responses, offences and sentencing, restorative justice and family law
  - prevention and perpetrator interventions
  - health and wellbeing approaches, including in the workplace
  - family violence and diversity, vulnerable cohorts and impacts on specific communities
  - governance arrangements, industry planning and investment in data and research (including ongoing review of family violence deaths).
- 2.64 The first terms of reference received by the Commission directly relate to matters raised by Recommendation 106 of the Royal Commission into Family Violence, which recommended that:
- The Victorian Law Reform Commission consider the matters the Commission raised in this report in relation to the Victims of Crime Assistance Tribunal and the Victim Assistance Program in its Victims of Crime in the Criminal Trial Process review. To the extent that these matters do not fall within the terms of reference for that review, the Attorney-General should amend the terms of reference or ensure that a separate review of these matters is carried out.<sup>66</sup>
- 2.65 Recommendation 106 formed part of the findings of the Royal Commission into Family Violence about ‘recovery and wellbeing’ for victims of family violence. These findings emphasised that the cumulative effects of family violence can be made worse by difficulties victims have in navigating the justice and service system, including attempting to gain social and financial independence.<sup>67</sup>
- 2.66 The Royal Commission into Family Violence also supported a further inquiry into the efficacy of a combined victim support and financial assistance scheme, like that administered in New South Wales.<sup>68</sup>
- 2.67 These matters, along with other matters specifically addressing issues with the operation of the Act for victims of family violence, were comprehensively discussed in the Commission’s first consultation paper.<sup>69</sup>

### Victorian Government response—*Ending Family Violence: Victoria’s Plan for Change*

- 2.68 *Ending Family Violence: Victoria’s Plan for Change* outlines how the government intends to implement all 227 recommendations of the Royal Commission into Family Violence.<sup>70</sup> There are four broad outcomes articulated in the plan:
- Family violence and gender inequality are not tolerated.
  - Victim survivors, vulnerable children and families, are safe and supported to recover and thrive.

65 This is a high-level thematic summary of the 227 recommendations. For a comprehensive list, see Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) 45–106.

66 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 4, 87.

67 Ibid 65.

68 Ibid 86.

69 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017).

70 Department of Premier and Cabinet (Vic), *Ending Family Violence: Victoria’s Plan for Change* (2016) ix.

- Perpetrators are held to account, engaged and connected.
- Preventing and responding to family violence is systemic and enduring.

2.69 VOCAT is a key component of victim support and recovery, and directly relates to Outcome 2: Victim survivors, vulnerable children and families, are safe and supported to recover and thrive.

### Establishment of support and safety hubs across Victoria

- 2.70 In July 2017, the Victorian Government released *Support and Safety Hubs: Statewide Concept*, which outlines the intent, scope, key functions and roles of the support and safety hubs to be launched at five sites by the end of 2017. This initiative relates to Recommendation 37 of the Royal Commission.<sup>71</sup>
- 2.71 Support and safety hubs will operate as a single location for victims and perpetrators of family violence to access a range of information and support, rather than having to seek information and support via multiple avenues. Linkages between victims, victim and family violence support services and the justice system, including VOCAT, are expected to improve once support and safety hubs are established.<sup>72</sup>
- 2.72 This concept document highlights the need for better connection to VOCAT for victims of family violence and states that the hubs will help victims access VOCAT seamlessly.<sup>73</sup> The hubs will also work closely with the Victims Support Agency in the provision of existing victim support services.<sup>74</sup>

### 2016 Victorian Parliamentary Inquiry into Abuse in Disability Services

- 2.73 The 2016 Victorian Parliamentary Inquiry into Abuse in Disability Services examined why abuse in disability services is not appropriately reported or acted upon, and how it can be prevented.
- 2.74 Of particular significance for this reference is the extent to which such victims of crime might face barriers to reporting violence and abuse to police, and why recognition of these barriers is important when making decisions under the Act.
- 2.75 Acts of violence perpetrated against disability services clients are often not reported to police despite being identified as ‘incidents’ by service providers.<sup>75</sup> Beyond the obvious justice system implications of this, and the impacts on victims who are subjected to such abuse, these practices also affect a victim’s ability to pursue appropriate recourse through VOCAT.
- 2.76 In addition, like victims of family violence, victims of abuse perpetrated in the provision of care are frequently subjected to cycles of violence or patterns of abuse. For these reasons, many victims face similar barriers, identified in the Commission’s first consultation paper, to those faced by victims of family violence. These barriers are further considered throughout this paper, including the ‘related criminal acts’ provision of the Act and the special financial assistance formula.<sup>76</sup>

### 2014 Victorian Parliamentary Inquiry into the Handling of Child Abuse by Religious and other Non-Government Organisations—*Betrayal of Trust* report

- 2.77 The final report of the Victorian Inquiry into the Handling of Child Abuse by Religious and other Non-Government Organisations, *Betrayal of Trust*, was tabled in the Victorian Parliament in May 2014.

71 Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) 37.

72 See, eg, ‘Case Study: Marla’s Experience in the Future’, illustrating that a support and safety hub will connect victims with a lawyer to assist with an application to VOCAT: See Department of Premier and Cabinet (Vic), *Ending Family Violence: Victoria’s Plan for Change* (2016) 40–1.

73 Department of Premier and Cabinet (Vic), *Support and Safety Hubs: Statewide Concept* (2017) 53.

74 Ibid 54.

75 Family and Community Development Committee, Parliament of Victoria, *Inquiry into Abuse in Disability Services: Final Report* (2016) 4.

76 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) xviii.

- 2.78 The inquiry considered the way in which religious and other non-government organisations respond to the criminal abuse of children within their organisations.
- 2.79 Part of the inquiry's findings related to VOCAT. The inquiry noted that VOCAT provides a viable alternative to civil litigation for victims of criminal child abuse because of its ability to provide an independent acknowledgment of harm, its non-adversarial approach, and the supports provided for victims.<sup>77</sup>
- 2.80 Although the inquiry received little evidence about victims' experiences of VOCAT, evidence suggested some limitations to the ability of the Act and VOCAT to respond adequately to historical child abuse. Issues raised included the two-year time limit for making an application, the limited compensation available, the lack of ongoing financial support for victims, and the absence of a mechanism for organisations to contribute to awards of financial assistance.
- 2.81 The inquiry made the following recommendations relating to VOCAT:
- that the Act be amended to specify that no time limits apply for applications for assistance by victims of criminal abuse in organisational settings<sup>78</sup>
  - that the Victorian Government review the functions of VOCAT to consider its capacity to administer a specific scheme for victims of criminal child abuse.<sup>79</sup>
- 2.82 While many of the recommendations have been implemented, the Victorian Government has committed to working with the ongoing Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission into Child Sexual Abuse) on matters that intersect with the Victorian inquiry, including the establishment of a national redress scheme in response to the recommendations of the Royal Commission.
- 2.83 On 4 November 2016, the Minister for Social Services, Christian Porter MP, announced that the Commonwealth Government intends to establish a national redress scheme in response to the recommendations of the Commonwealth Royal Commission into Child Sexual Abuse.
- 2.84 Prior to this, the Victorian Government had been considering options to implement a state redress scheme based on the recommendation in *Betrayal of Trust*, and had released a consultation paper suggesting the expansion of VOCAT, with a new specialised stream for historical child sexual abuse in institutional settings. It was envisaged this new stream would have a modified standard of proof and provide a wider range of financial and non-financial benefits as well as remove the legalistic elements of VOCAT's process.<sup>80</sup>
- 2.85 Since the Commonwealth Government announcement in November 2016 relating to the national redress scheme, the Victorian Government has indicated it is consulting with the Commonwealth about the design and structure of a national redress scheme.<sup>81</sup>
- 2.86 Therefore, as at the date of this supplementary consultation paper, the recommendations relating to VOCAT in *Betrayal of Trust*, have not been implemented.

77 Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (2013) vol 2, 556.

78 Ibid 553.

79 Ibid 561.

80 Department of Justice and Regulation (Vic), *A Victorian Redress Scheme for Institutional Child Abuse*, Public Consultation Paper (5 August 2015) 35.

81 Department of Justice and Regulation (Vic), *Betrayal of Trust Implementation* (2017) <[www.justice.vic.gov.au/home/safer+communities/protecting+children+and+families/betrayal+of+trust+implementation](http://www.justice.vic.gov.au/home/safer+communities/protecting+children+and+families/betrayal+of+trust+implementation)>.

## Reviews and reforms in other jurisdictions

### Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse

- 2.87 The Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse, established in January 2013, requires the Commissioners to inquire into institutional responses to allegations and incidents of child sexual abuse, focusing on systemic issues while being informed by individual cases. Of specific relevance to this reference is the requirement of the Royal Commission to inquire into current redress options for victims of sexual abuse.
- 2.88 The Royal Commission published its interim report in relation to redress and civil litigation in 2015, recommending the establishment, funding and operation of a single national redress scheme.<sup>82</sup> The Royal Commission noted that while its report was an interim one, it contained its final recommendations in relation to redress for victims.
- 2.89 The Royal Commission's report suggested states and territories could use their existing victims of crime compensation or financial assistance schemes to deliver the services of a national redress scheme. However, the Royal Commission stated that their use should be limited to 'back office' operational support, with the national redress scheme establishing nationally consistent branding, application forms and processes, guidelines and processes for determining payments.<sup>83</sup>
- 2.90 The Commonwealth Government has committed to the establishment of a Commonwealth Redress Scheme to commence in 2018 for survivors of child sexual abuse in Commonwealth institutional settings.<sup>84</sup>
- 2.91 The Commonwealth Government is encouraging states, territories and non-government institutions to opt in to the scheme. However, as at the date of this consultation paper, the national redress scheme has not yet been finalised, although negotiations with states and territories continue. In June 2017, the Commonwealth Government stated:

[The Commonwealth] Government will continue to work with the states and territories and non-government institutions to encourage them to join the Scheme to promote a nationally consistent approach to redress.<sup>85</sup>

### New South Wales—2012 Review of the Victims Compensation Fund

- 2.92 In 2012, the New South Wales Department of Attorney General and Justice published its report *Review of the Victims Compensation Fund*. The independent review by PricewaterhouseCoopers found that the objectives of the *Victims Support and Rehabilitation Act 1996* (NSW)—to provide support and rehabilitation to victims of violent crime through counselling and compensation—were not being met. This was due to significant delays in the provision of compensation, with an average wait of over two years.<sup>86</sup> The system was also described as 'complicated' because of the need to provide expert medical reports and use lawyers to make claims.<sup>87</sup>
- 2.93 The reviewers noted that providing practical assistance shortly after a person experienced an act of violence would better assist victims to begin their healing process.<sup>88</sup> In particular, the benefits of early provision of funding for relocation assistance, security upgrades and assistance with medical expenses were noted.

82 Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015) 322.

83 Ibid 317.

84 Department of Social Services (Cth), *Redress Scheme for Survivors of Institutional Child Sexual Abuse* (2017) <[www.dss.gov.au/families-and-children/programs-services/children/commonwealth-redress-scheme-for-survivors-of-institutional-child-sexual-abuse](http://www.dss.gov.au/families-and-children/programs-services/children/commonwealth-redress-scheme-for-survivors-of-institutional-child-sexual-abuse)>.

85 Ibid.

86 Department of Attorney General and Justice (NSW), *Review of the Victims Compensation Fund* (PricewaterhouseCoopers Australia, 2012) 46.

87 New South Wales Government, Submission No 11 to Royal Commission into Institutional Responses to Child Sexual Abuse in Response to Issues Paper 7, *Royal Commission into Institutional Responses into Child Sexual Abuse*, 2014, 2.

88 Department of Attorney General and Justice (NSW), *Review of the Victims Compensation Fund* (PricewaterhouseCoopers Australia, 2012) 46.

- 2.94 The *Victims Rights and Support Act 2013* (NSW) established a new Victims Support Scheme (VSS) and a new Commissioner of Victims Rights. The VSS was designed to provide more tailored, timely and integrated victim support and compensation through the one scheme:
- The VSS does not focus on specific injuries sustained by victims, but looks holistically at the impact of a violent crime on victims' lives as a whole. The VSS focuses on providing victims with practical and financial assistance when they need it most. The new VSS has reduced the amount of lump sum payments previously available ... and instead focuses on providing with minimal delay a package of practical and financial support to victims of violent crime with a smaller recognition payment.<sup>89</sup>
- 2.95 The VSS is based on four 'pillars' of support: counselling, immediate needs, financial assistance and recognition payments. The VSS provides the following assistance, delivered through one agency:
- counselling
  - up to \$5000 for immediate needs to cover emergency medical treatment, relocation expenses, crime scene clean-up, safety measures in the home
  - funeral assistance
  - economic loss—up to \$30,000 including loss of earnings, out-of-pocket justice-related expenses
  - recognition payments—up to \$15,000.<sup>90</sup>
- 2.96 One of the key features of the scheme is timely access to support and financial assistance. Assistance is now provided in just under three months compared to over two years under the former scheme.<sup>91</sup>
- 2.97 By way of comparison, the provision of these services through the New South Wales Victims Support Scheme is equivalent to Victoria's financial assistance scheme being delivered through the Victims Support Agency in the Department of Justice and Regulation rather than through a separate tribunal.
- 2.98 A review of the New South Wales Victims Support Scheme is currently underway. The New South Wales Department of Justice has invited interested organisations to make submissions on the review. However, at the time of writing, a final report has not been published.

### Northern Territory—2012 Review of the Victims of Crime Assistance Act

- 2.99 The *Victims of Crime Assistance Act 2007* (NT) was introduced in 2007 to replace an earlier court-based compensation scheme which had been found to be inefficient, slow, overly complex and costly. The 2007 scheme introduced a more streamlined administrative case assessment process for financial assistance, complemented by the provision of free counselling.<sup>92</sup>
- 2.100 A statutory review of the operation of the Act commenced by way of an issues paper released in December 2012.
- 2.101 The issues paper considered similar issues to those considered by the Commission in its first consultation paper, including the way in which related criminal acts are treated, time limits for applications, notification of alleged perpetrators, perpetrator benefit and recognition of family violence for the purposes of specific provisions.

89 New South Wales Government, Submission No 11 to Royal Commission into Institutional Responses to Child Sexual Abuse in Response to Issues Paper 7, *Royal Commission into Institutional Responses into Child Sexual Abuse*, 2014, 2.

90 Ibid 3.

91 Ibid 5.

92 Department of the Attorney-General and Justice (NT), *Issues Raised at Consultation for the Review of the Victims of Crime Assistance Act*, Issues Paper (2012) 12.

- 2.102 Minor amendments were made to the Act in 2013 to increase offender levies.<sup>93</sup> However, there is no publicly available government response to the issues paper nor evidence of any significant changes to the scheme.

### Australian Capital Territory—2014 Review of the Victims of Crime Financial Assistance Scheme

- 2.103 In 2014, the Justice and Community Safety Directorate in the Australian Capital Territory released a paper outlining its proposed model for a new financial assistance scheme for victims of crime.<sup>94</sup> A new financial assistance scheme subsequently commenced on 1 July 2016.
- 2.104 The new system abolished the previous court-based system delivered through the Magistrates' Court. Victim Support ACT, the government body responsible for delivering the Victims Services Scheme, now administers both the financial assistance scheme and victim case management services provided under the Victims Services Scheme.<sup>95</sup>
- 2.105 Clients registered for case management can receive assessment, court support, advocacy and therapeutic services.<sup>96</sup> Assessors at Victim Support ACT process applications for financial assistance and the Victims of Crime Commissioner, the head of Victim Support ACT, is the final decision maker.<sup>97</sup>
- 2.106 Victim Support ACT describes the new scheme as reducing barriers for victims of crime by separating the process from the court system and reducing reliance on legal representation.<sup>98</sup>

### Queensland—2015 Final Report on the Review of the *Victims of Crime Assistance Act 2009*

- 2.107 The *Victims of Crime Assistance Act 2009* (Qld) introduced an administratively based scheme by establishing Victim Assist Queensland to administer the financial assistance scheme along with services and support for victims of crime.<sup>99</sup>
- 2.108 A final report relating to a statutory review of the scheme was published in 2015. Overall, the review found the scheme to be operating well in comparison to the previous court-based scheme.<sup>100</sup> However, a number of recommendations were made to build on the existing statutory framework. As a result, the *Victims of Crime Assistance and Other Legislation Amendment Act 2017* (Qld) was passed in March 2017 to amend the *Victims of Crime Assistance Act 2009* (Qld) (the Queensland Act). The amendments came into force in July 2017.
- 2.109 In the Queensland Act, an 'act of violence' now explicitly includes 'domestic violence'<sup>101</sup> as defined in Queensland's *Domestic and Family Violence Protection Act 2012*,<sup>102</sup> which includes non-criminal conduct, such as psychological and emotional abuse, economic abuse and behaviour that is threatening, coercive or in any other way dominates a person, causing them to fear for their safety or wellbeing or that of someone else.<sup>103</sup> This makes Queensland the only jurisdiction to provide financial assistance for non-criminal forms of family violence, consistent with its *Domestic and Family Violence Protection Act 2012* (Qld).

93 *Victims of Crime Assistance Amendment Act 2013* (NT).

94 Justice and Community Safety Directorate (ACT), *The ACT Victims of Crime Financial Assistance Scheme: Proposed Model* (2013).

95 Victim Support (ACT), *Important Changes to the Victims of Crime Financial Assistance Scheme* (2017) <[www.victimssupport.act.gov.au/functions/latest-news/important-changes-to-the-financial-assistance-scheme](http://www.victimssupport.act.gov.au/functions/latest-news/important-changes-to-the-financial-assistance-scheme)>.

96 Victim Support (ACT), *Annual Report 2015–16* (2016) 14.

97 Victim Support (ACT), *Frequently Asked Questions* (2016) <[www.victimssupport.act.gov.au/financial-assistance-scheme/new-financial-assistance-scheme-1-july-2016/](http://www.victimssupport.act.gov.au/financial-assistance-scheme/new-financial-assistance-scheme-1-july-2016/)>.

98 Victim Support (ACT), *Annual Report 2015–16* (2016) 29.

99 Department of Justice and Attorney-General (Qld), *Final Report on the Review of the Victims of Crime Assistance Act 2009* (2015) 3.

100 Ibid 4.

101 *Victims of Crime Assistance Act 2009* (Qld) s 25(2).

102 Ibid sch 3.

103 *Domestic and Family Violence Protection Act 2012* (Qld) s 8.

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- 2.110 The Queensland Act now also has a broader range of injuries for which victims of sexual offences and victims of family violence can claim. Injuries include a sense of violation, reduced self-worth or perception, lost or reduced physical immunity, lost or reduced physical capacity, increased fear or feelings of insecurity, the adverse effect of others reacting adversely to them, the adverse impact on lawful sexual relations and the adverse impact on feelings.<sup>104</sup>
- 2.111 The Queensland Act previously enabled victims of sexual assault, child victims and victims of an offender who was in a position of power, influence or trust ('special primary victims') to make a report to a counsellor, psychologist or doctor in addition to a police officer. This has now been extended to victims of family violence who are now also considered 'special primary victims', meaning that they too can report to this expanded range of professionals.<sup>105</sup>
- 2.112 In addition, 'domestic violence service' has been added to the list of professionals to whom 'special primary victims' can report.<sup>106</sup>
- 2.113 In determining whether the applicant had a reasonable excuse for not assisting the police, the government assessor must now have regard to 'whether the act of violence involves domestic violence'.<sup>107</sup>
- 2.114 This makes Queensland the only jurisdiction to make domestic violence an explicit consideration in relation to an applicant not having assisted police.
- 2.115 The Queensland Act also aims to simplify how victims apply for financial assistance by removing the need for applications to include statutory declarations; removing pools of financial assistance to ensure all applications are considered on their own merit; and introducing a Charter of Victims' Rights to guide how government and non-government agencies respond to victims.

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104 *Victims of Crime Assistance Act 2009* (Qld) s 27(1)(f).

105 *Ibid* s 81(2)(a)(iii).

106 *Ibid* s 81(1)(a)(ii). 'Domestic violence service' is defined as 'an entity that provides services to persons who fear or experience domestic violence': s 81(2).

107 *Ibid* s 82(3)(e).

# The Victims of Crime Assistance Act 1996

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## 3. The Victims of Crime Assistance Act 1996

### Introduction

- 3.1 This chapter provides an overview of the *Victims of Crime Assistance Act 1996* (Vic) (the Act) which establishes the purpose and objectives of the state-funded financial assistance scheme in Victoria, sets out eligibility for assistance and details the circumstances in which awards of assistance can be made.
- 3.2 The Act also establishes the Victims of Crime Assistance Tribunal (VOCAT). VOCAT is the key body to which both the supplementary and the first terms of reference relate. It determines all applications for financial assistance made under the Act and is discussed in further detail in Chapter 4.

### Policy intent of the Act

- 3.3 When the Act was introduced, the then Attorney-General, the Hon. Jan Wade MP articulated a broad intent to develop a model more responsive to the needs of victims in order to 'maximise the potential for a victim's recovery from the psychological and physical effects of a violent offence'.<sup>1</sup>
- 3.4 The Attorney-General described the Act as establishing an integrated model of assistance for victims of crime.<sup>2</sup>
- 3.5 She stated the Act would address the needs of victims of violent crimes and achieve an appropriate balance between the interests of victims, the state and the rights of offenders. Furthermore, the Act would:
- address the physical and psychological needs of a victim of crime by ensuring that appropriate services were available to help the victim make a speedy recovery
  - wherever practicable, ensure that convicted offenders made good the harm caused by their crimes by paying compensation for pain and suffering to the victim
  - ensure that procedures within the criminal justice system provided a quick and economical means for the redress of harm suffered as a result of the offender's criminal conduct
  - ensure that services provided by the state to victims of crime were affordable.<sup>3</sup>
- 3.6 However, the Act removed the provision of state-funded compensation for 'pain and suffering' for victims, which had been available under Victoria's preceding criminal injuries compensation laws. To address this omission, the *Victims of Crime Assistance (Amendment) Act 2000* (Vic) later introduced new awards of special financial assistance for primary victims 'who suffer significant adverse effects as a direct result of an act of

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1 Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 1996, 1023 (Jan Wade, Attorney-General).  
2 Ibid 1024.  
3 Ibid.

violence'.<sup>4</sup> While providing for lump-sum payments, this amending legislation did not reinstate compensation for pain and suffering as constituted by previous acts. These provisions are discussed in more detail below and in Chapter 6 of this consultation paper.

## Overview of the Act

- 3.7 Part One of the Act sets out the Act's purpose and objectives and defines key terminology.
- 3.8 Part Two of the Act sets out eligibility for assistance.
- 3.9 Part Three of the Act establishes VOCAT, details the form and timing for applications, sets out the procedures and powers of the Tribunal and outlines the procedures for the making of awards.
- 3.10 Part Four of the Act sets out procedures for review, variation and refund of awards and Part Five contains miscellaneous provisions.

## Purpose and objectives of the Act

- 3.11 The purpose of the Act is to 'provide assistance to victims of crime'.<sup>5</sup>
- 3.12 The objectives of the Act are:
  - to assist victims of crime to recover by paying them financial assistance for expenses incurred, or reasonably likely to be incurred, as a direct result of the crime<sup>6</sup>
  - 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<sup>7</sup>
  - to allow victims of crime to have recourse to financial assistance where compensation for the injury cannot be obtained from the offender or other sources.<sup>8</sup>
- 3.13 The Act's purpose and objectives also state that:
  - Awards of financial assistance (including special financial assistance) are not intended to reflect the level of compensation to which victims of crime may be entitled at common law or otherwise.<sup>9</sup>
  - The scheme provided by the Act is intended to complement other services provided by government to victims of crime.<sup>10</sup>
- 3.14 The purpose and objectives of the Act are discussed in more detail in Chapter 14.

## Who is a victim under the Act?

- 3.15 Victims of crime are often defined as people who have suffered in some way as a result of a crime—whether that be physically, emotionally or financially.<sup>11</sup>
- 3.16 However, the legal definition of 'victim' differs depending on the context and applicable legislation. For example, the *Victims' Charter Act 2006* (Vic) defines a victim as a person who has suffered injury or death as a result of a criminal offence, or a family member of a child who has suffered injury or death.<sup>12</sup> The definition of victim in the *Sentencing Act 1991* (Vic) is a person who has suffered injury, loss or damage (including grief, distress,

4 See Victoria, *Parliamentary Debates*, Legislative Assembly, 26 May 2000, 1911 (Rob Hulls, Attorney-General).

5 *Victims of Crime Assistance Act 1996* (Vic) s 1(1).

6 *Ibid* s 1(2)(a).

7 *Ibid* s 1(2)(b).

8 *Ibid* s 1(2)(c).

9 *Ibid* s 1(3).

10 *Ibid* s 1(4).

11 Victims Support Agency (Vic), *The Crime* (2017) <<http://www.victimsofcrime.vic.gov.au/home/the+crime/>>.

12 *Victims' Charter Act 2006* (Vic) s 3(1).

trauma or other significant adverse effect) as a direct result of the offence.<sup>13</sup> 'Injury', 'loss' and 'damage' are common elements in various legislative instruments.

3.17 In the *Victims of Crime Assistance Act 1996* (Vic), the definition of victim is narrower.

3.18 First, the victim must be a victim of an 'act of violence'. An 'act of violence' is defined under the Act as a 'criminal act' or 'a series of related criminal acts' that occurred in Victoria and that 'directly resulted in injury or death to one or more persons'.<sup>14</sup> The Act defines a 'criminal act' as an act or omission that is a 'relevant offence'.<sup>15</sup> The term 'relevant offence' is also defined in the Act as the following offences:

- an offence that involves an assault, an injury or a threat of injury to a person and which is punishable by imprisonment<sup>16</sup>
- the offences contained in subdivisions 8A, 8B, 8C, 8E or 8FA of Division 1 of Part I of the *Crimes Act 1958* (Vic), which include rape, sexual assault, sexual offences against children, incest, sexual offences against persons with a cognitive impairment and other sexual offences, as well as the common law offences of rape or assault with intent to rape<sup>17</sup>
- the offences of stalking, child stealing and kidnapping<sup>18</sup>
- conspiracy, incitement or an attempt to commit any of the offences listed above.<sup>19</sup>

3.19 The act of violence must also directly result in 'injury' or 'death',<sup>20</sup> and/or for primary victims, a 'significant adverse effect'.<sup>21</sup>

3.20 Therefore, not all people who may identify as a victim of crime may fall within the definition of 'victim' under the Act. Eligibility under the Act is discussed in more detail in Chapter 5 of this supplementary consultation paper.

13 *Sentencing Act 1991* (Vic) s 3(1).

14 *Victims of Crime Assistance Act 1996* (Vic) s 3(1).

15 *Ibid.*

16 *Ibid.*

17 *Ibid.*

18 *Ibid.* The offences referred to are those contained in ss 21A(1), 63 and 63A of the *Crimes Act 1958* (Vic) and any corresponding previous enactment.

19 *Victims of Crime Assistance Act 1996* (Vic) s 3(1).

20 *Ibid* ss 7, 9 and 11.

21 *Ibid* s 8A.

# The Victims of Crime Assistance Tribunal

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- 32** Establishment of VOCAT
- 32** The structure of VOCAT
- 33** Specialisation within the VOCAT structure
- 33** The procedure and process of VOCAT
- 36** VOCAT demand

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## 4. The Victims of Crime Assistance Tribunal

### Introduction

- 4.1 As outlined in Chapter 3, the *Victims of Crime Assistance Act 1996* (Vic) (the Act) established the Victims of Crime Assistance Tribunal (VOCAT).
- 4.2 VOCAT is the key body to which both the supplementary and the first terms of reference relate, as it determines all applications for financial assistance made under the Act.
- 4.3 This chapter outlines the establishment of VOCAT under the Act, the structure of VOCAT and the processes and procedures of VOCAT as required under the Act.
- 4.4 This chapter also provides an overview of current demand for VOCAT.

### Establishment of VOCAT

- 4.5 The Act established VOCAT as the body to hear and determine applications for financial assistance made by victims of crime.<sup>1</sup>
- 4.6 The Act prescribes the functions, powers and procedures of VOCAT and requires that in all matters before it, VOCAT must act:
- fairly
  - according to the substantial merits of the case
  - with as much expedition (promptness) as the requirements of the Act and a proper determination of the matter permit.<sup>2</sup>
- 4.7 VOCAT describes its role as one of hearing and determining applications for financial assistance made by victims of 'violent crime' and as providing a 'sympathetic and compassionate forum for applicants to relate their experience as victims of crime'.<sup>3</sup>
- 4.8 VOCAT has acknowledged it has an important role to play in providing practical and flexible assistance to victims, including in providing a therapeutic forum for victims to tell their story and have their experiences acknowledged.<sup>4</sup>

### The structure of VOCAT

- 4.9 VOCAT consists of tribunal members, who are magistrates. It comprises the Chief Magistrate and all magistrates and reserve magistrates under the *Magistrates' Court Act 1989* (Vic).<sup>5</sup> Each VOCAT hearing is constituted by a single tribunal member.<sup>6</sup>
- 4.10 Although located within the Magistrates' Court of Victoria, VOCAT is a separate entity with its own jurisdiction.

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1 *Victims of Crime Assistance Act 1996* (Vic) s 19.

2 *Ibid* s 32.

3 Victims of Crime Assistance Tribunal, *Our Role* (2016) <[www.vocat.vic.gov.au/about-tribunal/our-role](http://www.vocat.vic.gov.au/about-tribunal/our-role)>.

4 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 17.

5 *Victims of Crime Assistance Act 1996* (Vic) s 19(2).

6 *Ibid* s 21(1).

- 4.11 The Chief Magistrate appoints supervising magistrates to support the operation of VOCAT. Supervising magistrates encourage best practice across VOCAT and represent VOCAT in its dealings with other members of the judiciary, staff and the community.<sup>7</sup>
- 4.12 In addition, the Chief Magistrate has delegated tribunal powers to 10 judicial registrars to determine certain types of applications, including interim awards of financial assistance.<sup>8</sup> In 2015–16, judicial registrars determined almost 22 per cent of final awards.<sup>9</sup>
- 4.13 VOCAT operates in all 51 Magistrates' Court venues across Victoria.<sup>10</sup>

### Specialisation within the VOCAT structure

- 4.14 In 2006, VOCAT established a specialist Koori List which is now a permanent part of VOCAT operations. The list was created to ensure that the purposes and objectives of the Act could be achieved for Koori applicants.<sup>11</sup>
- 4.15 The Koori List does not apply any different legal considerations. All determinations are made within the framework of the Act. However, the list enables VOCAT to be more responsive to the circumstances of Koori victims of crime.<sup>12</sup>
- 4.16 VOCAT has stated that key to the success of the Koori List is the procedural flexibility and informality available under the Act which enable the Tribunal to respond flexibly to applicants' circumstances.<sup>13</sup> This may involve sitting at a table to hear participants, rather than at the bench, adopting a more informal approach and receiving culturally specific information from community representatives.<sup>14</sup>

### The procedure and process of VOCAT

- 4.17 VOCAT is not a court. VOCAT hearings are less formal than court hearings<sup>15</sup> and VOCAT is not bound by the rules of evidence.<sup>16</sup>
- 4.18 VOCAT's procedure, however, remains a legal process, which is bound by the provisions of the Act.<sup>17</sup>
- 4.19 As noted above, in deciding applications for financial assistance made by victims of crime, VOCAT has a duty to act fairly, expeditiously (promptly) and according to the merits of the case.<sup>18</sup>
- 4.20 In addition, VOCAT must give a party to the matter a reasonable opportunity to call or give evidence, examine, cross-examine or re-examine witnesses and to make submissions.<sup>19</sup>
- 4.21 VOCAT has the power to issue a warrant for arrest against a witness who has been served with a summons to attend a VOCAT hearing and who has failed to do so.<sup>20</sup> VOCAT also has broad investigative powers to make any enquiry and order any document or report that it requires.<sup>21</sup>
- 4.22 Figure 2 below outlines the VOCAT process and its relationship with other criminal and civil processes for victims.

7 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 14.

8 Ibid 13 and 25.

9 Ibid 28.

10 Ibid 13.

11 Victims of Crime Assistance Tribunal, *Koori VOCAT List Pilot: Review and Recommendations* (2010) 9.

12 Ibid 10.

13 Ibid 9.

14 Ibid 13–14.

15 Section 38(1)(a) of the *Victims of Crime Assistance Act 1996* (Vic) provides that VOCAT is not required to conduct itself in a formal manner.

16 Ibid s 38. See also Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 25.

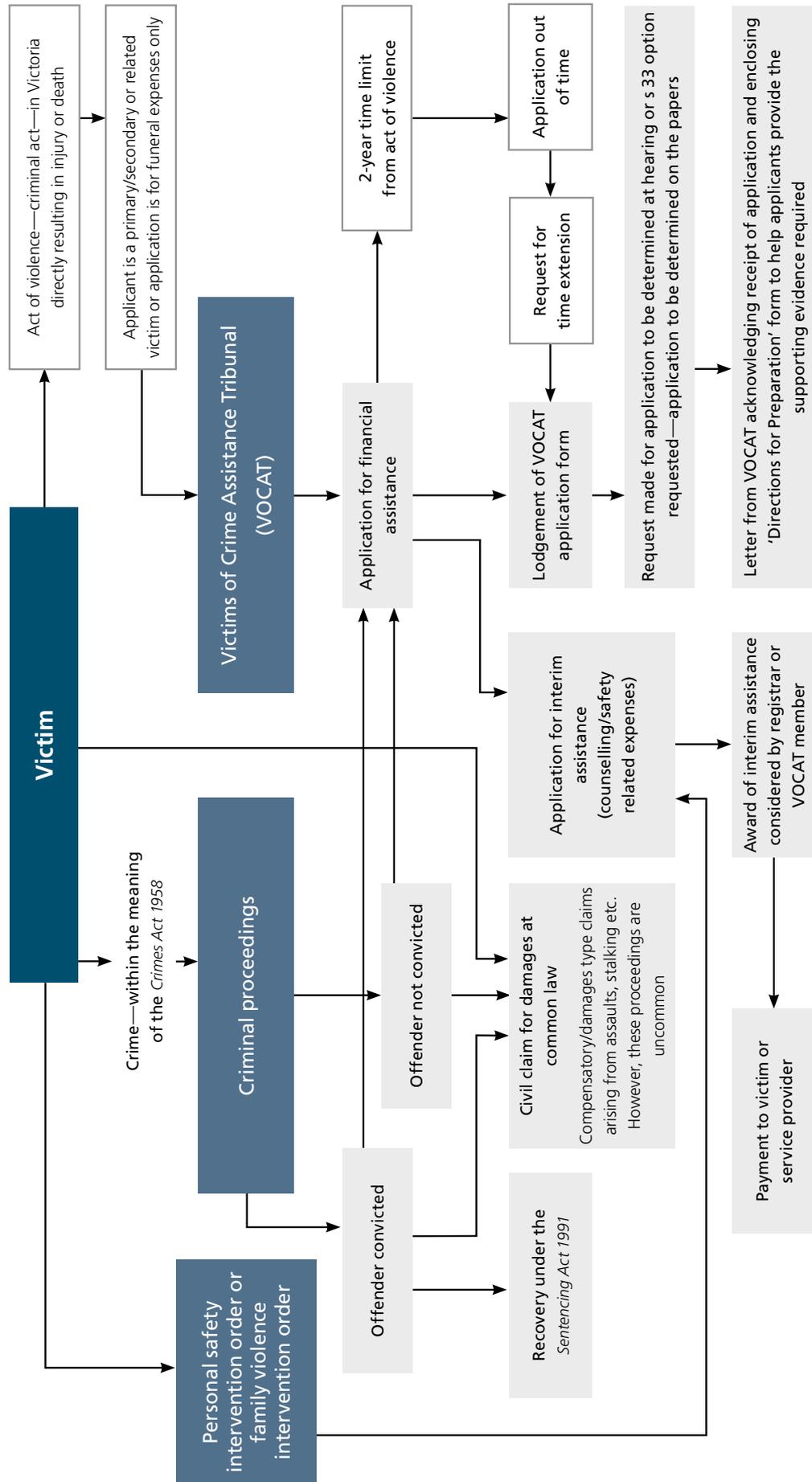
17 Section 20 of the *Victims of Crime Assistance Act 1996* (Vic) provides that VOCAT has the functions, powers and duties conferred on it by the Act. See also Victims Support Agency, Department of Justice and Regulation (Vic), *Counselling for Victims of Crime* (2011) 63.

18 *Victims of Crime Assistance Act 1996* (Vic) s 32(1).

19 Ibid s 38(1)(c).

20 Ibid s 37(1A).

21 Ibid s 39.



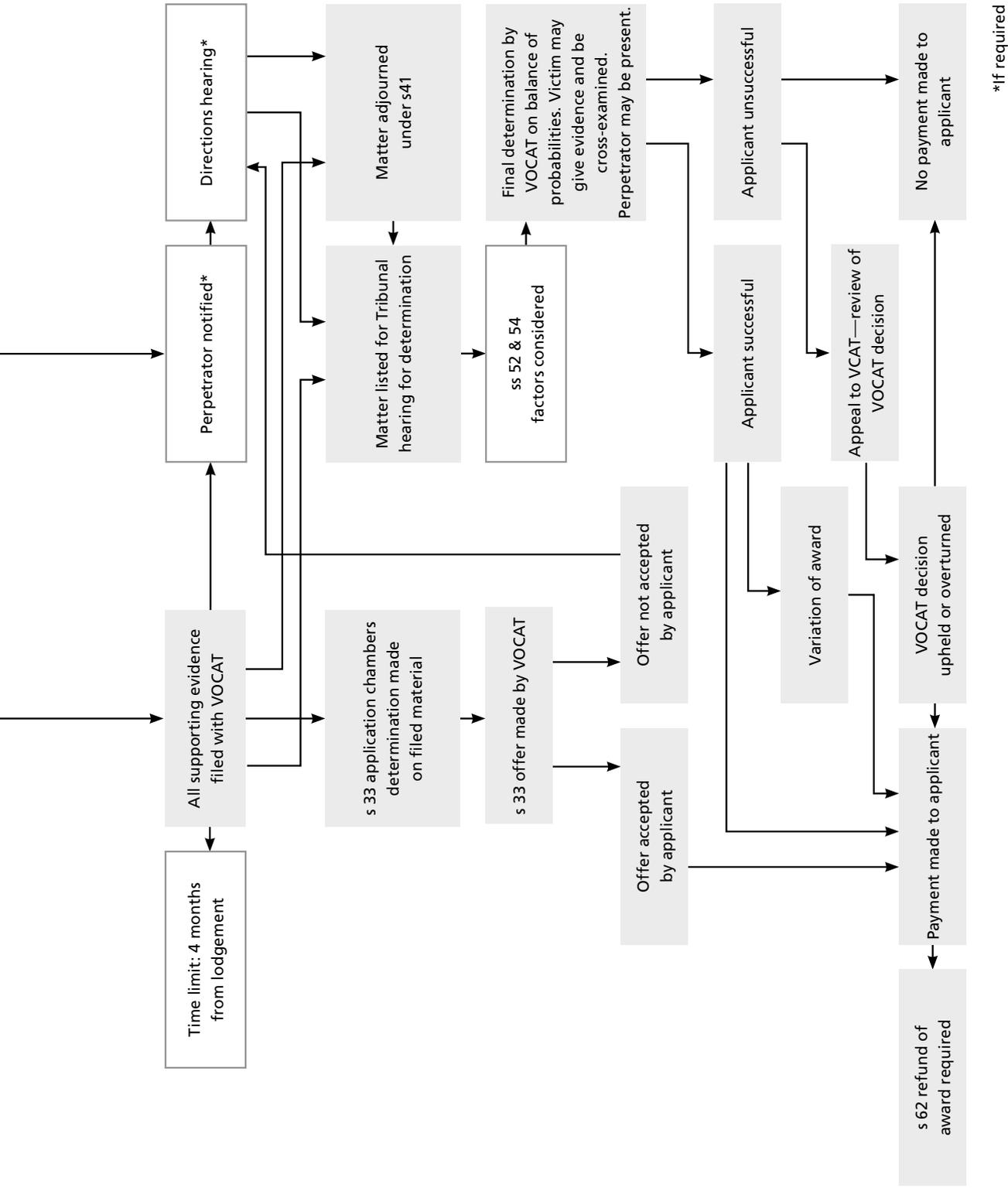


Figure 2: The VOCAT process for victims in context

## VOCAT demand

- 4.23 In its submission to the Victorian Royal Commission into Family Violence, the Magistrates' Court stated there had been a 337 per cent increase in VOCAT's case load between 2001–02 and 2013–14.<sup>22</sup>
- 4.24 In 2015–16 there were 6221 applications to VOCAT, representing an increase of 2.8 per cent from 2014–15.<sup>23</sup> In 2015–16, there were 4161 awards of financial assistance.<sup>24</sup> This is a decrease of 6.7 per cent from the previous financial year.
- 4.25 The average amount of financial assistance awarded by VOCAT in 2015–16 was \$7784.<sup>25</sup>

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22 Magistrates' Court of Victoria and Children's Court of Victoria, Submission No 978 to Royal Commission into Family Violence, *Royal Commission into Family Violence*, June 2015, 45.

23 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 32.

24 Ibid.

25 Ibid 33.

## PART TWO: ADDRESSING ISSUES WITH THE ACT

# Eligibility for assistance by VOCAT

- 38** Introduction to Part Two
- 39** Introduction to Chapter 5
- 39** Who is eligible?
- 45** Discussion and options for reform

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## 5. Eligibility for assistance by VOCAT

### Introduction to Part Two

- 5.1 This part of the supplementary consultation paper provides an overview of the key issues with the *Victims of Crime Assistance Act 1996* (Vic) (the Act) relevant for all victims of crime as identified in the supplementary terms of reference.
- 5.2 Many of these issues are the same or substantially similar to the issues with the Act raised in the first consultation paper, *Family Violence and the Victims of Crime Assistance Act 1996 Consultation Paper* as relevant to victims of family violence.<sup>1</sup> However, the supplementary terms of reference also raise a number of new matters for consideration which are also considered in this part.
- 5.3 The key issues are:
- the eligibility test for assistance
  - the categories and quantum (amount) of awards
  - the time limits for making an application
  - the making of awards, including mandatory refusal of an award and review, variation and refund of awards
  - timeliness of awards
  - VOCAT hearing processes, including notification of the alleged perpetrator, use of VOCAT materials and determinations without a hearing
  - awareness and accessibility of the Victims of Crime Assistance Tribunal.
- 5.4 Each chapter in this part outlines the relevant provisions of the Act and the VOCAT process, considers how these provisions may affect victims and discusses options for reform.
- 5.5 This part follows the approach of the first consultation paper, drawing on reports and inquiries that relate to the supplementary terms of reference and on academic literature. This part also uses case law to highlight how the Act functions for all victims of crime. However, as the Commission found in relation to the first consultation paper, there are very few decisions of the Victims of Crime Assistance Tribunal (VOCAT) publicly available. Accordingly, the Commission mainly relies upon review decisions by the Victorian Civil and Administrative Tribunal (VCAT) and the Supreme Court of Victoria.

## Introduction to Chapter 5

- 5.6 This chapter discusses the eligibility criteria that an applicant must meet in order to be granted financial assistance under the Act.
- 5.7 It relates to issues raised in the second, third and fourth matters of the supplementary terms of reference, which ask the Commission to consider:
- whether the Act recognises the appropriate people as victims
  - the tests for eligibility for assistance
  - the definition of ‘act of violence’.
- 5.8 This chapter details the difficulties some victims can experience because of the narrow definitions used in the eligibility criteria. In particular, this chapter discusses obstacles that can be encountered in relation to:
- the different victim categories under which an applicant can apply for assistance
  - the requirement for there to have been an ‘act of violence’
  - the requirement for there to have been ‘injury’, ‘death’ or a ‘significant adverse effect’
  - the requirement that the injury, death or significant adverse effect is the ‘direct result’ of the act of violence.
- 5.9 The chapter also sets out some options for reform to improve access for victims, and poses questions for consideration.

## Who is eligible?

- 5.10 In summary, a person is eligible for financial assistance under the Act if they are the ‘primary’, ‘secondary’ or ‘related’ victim of an ‘act of violence’, and that act of violence directly results in their suffering ‘injury’, ‘death’ or, for primary victims, ‘a significant adverse effect’.

## The victim categories

- 5.11 Under the Act there are three categories of victim who may be eligible for assistance:
- primary victims
  - secondary victims
  - related victims.
- 5.12 Depending on the category under which a person makes an application, he or she will be eligible for different kinds of assistance. The categories and quantum (amount) of financial assistance available are discussed in Chapter 6. This chapter focuses on eligibility.
- 5.13 Under the Act, an applicant can only apply to VOCAT in one capacity— even if she or he is eligible under multiple victim categories.<sup>2</sup>

## Primary victims

- 5.14 Under the Act, there are two ways that a person can be a primary victim:
- Section 7(1) states that ‘a primary victim is a person who is injured or dies as a direct result of an act of violence committed against him or her’. Section 8A(1) adds that a person is also a primary victim ‘if he or she experiences or suffers a significant adverse effect as a direct result of an act of violence’.
  - Section 7(2) provides that a person is also a primary victim if they are injured or die as a direct result of trying to arrest a perpetrator of an act of violence, trying to prevent an act of violence or trying to aid or rescue a victim of an act of violence.

- 5.15 To qualify as a primary victim under section 7(2), the attempt to arrest, prevent, aid or rescue must be proactive.<sup>3</sup> This means that if a person accidentally interrupts an act of violence, even if it ultimately prevents the offence or assists the victim, she or he is not a primary victim. In *Smith v Victims of Crime Assistance Tribunal*,<sup>4</sup> a daughter who went to check on her mother and inadvertently interrupted an assault by her father was found to be a secondary, rather than primary, victim.
- 5.16 Section 7(2) also provides that the person intervening in an act of violence only has to 'believe on reasonable grounds' that someone has committed an act of violence, or that someone is the victim of an act of violence, in order to be a primary victim on this basis.
- 5.17 If the primary victim dies, her or his right to receive financial assistance under the Act does not survive for the benefit of her or his estate.<sup>5</sup>

### Secondary victims

- 5.18 The Act provides that there are two ways for a person to be a secondary victim:
- Section 9(1) states that a person is a secondary victim if they are present at the scene of an act of violence and are injured as a direct result of witnessing that act.
  - Section 9(2) states that a person is a secondary victim if they are the parent or guardian of a primary victim, who is under 18 at the time of the event, and they are injured as a direct result of subsequently becoming aware of the act of violence against their child.
- 5.19 The Act provides that a person is not a secondary victim under section 9(2) if they commit or are criminally responsible for the act of violence committed against the primary victim.<sup>6</sup>

### Related victims

- 5.20 A person is a 'related victim' under the Act if there is a primary victim who has died as a direct result of an act of violence and the person is:
- a 'close family member' of the deceased primary victim
  - a 'dependent' of the deceased primary victim
  - someone who has an 'intimate personal relationship' with the deceased primary victim.<sup>7</sup>
- 5.21 The Act defines a 'close family member' as a 'person who had a genuine personal relationship with the victim at the time of the death' and is the spouse, parent, guardian, step-parent, child (including by guardianship), step-child, brother, sister, step-brother or step-sister of the victim.<sup>8</sup> This list is exhaustive and excludes other types of family members.
- 5.22 A 'dependant' means an individual who was wholly or substantially dependent on the victim's income before the commission of the act of violence, or the child of a victim who would have been dependent on the victim but who was born after their death.<sup>9</sup>
- 5.23 'Intimate personal relationship' is not defined in the Act. However, the term 'intimate personal relationship' has been the subject of judicial consideration. In *Reid v Victims of Crime Assistance Tribunal*,<sup>10</sup> VCAT held that some or all of the following factors could indicate the existence of an 'intimate personal relationship':

3 *Smith v Victims of Crime Assistance Tribunal* [2003] VCAT 1489 (22 October 2003) [25].

4 *Ibid.*

5 *Victims of Crime Assistance Act 1996* (Vic) s 5.

6 *Ibid* s 9(3).

7 *Ibid* s 11(1).

8 *Ibid* s 3(1).

9 *Ibid.*

10 [2002] VCAT 373 (24 May 2002) [15].

- an ongoing sexual relationship
  - an ongoing emotional commitment
  - an ongoing provision of comfort, support and advice of a personal nature
  - an ongoing sharing of confidences, intimacies and personal information
  - an ongoing sharing of social contacts and attendances at social functions.<sup>11</sup>
- 5.24 In that case, VCAT also held that the following factors (in the absence of other indicators) may not constitute an ‘intimate personal relationship’:
- financial or other material support
  - a sharing of residential property
  - occasional contact personally or by correspondence or telephone
  - meeting or sharing at times of family events, including religious, ethnic or other holiday periods.<sup>12</sup>
- 5.25 Based on these factors, VCAT found in *Reid v Victims of Crime Assistance Tribunal* that a close relationship between an aunt and a niece did not constitute an ‘intimate personal relationship’.<sup>13</sup>
- 5.26 In addition, in order to be a related victim or a secondary victim, there must be a primary victim. In *McKenna v Victims of Crime Assistance Tribunal*,<sup>14</sup> VCAT held that the mother of an unborn child, who died in the womb as the result of an act of violence, was not a related victim.<sup>15</sup> This is because the unborn child was not a ‘person’ for the purposes of the definition of a primary victim in the Act.<sup>16</sup>
- 5.27 The Act also excludes related victims from applying for financial assistance under the Act if they commit or are criminally responsible for the act of violence in question.<sup>17</sup>

### The requirement for ‘an act of violence’

- 5.28 To be eligible for assistance under any of the three victim categories, the Act requires that there must have been an ‘act of violence’.
- 5.29 An ‘act of violence’ is defined under the Act as a ‘criminal act’ or ‘a series of related criminal acts’ that occurred in Victoria and that ‘directly resulted in injury or death to one or more persons’.<sup>18</sup>
- 5.30 The Act defines a ‘criminal act’ as an act or omission that is a ‘relevant offence’.<sup>19</sup> The term ‘relevant offence’ is also defined in the Act as the following offences:
- an offence that involves an assault, an injury or a threat of injury to a person and which is punishable by imprisonment<sup>20</sup>
  - sexual offences contained in subdivisions 8A, 8B, 8C, 8E or 8FA of division 1 of part I of the *Crimes Act 1958* (Vic), which include rape, sexual assault, sexual offences against children, incest, sexual offences against persons with a cognitive impairment and other sexual offences, as well as the common law offences of rape or assault with intent to rape<sup>21</sup>

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11 Ibid.  
 12 Ibid [16].  
 13 Ibid [18]—[26].  
 14 [2003] VCAT 1488 (22 October 2003).  
 15 Ibid [42]–[44].  
 16 Ibid.  
 17 *Victims of Crime Assistance Act 1996* (Vic) s 11(2).  
 18 Ibid s 3(1).  
 19 Ibid.  
 20 Ibid.  
 21 Ibid.

- the offences of stalking, child stealing and kidnapping<sup>22</sup>
- conspiracy, incitement or an attempt to commit any of the offences listed above.<sup>23</sup>

5.31 In addition, the Act defines a 'criminal act' as including an act or omission that would have constituted one of the relevant offences if the perpetrator had not been incapable of criminal responsibility due to their age, mental impairment or the existence of any other defence.<sup>24</sup>

5.32 In a number of cases, VCAT has held that an 'act of violence' must involve an offence against the person and does not include property offences.<sup>25</sup> This means that a person whose house is the subject of the offence of arson, for example, is not eligible for assistance under the Act.<sup>26</sup>

### The requirement for 'injury', 'death' or a 'significant adverse effect'

5.33 The Act requires that for a victim to be eligible for assistance, they must have not only experienced an 'act of violence' but that act of violence must have directly resulted in their 'injury' or 'death',<sup>27</sup> and/or, for primary victims, a 'significant adverse effect'.<sup>28</sup>

### Establishing injury or death

5.34 The requirement to establish injury or death varies depending on the category of victim:

- For primary victims, it needs to be established that the act of violence directly resulted in their death or injury.<sup>29</sup>
- Secondary victims applying under section 9(1) need to establish that they were injured as a direct result of witnessing the act of violence. Secondary victims applying under section 9(2) as a parent of a primary victim need to establish two injuries:
  - first, that the act of violence directly resulted in the death or injury of their child as the primary victim, and
  - second, that they personally suffered injury as a direct result of becoming aware of the act of violence.
- Related victims need to establish that the act of violence directly caused the death of their close relation as the primary victim.

5.35 'Injury' is defined in the Act as:

- actual physical bodily harm
- mental illness or disorder or exacerbation of a mental illness or disorder, whether or not flowing from nervous shock
- pregnancy
- any combination of these matters arising from an act of violence.<sup>30</sup>

22 Ibid. The offences referred to are those contained in ss 21A(1), 63 and 63A of the *Crimes Act 1958* (Vic) and any corresponding previous enactment.

23 *Victims of Crime Assistance Act 1996* (Vic) s 3(1).

24 Ibid. See also *BVB v Victims of Crime Assistance Tribunal* (2010) 27 VR 425, in which the fact that the perpetrators were children did not prevent the primary victim from making an application for assistance, and *Gulcan v Victims of Crime Assistance Tribunal* [2007] VCAT 2372, in which the fact that the driver of a car was suffering an epileptic fit when they struck the primary victim did not stand in the way of the primary victim's claim.

25 See *Lowe v Victims of Crime Assistance Tribunal* [2004] VCAT 1092 (8 June 2004) [15]; *Purcell v Victims of Crime Assistance Tribunal* (13 June 2011) [18]; *Matthews v Victims of Crime Assistance Tribunal* [2012] VCAT 1099 (27 July 2012) [18]–[19].

26 See, eg, *Lowe v Victims of Crime Assistance Tribunal* [2004] VCAT 1092 (8 June 2004); *Matthews v Victims of Crime Assistance Tribunal* [2012] VCAT 1099 (27 July 2012).

27 *Victims of Crime Assistance Act 1996* (Vic) ss 7, 9 and 11.

28 Ibid s 8A.

29 Ibid s 7.

30 Ibid s 3(1).

- 5.36 The meaning of ‘actual physical bodily harm’ was considered in *RBA v Victims of Crime Assistance Tribunal*.<sup>31</sup> In that case, VCAT held that while ‘actual physical bodily harm’ does not include transitory pain that lasts for a matter of minutes, it can include pain that lasts for a period of days.<sup>32</sup>
- 5.37 The term ‘mental illness or disorder’ is also not defined in the Act. It appears to be generally understood by VCAT to mean any mental injury that constitutes a recognised psychiatric or psychological disorder.<sup>33</sup>
- 5.38 However, in some cases, the presence of psychiatric symptoms without a diagnosis of a disorder has been enough to qualify as a ‘mental injury or disorder’ under the Act. For example, in *AVA v Victims of Crime Assistance Tribunal*,<sup>34</sup> which concerned an application by a child in relation to her mother’s partner having taken indecent photos of her while she was asleep, VCAT had found that the applicant’s ‘shyness and anxiety problems’ did not constitute a mental injury.<sup>35</sup> On appeal, however, VCAT found that the presence of anxiety symptoms without an anxiety disorder still amounted to a mental injury for the purposes of the Act.<sup>36</sup>
- 5.39 The Act also deems a person to be suffering an injury if VCAT is satisfied on medical or psychological evidence that treatment or counselling is required as a result of ‘trauma’ associated with an act of violence.<sup>37</sup> VCAT has interpreted the word ‘trauma’ to ‘include not only physical injury but also psychological injury of a “startling experience which has a lasting effect on mental life; a shock”’.<sup>38</sup>
- 5.40 The Act expressly provides that ‘injury’ does not include injury arising from property loss or damage.<sup>39</sup>

### Significant adverse effect

- 5.41 Under the Act, financial assistance can also be claimed if a victim has experienced or suffered a ‘significant adverse effect’.<sup>40</sup>
- 5.42 There are two circumstances in which this can occur:
- First, a primary victim may be eligible for ‘special financial assistance’ under section 8A if he or she suffers a ‘significant adverse effect’ as a direct result of an act of violence. The category of ‘special financial assistance’ is discussed in more detail in Chapter 6.
  - Second, a secondary victim may make a claim for assistance in relation to an act of violence that results in a ‘significant adverse effect’ for the primary victim.<sup>41</sup> However, in this scenario, the secondary victim still needs to establish that she or he personally suffered an ‘injury’ as a result of witnessing or learning about the act of violence.<sup>42</sup>
- 5.43 A ‘significant adverse effect’ is defined in the Act to include ‘any grief, distress, trauma or injury experienced or suffered by the victim as a direct result of the act of violence’.<sup>43</sup>
- 5.44 However, as with ‘injury’, the Act provides that a ‘significant adverse effect’ does not include any property loss or damage.<sup>44</sup>

31 [2009] VCAT 2225 (26 October 2009).

32 Ibid [21].

33 See, eg, *RBA v Victims of Crime Assistance Tribunal* [2009] VCAT 2225 (26 October 2009) [20]. While VCAT accepted that the applicant was a ‘traumatised person’, it found that there was no evidence that she suffered a mental illness or disorder.

34 [2010] VCAT 2078 (23 December 2010).

35 Victims of Crime Assistance Tribunal cited in *AVA v Victims of Crime Assistance Tribunal* [2010] VCAT 2078 (23 December 2010) [29].

36 Ibid [74]–[75].

37 *Victims of Crime Assistance Act 1996* (Vic) s 3(2).

38 *J v Victims of Crime Assistance Tribunal* [2002] VCAT 532 (24 July 2002) [83].

39 *Victims of Crime Assistance Act 1996* (Vic) s 3(1).

40 Ibid s 8A.

41 See interpretation of significant adverse effect and injury, *Victims of Crime Assistance Act 1996* (Vic) ss 3(2), 3(3).

42 Ibid s 9.

43 Ibid s 3(1).

44 Ibid.

## Connecting ‘injury’ with the ‘act of violence’— the requirement for causation

- 5.45 As already noted, the Act requires that an act of violence must ‘directly result’ in the victim’s injury, death or a significant adverse effect.
- 5.46 The ‘but for’ test is frequently used by VCAT to establish whether the act of violence directly resulted in the victim’s injury.<sup>45</sup> This means that the test is: ‘But for the act of violence, would the victim have experienced the injury?’
- 5.47 However, despite using it frequently, VCAT has not held that the ‘but for’ test is the only way to establish causation under the Act. In *JM v Victims of Crime Assistance Tribunal*,<sup>46</sup> the judge stated:
- it is unnecessary for me to decide whether satisfaction of the ‘but for’ test is in fact a prerequisite. I add by way of comment that the argument in support of the ‘but for’ test seems compelling.<sup>47</sup>
- 5.48 Accordingly, there is a possibility that a causal connection may be established in another way. What this might be remains unclear.

## Standard of proof

- 5.49 The standard of proof for establishing both that an act of violence occurred and that it directly resulted in an injury is the ‘balance of probabilities’.<sup>48</sup> This is a lower standard of proof than the criminal standard of ‘beyond reasonable doubt’. (See Glossary on page xi.)
- 5.50 In determining whether this standard has been met in applications made under the Act, VCAT has frequently applied the test set out in *Briginshaw v Briginshaw*.<sup>49</sup> In that case, Mr Justice Dixon said:
- when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found ... The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.<sup>50</sup>
- 5.51 In other words, under this test, the strength of the evidence required to determine whether or not a fact exists on the ‘balance of probabilities’ may vary depending on the seriousness of an allegation.<sup>51</sup>
- 5.52 In the context of the Act, in which VCAT must find whether or not a ‘criminal act’ occurred, the allegation will almost always be of a serious nature. This means that VCAT proceedings might require a higher standard of evidence than some other civil matters.
- 5.53 However, in a number of cases, VCAT has held that while the *Briginshaw* test is relevant, the beneficial intent of the Act should also be taken into account when making a determination of fact with respect to an application for financial assistance.<sup>52</sup> In particular, it has pointed to the Act’s stated purpose of recognising the effect of an act of violence on victims of crime and expressing the community’s sympathy and condolence.<sup>53</sup>

45 See, eg, *L v Victims of Crime Assistance Tribunal* [2004] VCAT 496 (27 July 2004); *JM v Victims of Crime Assistance Tribunal* [2002] VCAT 496 (17 June 2002).

46 [2002] VCAT 496 (17 June 2002).

47 *Ibid* [14].

48 *Victims of Crime Assistance Act 1996* (Vic) s 31.

49 (1938) 60 CLR 336. For VCAT’s application of this test to the Act, see, eg, *BFK v Victims of Crime Assistance Tribunal* [2017] VCAT 289 (15 March 2017) [16]; *Kirk v Victims of Crime Assistance Tribunal* [2007] VCAT 971 (13 June 2007) [37]; *Rajah v Victims of Crime Assistance Tribunal* [2002] VCAT 1422 (6 December 2002) [17].

50 *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361–2.

51 *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170, 171. See also *BFK v Victims of Crime Assistance Tribunal* [2017] VCAT 289 (15 March 2017) [16].

52 See, eg, *J v Victims of Crime Assistance Tribunal* [2002] VCAT 532 (24 July 2002) [48]; *FG v Victims of Crime Assistance Tribunal* [2011] VCAT 2449 (1 September 2011) [34].

53 *J v Victims of Crime Assistance Tribunal* [2002] VCAT 532 (24 July 2002) [48].

## Discussion and options for reform

- 5.54 As discussed in the first consultation paper in relation to family violence victims, the eligibility criteria under the Act can be a barrier for some victims to access assistance.<sup>54</sup>
- 5.55 In particular, the narrow definitions in the Act of ‘victim’, ‘act of violence’ and ‘injury’ can make it difficult for victims of crime to claim assistance successfully.
- 5.56 This section of the paper considers whether the eligibility criteria under the Act enable the appropriate people to be recognised as victims, as well as whether they are adequate to account for the kinds of harm suffered by victims. It also sets out options for reform.
- 5.57 The Commission seeks the views of victims, persons affected, professionals, stakeholders and the community on what changes should be made so that the appropriate people have access to financial assistance under the Act. Specific questions are set out below.

### The victim categories

- 5.58 The distinction between primary, secondary and related victims has the effect of creating a hierarchy of victimhood. However, this does not reflect some victims’ experiences of violent crime or account for their needs.
- 5.59 In addition, the definitions and categories of ‘primary victim’, ‘secondary victim’ and ‘related victim’ in the Act exclude people, such as some family members and people who assist crime victims in the aftermath of an act of violence. Because of the ripple effects of violent crime, they are also crime victims in the broader sense.
- 5.60 Finally, there are some other groups of victims, such as children who hear or are otherwise exposed to violence but who do not witness it, who do not fit into the victim categories of the Act as currently constructed.
- 5.61 Accordingly, in considering options for reform this section focuses on the following groups of people, who face difficulties in relation to the victim categories under the Act:
- children who hear, witness or are otherwise exposed to violence
  - people who assist in the aftermath of an act of violence
  - family members who are injured by becoming aware of the act of violence
  - family members who do not constitute ‘close family members’ under the ‘related victims’ category.
- 5.62 This section discusses these issues and sets out options for reform.
- 5.63 The Commission seeks the views of victims, persons affected, professionals, stakeholders and the community on what changes should be made to the victim categories to ensure that the Act recognises appropriate people as victims. Specific questions for consideration are also set out below.

### Children who hear, witness or are otherwise exposed to violence

- 5.64 In addition to violence being directly perpetrated against them, children often experience violence by hearing it, witnessing it or being exposed to it. As the first consultation paper discussed, this is especially so for child victims of family violence.<sup>55</sup> However, children can also hear, witness or be exposed to violence in other contexts.<sup>56</sup>

54 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) ch 6.

55 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017), 49-50 [6.74]–[6.79]. See also, Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 2; Kelly Richards, *Children’s Exposure to Domestic Violence in Australia*, Trends and Issues in Crime and Criminal Justice No 419 (Australian Institute of Criminology, 2011); Monica Campo, *Children’s Exposure to Domestic and Family Violence: Key Issues and Responses*, CFC Paper No 36 (Australian Institute of Family Studies, 2015); K O’Brian et al, ‘Lifting the Cloak of Silence: Resilient Australian Women’s Reflected Memories of Their Childhood Experiences of Witnessing Domestic Violence’ (2013) 28 *Journal of Family Violence* 95; United Nations Children’s Fund, *Behind Closed Doors: The Impact of Domestic Violence on Children* (UNICEF, 2006).

56 See, eg, David Finkelhor et al, ‘Prevalence of Childhood Exposure to Violence, Crime and Abuse: Results from the National Survey of Children’s Exposure to Violence’ (2015) 169(8) *JAMA Pediatrics* 746; Daniel Flannery, Kelly Wester and Mark Singer, ‘Impact of Exposure to Violence in School on Child and Adolescent Mental Health and Behavior’ (2004) 32(5) *Journal of Community Psychology* 559.

- 5.65 Research demonstrates that hearing, witnessing or being exposed to violence can have far-reaching developmental and psychological consequences for children.<sup>57</sup> These adverse effects can sometimes be similar to those experienced by children against whom violence is directly perpetrated.
- 5.66 The impact of children’s exposure to violence is recognised in the context of family violence in both Victorian and Commonwealth legislation. For example, causing a child to hear, witness or be exposed to violence constitutes ‘family violence’ in the *Family Violence Protection Act 2008* (Vic)<sup>58</sup> and ‘abuse in relation to a child’ in the *Family Law Act 1975* (Cth).<sup>59</sup>
- 5.67 However, under the *Victims of Crime Assistance Act 1996* (Vic) (the Act), children who witness violence are classified as ‘secondary victims’, rather than ‘primary victims’. This is illustrated by *NF v Victims of Crime Assistance Tribunal*,<sup>60</sup> in which the applicant, who witnessed his father beat his step-father to death when he was eight years old, was only able to apply as a secondary or related victim. This was despite the severe psychological impact the violence had on him.<sup>61</sup>
- 5.68 The classification of child victims who hear, witness or are exposed to violence as ‘secondary victims’ can therefore fail to acknowledge their lived experience and the devastating effect that such violence may have on them. As the Royal Commission into Family Violence stated, ‘children and young people experiencing family violence should be recognised as victims in their own right’.<sup>62</sup>
- 5.69 In addition, categorising such child victims as secondary victims affects the categories and quantum of award for which they are eligible. For example, it prevents them from accessing special financial assistance, which is only available to primary victims.<sup>63</sup> This is problematic as special financial assistance, which is a lump-sum payment for which the applicant is not required to establish that she or he has suffered an injury, can be beneficial for child victims due to difficulties in anticipating their future level of injury and suffering.<sup>64</sup> The categories and quantum of awards under the Act are discussed in more detail in Chapter 6.
- 5.70 Moreover, children who are exposed to violence, but do not directly witness it or are not present at the time of the act of violence, may not fall into any victim category under the Act. In the context of family violence, children can be exposed to violence by overhearing threats, being present when police officers attend an incident, providing comfort to the victim or by cleaning up in the aftermath of the violence.<sup>65</sup> However, as a child will only be considered a secondary victim if she or he was present at the time of the act of violence and witnessed it,<sup>66</sup> the child victims in those examples may be ineligible for financial assistance under the Act.
- 5.71 An option to recognise children who witness, hear or are exposed to violence as ‘primary victims’, is to amend the definition of ‘primary victim’ in section 7. This could be done, for example, by inserting into section 7 a new subsection (3), which states that ‘a person is also a primary victim of an act of violence if he or she is injured or dies as a

57 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 2, 106–12; Kelly Richards, *Children’s Exposure to Domestic Violence in Australia*, Trends and Issues in Crime and Criminal Justice No 419 (Australian Institute of Criminology, 2011) 1–3; Monica Campo, *Children’s Exposure to Domestic and Family Violence: Key Issues and Responses*, CFCA Paper No 36 (Australian Institute of Family Studies, 2015) 6–8.

58 *Family Violence Protection Act 2008* (Vic) s 5(1)(b).

59 *Family Law Act 1975* (Cth) ss 4(1), s 4AB(3) and (4).

60 [2012] VCAT 1740 (16 November 2012).

61 The applicant suffered from chronic post-traumatic stress disorder and substance abuse: *ibid* [40]–[46].

62 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 2, 142.

63 See *Victims of Crime Assistance Act 1996* (Vic) s 8A(1).

64 For the difficulties in anticipating the future injuries of child victims of sexual assault, see, eg, Christine Forster and Patrick Parkinson, ‘Compensating Child Sexual Assault Victims Within Statutory Schemes: Imagining a More Effective Compensatory Framework’ (2000) 23(2) *University of New South Wales Law Journal* 172, 189.

65 These are examples of children witnessing, hearing or being exposed to family violence listed in s 5(1) of the *Family Violence Protection Act 2008* (Vic).

66 *Victims of Crime Assistance Act 1996* (Vic) s 9(1).

direct result of witnessing, hearing or being exposed to violence and he or she was under the age of 18 years at the time of the commission of that act’.

- 5.72 Another way of including children who witness, hear or are exposed to violence as ‘primary victims’ in the Act is to expand the definition of an ‘act of violence’. This option could be either implemented generally to include exposure to all types of violence, or it could be done only in relation to exposure to certain forms of violence, such as family violence. This specific option for reform is considered further below in the context of the child victims and the definition of an ‘act of violence’ in the Act at [5.142]. However, it should be noted here that if the definition of an ‘act of violence’ were amended to include causing a child to hear, witness or be exposed to an act of violence, then children who experience violence in this way would also be considered ‘primary victims’ for the purposes of the Act.

### People who render assistance to victims after an act of violence has occurred

- 5.73 Another group that may not be captured by the existing victim categories in the Act are people who provide care and assistance to the victim after an act of violence has occurred, such as family members and paramedics.
- 5.74 As mentioned above, people who are injured or die as a direct result of trying to aid or rescue someone whom they believe on reasonable grounds to be a victim of an act of violence constitute ‘primary victims’ under section 7(2)(c) of the Act.
- 5.75 However, section 7(2)(c) of the Act has been interpreted narrowly by VCAT to require proactive and substantial aid at the time of the act of violence or immediately thereafter.<sup>67</sup> As the case law demonstrates, this interpretation can exclude those who provide other forms of care and assistance in the aftermath of an act of violence, including family members, paramedics and other medical professionals.
- 5.76 In *Smith v Victims of Crime Assistance Tribunal*,<sup>68</sup> the applicant made a claim for assistance as a primary victim pursuant to section 7(2)(c) of the Act on the basis that she had inadvertently interrupted an assault on her mother by her father. After entering her mother’s room, the applicant assisted her mother by staying with her, collecting a flannel and bowl to clean her wounds and putting her brother to bed.<sup>69</sup> This incident resulted in the applicant suffering from post-traumatic stress disorder.<sup>70</sup>
- 5.77 In that case, VCAT held that the applicant was not a primary victim, as the assistance she had rendered did not constitute ‘aid’ as contemplated by the Act. This is because it was ‘no more than offering first aid ... after the event’.<sup>71</sup> VCAT found that to view such assistance as aid within the meaning of section 7(2)(c) would ‘mean any ambulance officer or paramedic giving assistance ... would be entitled as a primary victim’,<sup>72</sup> which was ‘clearly not an intended consequence when the legislative history was considered’.<sup>73</sup> However, VCAT did find that the applicant was a ‘secondary victim’, as she had been injured by witnessing the act of violence.<sup>74</sup>
- 5.78 A similar issue arose in *Will v Victims of Crime Assistance Tribunal*.<sup>75</sup> In that case, the applicant was the mother of an adult primary victim who had been stabbed in the chest, resulting in major heart and lung injuries.<sup>76</sup> Although the applicant had not been present at the time of the stabbing, she attended on her son as soon as she was informed of the act of violence and stayed by his bedside for many hours a day for several months

67 See, eg, *Smith v Victims of Crime Assistance Tribunal* [2003] VCAT 1489 (22 October 2003); *Will v Victims of Crime Assistance Tribunal* [2011] VCAT 1739 (13 September 2011).

68 [2003] VCAT 1489 (22 October 2003).

69 *Ibid* [8].

70 *Ibid* [20].

71 *Ibid* [23].

72 *Ibid*.

73 *Ibid*.

74 *Ibid* [28]–[29].

75 [2011] VCAT 1739 (13 September 2011).

76 *Ibid* [1] and [3].

while he recovered in hospital.<sup>77</sup> The applicant suffered from depression and anxiety as a result.<sup>78</sup> VCAT held that she was not a primary victim under section 7(2)(c). It stated:

Section 7[2](c) is designed to cover a person who comes to the aid of someone being attacked or if after the attack they immediately step in and do things to assist the victim ... it does not refer to an act where a mother is sitting beside the bedside of her son.<sup>79</sup>

- 5.79 In addition, VCAT also rejected the applicant's claim as a 'secondary victim' on the grounds that she was not present at the time of the act of violence.<sup>80</sup> This finding is discussed in more detail below at [5.88].
- 5.80 The distinction between aid rendered to a victim at the time of an act of violence and assistance provided afterwards is potentially problematic when the purpose of section 7(2)(c) is considered. It appears that this provision is intended to elevate people who are not direct victims of an act of violence to the status of primary victims in order to, at least in part, reward the behaviour of 'good Samaritans'.<sup>81</sup> Dubber describes such provisions in crime victim compensation schemes as 'perhaps even an effort to encourage citizens to assist one another in times of need'.<sup>82</sup> If this is the case, then it may be appropriate for the Act to be amended to also recognise those who provide first aid in the aftermath of a violent crime, or those who spend many months attending on a victim following an act of violence.
- 5.81 Moreover, the assistance given by family members and medical professionals should not necessarily be viewed as less valuable or less traumatic for them simply because society expects them to render such assistance. As the cases of *Smith* and *Will* demonstrate, assisting family members after an act of violence can take a severe toll on a person's mental health.
- 5.82 To address these issues, the definition of 'primary victim' in the Act could be amended to recognise people who assist victims in a manner that does not currently amount to 'aid'. This could be done by inserting the word 'assist' into section 7(2)(c) so that it reads 'trying to aid, rescue or assist someone whom he or she believes on reasonable grounds is a victim of an act of violence'.
- 5.83 Additionally or alternatively, the Act could specify that section 7(2)(c) applies to aid and assistance rendered both at the time of the act of violence and afterwards, as long as there remains a causal connection between the aid and assistance and the act of violence. This would ensure that those who assist a victim after an act of violence has occurred would be included as primary victims.

### Family members who are injured by becoming aware of the act of violence

- 5.84 Another gap in relation to the victim categories in the Act is that most family members of a primary victim do not constitute 'secondary victims'.
- 5.85 As described above, the definition of 'secondary victim' is limited to persons who directly witness the act of violence and persons who are the parents or guardians of a primary victim aged under 18.
- 5.86 This means that other family members of the primary victim who were not present at the act of violence are excluded from this victim category. This includes the child and spouse of a primary victim, as well as the parent or guardian of a primary victim who is aged over 18 at the time of the act of violence.

77 Ibid [2]–[3].

78 Ibid [4].

79 Ibid [14].

80 Ibid [18]–[20].

81 Markus Dirk Dubber, *Victims in the War on Crime: The Use and Abuse of Victims' Rights* (New York University Press, 2002) 308.

82 Ibid.

- 5.87 Although some family members are able to apply as related victims under the Act, they may only do so if the primary victim has died as a direct result of the act of violence.<sup>83</sup> Accordingly, the child, spouse or parent of an adult primary victim who has been severely disabled as a direct result of an act of violence but who has not died, for example, may not be eligible for assistance under the Act.
- 5.88 This issue is again illustrated by *Will v Victims of Crime Assistance Tribunal*.<sup>84</sup> The applicant was the mother of a 22-year-old primary victim who had been stabbed. Although the mother had suffered a severe mental injury as a result of becoming aware of the act of violence against her son and subsequently providing assistance to him, VCAT rejected her application as a secondary victim because the applicant had not been present at the scene of the act of violence and her son was over the age of 18 at the time.<sup>85</sup>
- 5.89 This narrow definition of ‘secondary victim’ is at odds with extensive research demonstrating that non-perpetrator family members, partners and children of victims of violence can ‘experience the effects of trauma as well, sometimes with similar symptoms to those of primary victims’.<sup>86</sup> This is especially so for the family members of victims of sexual assault.<sup>87</sup>
- 5.90 Furthermore, there is potentially an inconsistency in classifying the parents of a ‘primary victim’ who is aged under 18 years as ‘secondary victims’, but not the underage children of a ‘primary victim’.
- 5.91 One option for reform is to extend the definition of a ‘secondary victim’ to include more family members than just the parents or guardians of a primary victim who is under 18.
- 5.92 This could be done by expanding the ‘secondary victim’ category to include the children of a primary victim. This is the approach of the Northern Territory scheme, which includes the child, step-child or child under guardianship of the primary victim, in addition to the parents, step-parents and guardian of the primary victim, in its definition of ‘secondary victim’.<sup>88</sup> The Northern Territory legislation appears to cover both the underage and the adult children of a primary victim. The Victorian Act could adopt this approach or it could specify that only a child who is under 18 years of age whose parent is a primary victim, constitutes a ‘secondary victim’.
- 5.93 Alternatively, the Victorian Act could go further than the Northern Territory scheme and include other close family members who are injured by becoming aware of the act of violence against the primary victim, such as the spouse and/or siblings of the primary victim.

### The related victim category and the treatment of family relationships

- 5.94 Another aspect of the victim categories under the Act that may be in need of review is the definition of ‘related victim’, which only covers a limited selection of family relationships.

83 See the definition of ‘related victim’ in *Victims of Crime Assistance Act 1996* (Vic) s 11(1).

84 [2011] VCAT 1739 (13 September 2011).

85 Ibid [18]–[20].

86 Australian Centre for the Study of Sexual Assault, ‘“Ripple Effects” of Sexual Assault’ (2007) 7 *ACSSA Issues*, <<https://aifs.gov.au/publications/ripple-effects-sexual-assault/secondary-victims-sexual-assault>>. See also David Riggs and Dean Kilpatrick, ‘Family and Friends: Indirect Victimization by Crime’ in Arthur Lurigio, Wesley Skogan and Robert Davis (eds) *Victims of Crime: Problems, Policies and Programs* (Sage, 1990) 122; Rob Davis, Bruce Taylor and Sarah Bench, ‘Impact of Sexual and Nonsexual Assault on Secondary Victims’ (1995) 10(1) *Violence and Victims* 73; Charles Figley and Rolf Kleber, ‘Beyond the “Victim”: Secondary Traumatic Stress’ in Rolf Kleber, Charles Figley and Berthold (eds) *Beyond Trauma: Cultural and Societal Dynamics* (Plenum Press, 1995) 75.

87 See, eg, Australian Centre for the Study of Sexual Assault, ‘“Ripple Effects” of Sexual Assault’ (2007) 7 *ACSSA Issues*, <<https://aifs.gov.au/publications/ripple-effects-sexual-assault/secondary-victims-sexual-assault>>; Diane Daane, ‘The Ripple Effects: Secondary Sexual Assault Survivors’ in Frances Reddington and Betsy Wright Kreisel (eds) *Sexual Assault: The Victims, the Perpetrators and the Criminal Justice System* (Carolina Academic Press, 2005).

88 *Victims of Crime Assistance Act 2006* (NT) s 11(2)(a) and (b).

- 5.95 A 'related victim' is defined as a close family member of, a dependent of, or someone in an intimate personal relationship with the primary victim.<sup>89</sup> The Act further defines a 'close family member' as a 'person who had a genuine personal relationship with the victim at the time of the death' and is the spouse, parent, guardian, step-parent, child (including by guardianship), step-child, brother, sister, step-brother or step-sister of the victim.<sup>90</sup>
- 5.96 This definition of 'close family member' excludes other family members, such as the grandparent, cousin or aunt of a primary victim. Other such family members may be able to make an application under the Act on the basis that they had an 'intimate personal relationship' with the deceased primary victim. However, 'intimate personal relationship' has been interpreted narrowly by VCAT.
- 5.97 For example, in *Reid v Victims of Crime Assistance Tribunal*,<sup>91</sup> VCAT found that the aunt of a primary victim who had been murdered did not have an 'intimate personal relationship' with the primary victim, and therefore was not a 'related victim', because they had had infrequent contact in the years preceding the primary victim's death.<sup>92</sup> VCAT reached this conclusion despite accepting that at times in the primary victim's life 'the Applicant [had] carried out the role that would normally have been assumed by the victim's mother'.<sup>93</sup> This decision indicates that it may be difficult for family members of a primary victim to make an application as a 'related victim' if they are not included in the definition of 'close family member'.
- 5.98 The limited family relationships covered by the category of 'related victim' may also be a particular issue for members of the Aboriginal and Torres Strait Islander community. This is because Aboriginal and Torres Strait Islander cultures place importance on relationships that are excluded by the Act. This includes relationships with grandparents and other elders, as well as with members of the wider kinship group who might not be a 'sister' or 'brother' in a biological or legal sense, but who are considered as such by the community.<sup>94</sup>
- 5.99 To address these issues, the definition of a 'related victim' in the Act could be amended to include more family relationships. For example, Victoria could follow the Western Australian approach of including grandchildren and grandparents.<sup>95</sup> This would allow the Act to recognise the close relationship between grandparents and grandchildren in Aboriginal and Torres Strait Islander communities.
- 5.100 Additionally or alternatively, the Act could make explicit provision for Aboriginal and Torres Strait Islander kinship relationships in the definition of 'related victim'. In both the Australian Capital Territory and Queensland, the definition of 'family member', for the purposes of being a 'related victim', includes a person who is regarded in Aboriginal or Torres Strait Islander tradition or custom as one of the listed types of family member.<sup>96</sup> The Victorian Act could be amended to also include a similar provision in its definition of 'close family member.'

89 *Victims of Crime Assistance Act 1996* (Vic) s 11(1).

90 *Ibid* s 3(1).

91 [2002] VCAT 373 (24 May 2002).

92 *Ibid* [23]–[25].

93 *Ibid* [20].

94 See generally Eleanor Bourke and Colin Bourke, 'Aboriginal Families in Australia' in Robyn Hartley (ed) *Families and Cultural Diversity in Australia* (Australian Institute of Family Studies, 1995) <<https://aifs.gov.au/publications/families-and-cultural-diversity-australia/3-aboriginal-families-australia>>.

95 *Criminal Injuries Compensation Act 2003* (WA) s 4(1).

96 *Victims of Crime Assistance Act 2009* (Qld) sch 3; *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 15(2)(b)(ii).

## The related victim category and the treatment of domestic partnerships

- 5.101 Another issue with the ‘related victim’ category is that it does not explicitly include domestic partners. A person’s ‘domestic partner’ describes someone to whom that person is not married, but with whom they are in a relationship involving cohabitation and/or personal or financial commitment and support of a domestic nature.<sup>97</sup> The term ‘domestic partner’ is also used here to include people who are in a registered relationship under the *Relationships Act 2008* (Vic).<sup>98</sup>
- 5.102 The definition of ‘close family member’ under the Act only refers to the primary victim’s ‘spouse’, defined under the Act to mean ‘a person to whom the person is married’.<sup>99</sup> This means that the domestic partner of a primary victim cannot make an application as a ‘close family member’ for the purposes of the ‘related victim’ category.<sup>100</sup>
- 5.103 Domestic partners may apply as a ‘related victim’ on the basis that they had an ‘intimate personal relationship’ with the primary victim. VCAT has provided a number of factors which might point towards the existence of an ‘intimate personal relationship’. These include an ongoing sexual relationship, an ongoing emotional commitment, providing comfort and support, sharing confidences and intimacies and sharing social contacts and attendances at social functions.<sup>101</sup> Based on these factors, a domestic partner would probably be able to establish an ‘intimate personal relationship’ with the primary victim.<sup>102</sup>
- 5.104 Nevertheless, this outcome is still subject to the discretion of the decision maker and there is no guarantee that domestic partners, including those in a registered relationship under the Relationships Act, will be recognised as related victims. This seems to be out-of-step with contemporary values, as well as with the way that such relationships are legally construed elsewhere. It is also inconsistent with other parts of the Act that recognise domestic partners. For example, section 10A, which concerns additional assistance available to secondary victims, includes ‘domestic partner’ alongside ‘spouse’ in its definition of ‘family member’.<sup>103</sup>
- 5.105 Moreover, the uncertainty in the Act in relation to the eligibility of domestic partners unfairly discriminates against LGBTIQ partners, who are currently unable to marry under Australian law.
- 5.106 The definition of ‘related victim’ could be amended to explicitly include domestic partners. Every other Australian jurisdiction, with the exception of Queensland and Tasmania, expressly provides that a ‘de facto partner’<sup>104</sup> or a ‘domestic partner’<sup>105</sup> is a related victim in their crime victim compensation legislation.
- 5.107 Moreover, the Australian Capital Territory legislation includes ‘domestic partner’ in addition to an ‘intimate partner’,<sup>106</sup> which it defines as ‘someone with whom the person has an intimate relationship, whether they are members of the same household or not’.<sup>107</sup> This approach is the most inclusive, as it automatically recognises relationships that are akin to marriage, while still leaving open the possibility for persons in other forms of relationship to apply for assistance.

97 See *Victims of Crime Assistance Act 1996* (Vic) s 3(1): definition of ‘domestic partner’.

98 Registered relationships are also included in the definition of ‘domestic partner’ in the Act: *ibid* s 3(1) and (4).

99 *Ibid* s 3(1).

100 This was confirmed by the Victorian Civil and Administrative Tribunal in *Reid v Victims of Crime Assistance Tribunal* [2002] VCAT 373 (24 May 2002) [10].

101 *Ibid* [15].

102 See the discussion of domestic partners in *Reid v Victims of Crime Assistance Tribunal* [2002] VCAT 373 (24 May 2002) [8]–[12].

103 *Victims of Crime Assistance Act 1996* (Vic) s 10A(3)(a). For the definition of domestic partner, see s 3(1) and (4). See also *Reid v Victims of Crime Assistance Tribunal* [2002] VCAT 373 (24 May 2002) [10], noting this divergence.

104 *Victims of Crime Assistance Act 2006* (NT) s 13(1)(a); *Victims Rights and Support Act 2013* (NSW) s 22(3)(b); *Criminal Injuries Compensation Act 2003* (WA) s 4(1).

105 *Victims of Crime (Financial Assistance) Act 2016* (ACT) ss 13(b)(i), 14(b)(i) and 17(1)(a); *Victims of Crime Act 2001* (SA) s 17(2)(a).

106 *Victims of Crime (Financial Assistance) Act 2016* (ACT) ss 13(b)(i) and (ii), 14(b)(i) and (ii) and 17(1)(a).

107 *Ibid*, ‘Dictionary’; *Family Violence Act 2016* (ACT) s 10.

- 5.108 The Victorian Act could adopt the Australian Capital Territory approach by including 'domestic partner' in the definition of 'close family member' and maintaining the category of 'intimate personal relationship'.

## Questions

- 1 How do the victim categories in the Act impact on people applying to VOCAT for financial assistance?
- 2 Should the victim categories in the Act be amended? If so, what changes should be made to the Act?

### The definition of an 'act of violence'

- 5.109 The narrow definition of an 'act of violence' under the Act means that only people who are victims of crimes against the person are eligible for financial assistance under the Act.
- 5.110 This emphasis on physical and sexual offences reflects traditional views regarding the nature of violence. However, as VOCAT noted in its *Annual Report 2014–15*, there are 'changing notions about what may constitute a violent crime and the possible ways in which a person can be victimised'.<sup>108</sup>
- 5.111 For example, the community may now view family violence victims, children, older people and people with disability who are subjected to financial, emotional or psychological abuse as victims of an 'act of violence'. In some cases, this view may be held in relation to both criminal and non-criminal forms of abuse. Similarly, children who hear, witness or are exposed to violence may now be considered victims of violence in their own right.
- 5.112 There is also growing recognition of the harm experienced by victims of non-physical criminal offences. This is especially so in relation to victims of non-contact sexual offences, such as the non-consensual distribution of a naked photograph on the Internet or 'grooming', as well as the adverse impact that some property offences can have on a victim's mental health.
- 5.113 An increasing number of applications are being made to VOCAT in relation to less 'traditional' forms of abuse.<sup>109</sup> Some of these are successful. For example, it has been accepted that cyber-bullying can amount to an 'act of violence'.<sup>110</sup>
- 5.114 However, many other victims of non-physical forms of violence still face difficulties establishing eligibility under the Act.
- 5.115 This section of the paper discusses the barriers to eligibility under the Act for victims of the following forms of abuse:
- criminal and non-criminal forms of financial abuse and psychological abuse
  - causing a child to hear, witness or be exposed to criminal and non-criminal forms of violence
  - non-contact sexual offences
  - property offences.

108 Victims of Crime Assistance Tribunal, *Annual Report 2014–15* (2015) 23.

109 Ibid.

110 In 2011, for example, VOCAT awarded financial assistance to the parents of Alem Halkic, a teenager who was driven to suicide by bullying on the Internet. See Alison Caldwell, 'Parents Welcome Ruling on Bullying Victim's Suicide' *ABC News* (online), 30 May 2011 <[www.abc.net.au/news/2011-05-30/parents-welcome-ruling-on-bullying-victims-suicide/2738058](http://www.abc.net.au/news/2011-05-30/parents-welcome-ruling-on-bullying-victims-suicide/2738058)>; Daniel Fogarty, 'Tribunal Find Cyberbullying is Violence', *The Sydney Morning Herald* (online), 30 May 2011 <[www.smh.com.au/breaking-news-national/tribunal-find-cyberbullying-is-violence-20110530-1fcn1.html](http://www.smh.com.au/breaking-news-national/tribunal-find-cyberbullying-is-violence-20110530-1fcn1.html)>; Julie Matthews and Andrew Matthews, *Stop the Bullying!* (Seashell Publishers, 2011), 6–7.

- 5.116 This section also sets out some options for reform.
- 5.117 The Commission seeks the views of victims, persons affected, professionals, stakeholders and the community on what changes should be made to the Act to improve access for victims of non-physical forms of violence and abuse. Specific questions are set out below.

### Financial and psychological abuse

- 5.118 The definition of an ‘act of violence’ under the Act excludes non-contact forms of abuse such as financial and psychological abuse. However, these are the forms of abuse most commonly experienced by some of the most vulnerable members of the community, including victims of family violence, children, the elderly, and people with disability.
- 5.119 As detailed in the first consultation paper, the narrow definition of an ‘act of violence’ is a barrier for victims of family violence.<sup>111</sup> This is because family violence victims can experience a range of criminal and non-criminal forms of abuse beyond sexual and physical offences. Other common forms of family violence include economic abuse, psychological and emotional abuse, as well as controlling and coercive behaviour.<sup>112</sup> However, these do not constitute an ‘act of violence’ for the purposes of the Act.<sup>113</sup>
- 5.120 The narrow definition of an ‘act of violence’ in the Act is also a problem for victims of elder abuse, abuse of people with disability and child abuse.

### Elder abuse

- 5.121 In May 2017, the Australian Law Reform Commission released its final report, *Elder Abuse—A National Legal Response*.<sup>114</sup> This report provides that in addition to physical and sexual abuse, elder abuse can take the form of psychological or emotional abuse, financial abuse and neglect.<sup>115</sup>
- 5.122 One of the most common types of abuse affecting older people is financial abuse.<sup>116</sup> For example, between 2012 and 2014, financial abuse accounted for over a third of the calls reporting abuse to the Seniors Rights Victoria helpline.<sup>117</sup> The forms of financial abuse that are frequently experienced by older people include being coerced or forced to hand over an asset, someone spending their money without their permission, having their signature forged or being forced to sign something and having someone abuse power of attorney arrangements.<sup>118</sup> A substantial amount of this financial abuse would constitute property offences, but it would not amount to an ‘act of violence’ under the Act.
- 5.123 The other most common form of abuse reported by elderly people is psychological abuse,<sup>119</sup> such as verbal abuse, name-calling, bullying, harassment, pressuring, intimidating, humiliating and ignoring.<sup>120</sup> Examples of psychological abuse commonly perpetrated against older people include repeatedly telling them that they have dementia, threatening to put them into a nursing home and preventing them from seeing family and friends.<sup>121</sup> However, these forms of behaviour may not amount to a criminal offence or an ‘act of violence’ as currently defined under the Act.

111 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 47–8 [6.54]–[6.64].

112 Christine Forster, ‘Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes’ (2014) 22 *Journal of Law and Medicine* 188, 194; Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 4, 78. See also the definition of family violence in the *Family Violence Protection Act 2008* (Vic) s 5, which covers behaviour that is physically or sexually abusive, emotionally or psychologically abusive, economically abusive, threatening, coercive or in any other way controls or dominates the family member causing them to feel fear for their safety or wellbeing or that of another person.

113 Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume* (2016) vol 4, 78.

114 Australian Law Reform Commission, *Elder Abuse—A National Legal Response*, Report No 131 (2017).

115 *Ibid* 19 [1.8]–[1.13].

116 *Ibid* 42–3 [2.51].

117 National Ageing Research Institute and Seniors Rights Victoria, *Profile of Elder Abuse in Victoria. Analysis of Data about People Seeking Help from Seniors Rights Victoria*, Summary Report (2015) cited in Australian Law Reform Commission, *Elder Abuse—A National Legal Response*, Report No 131 (2017) 42 [2.51].

118 Australian Law Reform Commission, *Elder Abuse—A National Legal Response*, Report No 131 (2017) 42–3 [2.51]–[2.53].

119 *Ibid* 42 [2.47].

120 *Ibid* [2.46]–[2.50].

121 *Ibid* [2.49].

## Abuse of people with disability

- 5.124 There have also been a number of recent inquiries into violence against and abuse of people with disability, including the Commonwealth Senate's Inquiry into *Violence, Abuse and Neglect against People with Disability in Institutional and Residential Settings*<sup>122</sup> and the Victorian Parliament's *Inquiry into Abuse in Disability Services*.<sup>123</sup>
- 5.125 Both these inquiries found that people with disability can experience financial and psychological abuse while in care with disability services.<sup>124</sup> The Victorian inquiry was informed that financial abuse faced by people with disability who are clients in care services can include the theft and misuse of their funds and staff eating food purchased for them.<sup>125</sup> The Senate inquiry also noted the misuse of the assets and funds of people with disability by public trustees and public guardians.<sup>126</sup>
- 5.126 The Victorian *Inquiry into Abuse in Disability Services* also found that people with disability who are clients of support services can experience verbal, emotional and psychological abuse. Examples include staff treating a client like a child, staff using disrespectful terms such as 'downsy' and 'nappy wearers', staff offering then denying treats to clients, and staff sending clients out to find the 'striped paint'.<sup>127</sup>
- 5.127 Again, while some of the abuse experienced by people with disability would constitute a criminal offence, many of these examples of abuse would not. In addition, none of these examples would be considered an 'act of violence' under the Act.

## Child abuse

- 5.128 The Victorian Inquiry into the Handling of Child Abuse by Religious and other Non-Government Organisations, *Betrayal of Trust*, found that the most common form of child abuse in Australia is emotional abuse.<sup>128</sup> This finding is also supported by data from the Australian Institute of Health and Welfare, which shows that 45 per cent of substantiated incidents of child abuse in 2015–16 concerned emotional abuse.<sup>129</sup>
- 5.129 However, as with older people and people with disability, children who experience non-physical abuse are unable to access financial assistance under the Act, as these forms of abuse do not fall into the definition of an 'act of violence'.

## Neglect

- 5.130 Neglect is the failure to provide someone with necessities such as food, shelter, medical care or other requisite forms of assistance.<sup>130</sup> The Australian Institute of Health and Welfare found that neglect was the second most common type of substantiated child abuse in 2015–16, accounting for 25 per cent of incidents.<sup>131</sup> Neglect is also frequently experienced by older people and people with disability.<sup>132</sup>

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122 Senate Community Affairs References Committee, Parliament of Australia, *Violence, Abuse and Neglect Against People with Disability in Institutional and Residential Settings, including the Gender and Age Related Dimensions, and the Particular Situation of Aboriginal and Torres Strait Islander People with Disability, and Culturally and Linguistically Diverse People with Disability* (2015).

123 Family and Community Development Committee, Parliament of Victoria, *Inquiry into Abuse in Disability Services: Final Report* (2016).

124 Ibid 12–13 [1.1.4]; Senate Community Affairs References Committee, Parliament of Australia, *Violence, Abuse and Neglect Against People with Disability in Institutional and Residential Settings, including the Gender and Age Related Dimensions, and the Particular Situation of Aboriginal and Torres Strait Islander People with Disability, and Culturally and Linguistically Diverse People with Disability* (2015) 89–91 [4.66]–[4.70].

125 Family and Community Development Committee, Parliament of Victoria, *Inquiry into Abuse in Disability Services: Final Report* (2016) 12 [1.1.4].

126 Senate Community Affairs References Committee, Parliament of Australia, *Violence, Abuse and Neglect Against People with Disability in Institutional and Residential Settings, including the Gender and Age Related Dimensions, and the Particular Situation of Aboriginal and Torres Strait Islander People with Disability, and Culturally and Linguistically Diverse People with Disability* (2015) 89–90 [4.67].

127 Family and Community Development Committee, Parliament of Victoria, *Inquiry into Abuse in Disability Services Final Report* (2016) 10–12 [1.1.3].

128 Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (2013) vol 1, 127–8.

129 Australian Institute of Health and Welfare, *Child Protection Australia 2015–16*, Child Welfare Series No. 66 (2017) 22.

130 Australian Law Reform Commission, *Elder Abuse—A National Legal Response*, Report No 131 (2017) 6 [1.13].

131 Australian Institute of Health and Welfare, *Child Protection Australia 2015–16*, Child Welfare Series No 66 (2017) 22.

132 For discussion of neglect of older people, see Australian Law Reform Commission, *Elder Abuse—A National Legal Response*, Report No 131 (2017) 43–4 [2.56]–[2.58]; for discussion of neglect of people with disability, see Family and Community Development Committee, Parliament of Victoria, *Inquiry into Abuse in Disability Services: Final Report* (2016) 13–16 [1.1.5].

- 5.131 Neglect leading to serious physical injury or death is likely to constitute an act of violence under the Act. Negligently causing serious injury is an offence under section 24 of the Crimes Act with a penalty of imprisonment for up to 10 years,<sup>133</sup> while negligently causing death can constitute manslaughter. As mentioned above, the definition of a ‘relevant offence’ in the Act includes ‘an offence, punishable by imprisonment, that involves ... injury ... to a person.’<sup>134</sup>
- 5.132 However, neglect that does not cause serious injury or death but which undermines their health or has a severe psychological impact on a victim and/or adversely affects their sense of dignity,<sup>135</sup> is also unlikely to constitute an ‘act of violence’ under the Act.

#### Including other forms of abuse in the definition of an ‘act of violence’

- 5.133 To address these issues, the definition of an ‘act of violence’ under the Act could be expanded to better accommodate victims of family violence, elder abuse, child abuse and abuse of people with disability.
- 5.134 The first consultation paper considered the recommendation by the Australian Law Reform Commission and New South Wales Law Reform Commission, in their joint report *Family Violence—A National Legal Response*, to explicitly include ‘family violence’ in the definition of an ‘act of violence’.<sup>136</sup>
- 5.135 Other specific forms of violence and abuse, such as ‘elder abuse’, ‘child abuse’ and ‘abuse of people with disability’, could also be explicitly included in the definition of an ‘act of violence’ in the Act.
- 5.136 Alternatively, only ‘family violence’ could be expressly included in the Act, but it could be defined to include violence perpetrated by people within a residential facility or in a relationship of dependence. This is the way that New South Wales defines ‘domestic violence’ in its victims of crime legislation. The definition of ‘domestic violence’ in the *Victims Rights and Support Act 2013* (NSW) includes offences perpetrated by a person who is living in the same household as the other person, a person who is living as a long-term resident in the same residential facility as the other person, and a person who is in a relationship involving their dependence on the ongoing paid or unpaid care of the other person.<sup>137</sup>
- 5.137 If the Victorian Act were amended to include a similar definition of family violence to that of New South Wales in relation to perpetrators, then it would encompass the majority of elder abuse, child abuse and abuse of people with disability, as most of these forms of abuse are perpetrated by family members, carers or other residents in residential facilities.<sup>138</sup>
- 5.138 Explicitly including family violence, elder abuse, child abuse and abuse of people with disability as an act of violence under the Act could give rise to eligibility for psychological and financial abuse. However, the extent to which it does so would depend on the kinds of behaviour it is defined to include. This section considers two different options for reform:

133 *Crimes Act 1958* (Vic) s 24.

134 *Victims of Crime Assistance Act 1996* (Vic) s 3(1).

135 For a discussion of the impact of neglect on a person’s sense of dignity, see Family and Community Development Committee, Parliament of Victoria, *Inquiry into Abuse in Disability Services Final Report* (2016) 14 [1.1.5].

136 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response: Final Report*, ALRC Report No 114 and NSWLRC Report No 128 (2010) 1395 (Recommendation 29-5). The Australian Law Reform Commission reiterated this recommendation in its submission to the Victorian Law Reform Commission in relation to the Victims of Crime in the Criminal Trial Process reference, see Australian Law Reform Commission, Submission No 1 to Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, 18 August 2015, 2. For the Commission’s consideration of this recommendation in the first consultation paper, see Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 51–4 [6.85]–[6.109].

137 *Victims Rights and Support Act 2013* (NSW) s 19(8)(f)(iv),(v) and (vi).

138 See, eg, People with Disability Australia (PWDA), Submission to Department of Justice (NSW), *New South Wales Statutory Review of the Victims Rights and Support Act 2013 No 37*, July 2016, 4, recommending the continued inclusion of the current definition of ‘domestic violence’, as it encompasses ‘relationships and forms of residence in which people with disability experience disproportionate violence’.

- using a definition that includes non-criminal behaviour, such as psychological abuse and financial abuse
- using a definition that includes non-violent offences, such as property offences and breaches of family violence intervention orders.

### *Extending eligibility to non-criminal forms of abuse*

- 5.139 The behaviour included in the definition of family violence, elder abuse, child abuse and abuse of people with disability could include non-criminal behaviour, such as psychological abuse and financial abuse.
- 5.140 This is the approach that Queensland has adopted in relation to domestic violence in its recent amendment to *Victims of Crime Assistance Act 2009* (Qld).<sup>139</sup> The Queensland Act now explicitly includes domestic violence within its definition of an act of violence.<sup>140</sup> Domestic violence is defined to include physical and sexual abuse, as well as psychological and emotional abuse, economic abuse and behaviour that is threatening, coercive or dominating.<sup>141</sup> This means that the Queensland Act now covers both criminal and non-criminal forms of family violence.
- 5.141 This approach could be adopted in the Victorian Act by using a similar list of behaviours to those included in section 5 of the *Family Violence Protection Act 2008* (Vic) to define 'family violence' (or 'family violence', 'elder abuse', 'child abuse' and 'abuse of people with disability', respectively). This would cover non-criminal behaviour, such as economic and psychological abuse, threats and coercion.
- 5.142 Moreover, using this definition would also enable child victims of family violence to be recognised as primary victims under the Act. As discussed earlier, the definition of 'family violence' in the Family Violence Protection Act includes 'behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, [family violence]'.<sup>142</sup>
- 5.143 However, concerns have been expressed about expanding the eligibility criteria to allow victims of non-criminal forms of family violence to access the Victorian Act and VOCAT. For example, in their joint submission to the Victorian Royal Commission on Family Violence, the Magistrates' Court and Children's Court stated that 'applications falling under the expanded category may be more complex to determine, and result in unintended consequences'.<sup>143</sup>
- 5.144 The Australian Law Reform Commission and New South Wales Law Reform Commission were also of the view that any definition of family violence in victims' financial assistance schemes should be limited to criminal acts. The Commissions stated that 'the adoption of a definition that captures non-criminal conduct would clearly be in direct conflict with the purposes of [victims' compensation] schemes, as they are presently framed'.<sup>144</sup>

### *Extending eligibility to other criminal forms of abuse*

- 5.145 An alternative option would be to define 'family violence', 'elder abuse', 'child abuse' and 'abuse of people with disability' only with reference to criminal offences. However, for these specific categories of abuse, the range of eligible criminal offences could be expanded.
- 5.146 This is the approach that the Australian Capital Territory has taken in its inclusion of 'domestic violence' in its victims of crime financial assistance legislation. In addition to

139 See *Victims of Crime Assistance and Other Legislation Amendment Act 2017* (Qld) s 29.

140 *Victims of Crime Assistance Act 2009* (Qld) s 25(2).

141 The *Victims of Crime Assistance Act 2009* (Qld) provides that 'domestic violence' has the same meaning as in the *Domestic and Family Violence Protection Act 2012* (Qld). See *Victims of Crime Assistance Act 2009* (Qld), sch 3 (dictionary). See also *Domestic and Family Violence Protection Act 2012* (Qld) s 8.

142 Family Violence Protection Act 2008 (Vic) s 5(1)(b).

143 Magistrates' Court of Victoria and Children's Court of Victoria, Submission No 978 to the Royal Commission into Family Violence, *Royal Commission into Family Violence*, June 2015, 58.

144 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response: Final Report*, ALRC Report No 114 and NSWLRC Report No 128 (2010) 285.

offences against the person, *the Victims of Crime (Financial Assistance) Act 2016* (ACT) provides for a separate category of domestic violence offences which can give rise to eligibility for financial assistance. The domestic violence offences listed include property offences, such as destroying or damaging property, arson and trespass, driving offences and contravention of family violence protection orders.<sup>145</sup>

- 5.147 The Victorian Act could adopt this approach by including in its definition of family violence (or its respective definitions of family violence, elder abuse, child abuse and abuse of people with disability) a list of non-violent criminal acts that are frequently committed in the context of these forms of abuse.
- 5.148 This option would likely cover a significant portion of the financial abuse experienced by older people and people with disability, as much of it could be characterised as offences such as theft or fraud. However, it would be less likely to encompass the kinds of psychological abuse to which these groups can be subjected. It may also be less likely to cover non-physical forms of child abuse.

### Non-contact sexual offences

- 5.149 Victorian criminal law now recognises a range of non-contact sexual offences. Many of these are sexual offences against children, such as engaging in sexual activity in the presence of a child,<sup>146</sup> encouraging or facilitating a child to be involved in sexual activity,<sup>147</sup> and the offence of 'grooming',<sup>148</sup> which is communication with a child with the intent of facilitating the child's engagement or involvement in a sexual offence.<sup>149</sup>
- 5.150 There are also non-contact sexual offences that can be committed against a person of any age, such as observing a person's genital or anal region,<sup>150</sup> taking images of a person's genital or anal region<sup>151</sup> and distributing intimate photographs<sup>152</sup> ('upskirting' offences).
- 5.151 Many of these offences have been introduced in recognition of changes in technology which have enabled new forms of sexual abuse. For example, upskirting offences were introduced to counter image-based abuse facilitated through the development of smaller cameras and cameras on mobile phones, as well as the Internet which has allowed for the easy distribution of images.<sup>153</sup> These offences are described as visual and image-based sexual offences in this paper.
- 5.152 Grooming offences also recognise that the Internet has facilitated opportunities for child sexual abuse by enabling perpetrators to use the anonymity of online services to win the trust of children.<sup>154</sup> The Victorian offence of grooming is the result of a greater understanding of the behavioural patterns surrounding child sexual abuse following the results of the Victorian report, *Betrayal of Trust*.<sup>155</sup>
- 5.153 However, despite these advances in the criminal law, it appears that victims of non-contact sexual offences may experience difficulties establishing eligibility under the Act due to the narrow definition of an 'act of violence'. As VOCAT noted in its *Annual Report 2015–16*:

The area of sexual offending in particular has seen the creation of many new offences in recent years to grapple with advances in technology that have enabled offending to

145 *Victims of Crime (Financial Assistance) Act 2016* (ACT), div 1.2.2 of pt 1.2 of sch 1.

146 *Crimes Act 1958* (Vic) ss 49F (for children under 16), 49G (for a child aged 16 or 17 who is under that person's care, supervision or authority).

147 *Ibid* ss 49S (facilitating a sexual offence against a child), 49K (encouraging a child under 16 to engage in or be involved in sexual activity), 49L (encouraging a child aged 16 or 17 under that person's care, supervision or authority to engage in or be involved in sexual activity).

148 *Ibid* s 49M.

149 The Victorian offence of grooming also includes communication with a person who is in a position of care, supervision or authority over the child, see *ibid* s 49M(1)(b)(ii).

150 *Summary Offences Act 1966* (Vic) s 41A.

151 *Ibid* s 41B.

152 *Ibid* s 41C.

153 See the Second Reading Speech for Summary Offences Amendment (Upskirting) Bill 2007 (Vic): Victoria, *Parliamentary Debates*, Assembly, 21 June 2007, 2146 (Rob Hulls, Attorney-General).

154 Commonwealth Director of Public Prosecutions, *Child Exploitation* <[www.cdpp.gov.au/crimes-we-prosecute/child-exploitation](http://www.cdpp.gov.au/crimes-we-prosecute/child-exploitation)>.

155 See the Second Reading Speech for the Crimes Amendment (Grooming) Bill 2013 (Vic): Victoria, *Parliamentary Debates*, Assembly, 12 December 2013, 4668 (Robert Clark, Attorney-General).

occur in ways not previously contemplated. Yet despite the harms caused to victims of such crimes, many of the new offences would not satisfy the eligibility requirements of the Act.<sup>156</sup>

### Visual and image-based sexual offences

- 5.154 Most victims of visual and image-based sexual offences would be ineligible under the Act. This is because only sexual offences which are contained in the Crimes Act or the common law constitute 'relevant offences' for the purposes of the Act. However, visual and image-based sexual offences in Victoria, other than such offences against children, are contained in the *Summary Offences Act 1966* (Vic).<sup>157</sup> The ineligibility under the Act of victims of these offences was acknowledged by VOCAT in its *Annual Report 2015–16*.<sup>158</sup>
- 5.155 The exclusion of such visual and image-based sexual offences from the Act is problematic, as research demonstrates that victims of image-based abuse can experience high levels of psychological distress.<sup>159</sup>

### Non-contact sexual offences against children

- 5.156 In contrast, it appears that most non-contact sexual offences against children would constitute an act of violence under the Act. This is because the Act explicitly provides that offences under subdivisions 8A, 8B, 8C, 8E or 8FA of division 1 of part I of the Crimes Act are relevant offences for the purposes of an act of violence.<sup>160</sup> Sexual offences against children, including the offences of grooming and encouraging or facilitating sexual offences against a child, are contained in subdivision 8B of the Crimes Act.
- 5.157 Nevertheless, child victims of such non-contact sexual offences may encounter obstacles when making a claim for assistance due to the 'non-violent' nature of such offences. For example, *AVA v Victims of Crime Assistance Tribunal*<sup>161</sup> concerned a child whose mother's partner had taken indecent photographs of her while she was sleeping. VOCAT initially refused the child's application on the basis that it was not satisfied that an 'act of violence' had occurred. This is because she 'was clothed when photographed; she was asleep at the time; and there was no evidence or inference of any physical contact whatsoever'.<sup>162</sup>
- 5.158 On appeal, VCAT set aside this decision. It found that the photographs amounted to 'an indecent act with or in the presence of a child under 16', which does not require any touching or for the child to have been aware of the act.<sup>163</sup> VCAT held that this was a 'relevant offence' for the purposes of the Act, as it was contained in the requisite subdivision of the Crimes Act.<sup>164</sup> In arriving at this decision, VCAT noted that the Act covers 'many relevant offences, which do not need to be associated with actual violence'.<sup>165</sup>
- 5.159 However, VCAT went on to hold that an 'indecent assault' had also occurred.<sup>166</sup> It found that the perpetrator had in fact touched the victim and that she would have been aware of at least some of the offences that had taken place.<sup>167</sup> This second finding went beyond the criminal proceedings against the perpetrator, who had only been convicted of an indecent act with or in the presence of a child under 16 and child pornography.<sup>168</sup>

156 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 15.

157 *Summary Offences Act 1966* (Vic) ss 41A, 41B and 41C. These provisions were inserted by the *Summary Offences Amendment (Upskirting) Act 2007* (Vic).

158 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 15.

159 Nicola Henry, Anastasia Powell and Asher Flynn, *Not Just 'Revenge Pornography': Australians' Experiences of Image-Based Abuse*, Summary Report (RMIT University, 2017) 5.

160 *Victims of Crime Assistance Act 1996* (Vic) s 3(1).

161 [2010] VCAT 2078 (23 December 2010).

162 Victims of Crime Assistance Tribunal cited in *ibid* [29].

163 *Ibid* [37]–[38].

164 *Ibid* [34], [36] and [44].

165 *Ibid* [34].

166 *Ibid* [43]–[44].

167 *Ibid* [45]–[46].

168 *Ibid* [27], fn 8.

The fact that VCAT also found that a contact-based sexual offence had taken place suggests that some uncertainty may remain in relation to the eligibility under the Act for victims of non-contact sexual offences against children.

- 5.160 In addition, in its *Annual Report 2015–16*, VOCAT stated that the Commonwealth offence of grooming would not constitute an act of violence under the Act.<sup>169</sup> This statement, which was written after the Victorian offence of grooming came into force,<sup>170</sup> is difficult to reconcile with the wording of the Act. This is because the Victorian offence of grooming is a relevant offence for the purposes of the Act.<sup>171</sup> Moreover, behaviour that would give rise to the Commonwealth offence of grooming would also constitute the Victorian offence of grooming, as the latter is broader in scope.<sup>172</sup> Nevertheless, VOCAT's statement demonstrates that there is ongoing uncertainty as to whether non-contact sexual offences constitute an act of violence under the Act.
- 5.161 The existence of potential barriers to eligibility under the Act for victims of non-contact sexual offences against children is problematic as it is now well accepted that the betrayal and manipulation of trust involved in offences such as grooming can result in significant trauma.<sup>173</sup>
- 5.162 One option for reform could be to expand the definition of an act of violence to cover all sexual offences, including non-contact sexual offences. This is the approach in the Australian Capital Territory. The *Victims of Crime (Financial Assistance) Act 2016* (ACT) applies to all sexual offences contained in Part 3 of the *Crimes Act 1900* (ACT).<sup>174</sup> This includes offences such as intimate observations or capturing visual data<sup>175</sup> and using the Internet to deprave young people.<sup>176</sup>
- 5.163 A similar outcome could be achieved in the Victorian Act by amending the definition of relevant offences to include all sexual offences in the common law, the *Summary Offences Act 1966* (Vic) and the *Crimes Act*, without distinction as to subdivision.

### Property offences

- 5.164 The definition of an act of violence means that victims of property offences are not eligible for assistance under the Act.
- 5.165 In a number of cases, VCAT has held that an act of violence must involve an offence against the person and does not include offences against property.<sup>177</sup> For example, in *Lowe v Victims of Crime Assistance Tribunal*<sup>178</sup> and *Matthews v Victims of Crime Assistance Tribunal*,<sup>179</sup> VCAT held that a victim of an arson attack against their home could not be victim of an act of violence unless she or he was under a threat of injury at the time of the fire.
- 5.166 However, the appropriateness of excluding property offences under the Act may require review, given the serious impact these crimes can have on victims. As part of its reference on victims of crime in the criminal trial process, the Commission received a submission from Victoria Police noting that victims of property offences tended to suffer the same

169 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 15.

170 The *Crimes Amendment (Grooming) Act 2014* (Vic) commenced on 9 April 2014, see Department of Justice and Regulation (Vic), *Grooming Offence* (2017), <[www.justice.vic.gov.au/home/safer+communities/protecting+children+and+families/grooming+offence](http://www.justice.vic.gov.au/home/safer+communities/protecting+children+and+families/grooming+offence)>.

171 Section 3(1) of the *Victims of Crime Assistance Act 1996* (Vic) provides that offences under sub-divs 8A, 8B, 8C, 8E or 8FA of div 1 of pt 1 of the *Crimes Act 1958* (Vic) are 'relevant offences'. The offence of grooming is contained in s 49M of the *Crimes Act 1958* (Vic).

172 The Commonwealth offence of grooming only covers communication with a child using a 'carriage service', such as an Internet provider, whereas the Victorian offence applies to both internet-based and in-person communication. For further commentary, see Department of Justice and Regulation (Vic), *Grooming Offence* (2017), <[www.justice.vic.gov.au/home/safer+communities/protecting+children+and+families/grooming+offence](http://www.justice.vic.gov.au/home/safer+communities/protecting+children+and+families/grooming+offence)>.

173 Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (2013) vol 2, 467–70.

174 *Victims of Crime (Financial Assistance) Act 2016* (ACT) div 1.2.1 of pt 1.2 of sch 1.

175 *Crimes Act 1900* (ACT) s 61B.

176 *Ibid* s 66.

177 See *Lowe v Victims of Crime Assistance Tribunal* [2004] VCAT 1092 (8 June 2004) [15]; *Purcell v Victims of Crime Assistance Tribunal* (13 June 2011) [18]; *Matthews v Victims of Crime Assistance Tribunal* [2012] VCAT 1099 (27 July 2012) [18]–[19].

178 [2004] VCAT 1092 (8 June 2004).

179 [2012] VCAT 1099 (27 July 2012).

psychological, emotional and social impacts as victims of crimes against the person.<sup>180</sup> This can be seen, for example, in *Lowe*, in which both applicants were diagnosed with chronic adjustment disorder with mixed anxiety and depressed mood as a result of an arson attack against their home.<sup>181</sup>

- 5.167 Victims of property offences may also have similar needs to victims of violent crimes in relation to safety-related expenses. For example, there was an incident reported in which victims of multiple break-ins by members of a gang were unable to claim financial assistance from VOCAT for a security door because they had not been physically attacked.<sup>182</sup> Safety-related expenses are discussed in more detail in Chapter 6.
- 5.168 The ineligibility of victims of property offences is a particular issue for victims of family violence. As discussed in the first consultation paper, destruction and damage to property is a common form of family violence that can have far-reaching consequences for the victims.<sup>183</sup> Property offences can also affect other vulnerable groups, such as older people and people with disability.<sup>184</sup>
- 5.169 Moreover, the rational basis for providing financial assistance to victims of offences against the person but not to victims of offences against property is questionable. As Kirby writes, 'it is difficult in logic to justify the distinction between victims of non-violent and violent crimes for the purposes of the State's compensating such victims'.<sup>185</sup>

#### Expanding the definition of an act of violence to include property offences

- 5.170 One option for reform is to expand the definition of an act of violence to include property offences.
- 5.171 There are different ways that this could be done. As discussed above at [5.145]-[5.148], eligibility could only be extended to property offences in specific circumstances. For example, Victoria could adopt the Australian Capital Territory approach of including property offences only in the context of family violence.<sup>186</sup>
- 5.172 Alternatively, the Act could be amended to extend eligibility to all victims of property offences. This is the approach of the Western Australian criminal injuries compensation scheme, which applies to all types of crimes, misdemeanours and simple offences, including property offences.<sup>187</sup> However, it should be noted that eligibility under the *Criminal Injuries Compensation Act 2003* (WA) is restricted in other ways. For example, that Act only applies to offences that have not been 'proved' (that is, the offender has been convicted) in limited circumstances, such as where there has been an acquittal due to unsoundness of mind, where the accused has been found not mentally fit to stand trial or where no person has been charged.<sup>188</sup>
- 5.173 The Commission has previously considered whether victims of property offences should also be eligible under the Act. As part of its reference on victims of crime in the criminal trial process, the Commission received a submission that the eligibility criteria in the Act

180 Victoria Police, Submission No 26 to Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, 12 October 2015, 31–2.

181 *Lowe v Victims of Crime Assistance Tribunal* [2004] VCAT 1092 (8 June 2004) [6]–[7].

182 See, eg, Megan Bailey, 'Casey Family Knocked Back for Victims Compensation Because They Weren't Assaulted in Apex Raid', *Herald Sun* (online) 7 September 2016, <[www.heraldsun.com.au/leader/south-east/casey-family-knocked-back-for-victims-compensation-because-they-werent-assaulted-in-apex-raid/news-story/5afedefc0a5b2e5ea32df385c3c09d23](http://www.heraldsun.com.au/leader/south-east/casey-family-knocked-back-for-victims-compensation-because-they-werent-assaulted-in-apex-raid/news-story/5afedefc0a5b2e5ea32df385c3c09d23)>.

183 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 47 [6.57]. For the impact of property damage on family violence victims' wellbeing, independence and financial security, see, eg, 'Maria's Story' in Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality after Family Violence—Report on the Stepping Stones Project* (Women's Legal Service Victoria, 2015) 21.

184 See Australian Law Reform Commission, *Elder Abuse—A National Legal Response*, Report No 131 (2017) 42–3 [2.51]–[2.53]; Family and Community Development Committee, Parliament of Victoria, *Inquiry into Abuse in Disability Services: Final Report* (2016) 12 [1.1.4]; Senate Community Affairs References Committee, Parliament of Australia, *Violence, Abuse and Neglect Against People with Disability in Institutional and Residential Settings, including the Gender and Age Related Dimensions, and the Particular Situation of Aboriginal and Torres Strait Islander People with Disability, and Culturally and Linguistically Diverse People with Disability* (2015) 89–90 [4.67].

185 Michael Kirby, 'Compensation for Victims of Criminal Injuries in Australia' (Paper presented at the British Institute of International and Comparative Law Conference, Windsor Great Park, United Kingdom, 27 March 1981) 6.

186 *Victims of Crime (Financial Assistance) Act 2016* (ACT), div 1.2.2, of pt 1.2 of sch 1.

187 See the definition of 'proved offence' and 'alleged offence' in *Criminal Injuries Compensation Act 2003* (WA) s 3. See also the explicit reference to offences against property in *ibid* s 35(2)(b).

188 *Ibid* ss 14, 15 and 17.

should be expanded to include property offences such as property damage, burglary and online fraud.<sup>189</sup> Victoria Police submitted that it was open to this option because of the adverse effects that these kinds of offence can have on victims.<sup>190</sup>

- 5.174 However, the Commission decided there was no compelling reason for such an expansion.<sup>191</sup> In arriving at this conclusion, the Commission took into account the Magistrates' Court's submission that 'expanding eligibility to victims of non-violent and property crimes would substantially increase the number and complexity of claims and the costs of the scheme'.<sup>192</sup>
- 5.175 In addition, the Commission considered Victoria Police's submission that the expansion of crimes compensation schemes to cover property offences could act as a disincentive for individuals to obtain property insurance.<sup>193</sup> It also referred<sup>194</sup> to the New Zealand Law Commission's consideration of this issue in its 2010 report, *Compensating Crime Victims*, which found that state-funded compensation for property loss would provide little social benefit and could create fundamental problems, such as those relating to property insurance.<sup>195</sup>
- 5.176 The first consultation paper noted, however, that concerns relating to property insurance may not be applicable in the context of family violence. This is because victims of family violence may already be precluded from making insurance claims for property damage which results from the actions of a family member whose name is also on the insurance policy. Insurance concerns may also be less applicable in relation to the kinds of property offences experienced by victims of elder abuse and abuse of people with disability. As such, an alternative option is to limit the property offences included in the definition of an 'act of violence' to those perpetrated by a family member or a carer.

## Questions

- 3 How does the definition of 'act of violence' in the Act impact on people applying to VOCAT for financial assistance?
- 4 Should the definition of 'act of violence' in the Act be amended to include other offences? If so, what offences should be included?
- 5 Should the definition of 'act of violence' in the Act be amended to include non-criminal behaviour? If so, what forms of non-criminal behaviour should be included?

### The definition of 'injury'

- 5.177 For some victims of crime, the narrow definition of 'injury' is another barrier to receiving assistance under the Act.
- 5.178 In particular, the need to establish mental illness or disorder means that the Act does not recognise other forms of mental harm, such as a sense of violation or a reduced sense of self-worth, that are commonly suffered by victims of sexual assault and family violence. As discussed in this section, the emphasis on mental illness or disorder can also have a counter-therapeutic effect on victims.

189 Dianne Hadden, Submission No 21 to Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, 2015, 11 [49].

190 Victoria Police, Submission No 26 to Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, 12 October 2015, 31–2.

191 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report No 34 (2016) 246 [9.100].

192 Ibid 245 [9.99].

193 Ibid [9.98].

194 Ibid 246 [9.100].

195 New Zealand Law Commission, *Compensating Crime Victims*, Report No 121 (2010) 26–7.

- 5.179 Moreover, the explicit exclusion of property loss or damage as an ‘injury’ means that awards of financial assistance under the Act may not always meet victims’ needs following an act of violence.
- 5.180 This section discusses these barriers to eligibility under the Act and sets out options for reform.
- 5.181 The Commission seeks the views of victims, persons affected, professionals, stakeholders and the community on what changes should be made to the Act to improve access for victims who experience mental harm or property loss or damage. Specific questions are also set out below.

### Mental injury as a ‘mental illness or disorder’

- 5.182 The Act defines mental injury as ‘mental illness or disorder’.<sup>196</sup> This has been interpreted by VCAT to mean mental injury that constitutes a recognised psychiatric or psychological disorder.<sup>197</sup>
- 5.183 While primary victims need only to establish that they are suffering from a ‘significant adverse effect’ in order to access special financial assistance,<sup>198</sup> they must still establish that they suffer from a mental or physical injury in order to be entitled to any of the other categories of award under the Act.
- 5.184 However, this definition of mental injury does not capture the kinds of harm that victims of certain crimes tend to suffer.<sup>199</sup> As the first consultation paper noted, victims of family violence are one group that commonly experience forms of harm that do not necessarily constitute a recognised mental illness or disorder.<sup>200</sup> Forster writes that the harms typically suffered by family violence victims are ‘cultural, vocational, psychological, behavioural, interpersonal, and social’.<sup>201</sup>
- 5.185 This is also the case for victims of sexual assault.<sup>202</sup> Victims of sexual assault may experience significant mental harm, such as a sense of violation or a reduced sense of self-worth, but not a recognised illness or disorder. In addition, in the case of Aboriginal women, the harm that flows from sexual assault may also be ‘specifically cultural and linked to community perceptions of the harm and the cultural expectations embedded in Aboriginal society’.<sup>203</sup> The same may also be true of other cultural groups.
- 5.186 The situation is even more complex for child victims of sexual assault. Sexual abuse in childhood can often have significant developmental consequences which may not be classified as a physical or psychiatric illness or disorder.<sup>204</sup> Moreover, it can often take many years for the harm suffered by child sexual abuse victims to manifest itself.<sup>205</sup> It can also be difficult to anticipate the level of injury that they will experience.<sup>206</sup> This can make it challenging for some child victims to establish injury at the time of their application to VOCAT.

196 See definition of ‘injury’ in *Victims of Crime Assistance Act 1996* (Vic) s 3(1).

197 See, eg, *RBA v Victims of Crime Assistance Tribunal* [2009] VCAT 2225 (26 October 2009) [20]. While the Victorian Civil and Administrative Tribunal accepted that the applicant was a ‘traumatised person’, it found that there was no evidence that she suffered a mental illness or disorder.

198 *Victims of Crime Assistance Act 1996* (Vic) s 3(1).

199 See, eg, Christine Forster, ‘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) 32 *University of Western Australia Law Review* 264, 284 (in relation to victims of sexual assault); Christine Forster, ‘Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes’ (2014) 22 *Journal of Law and Medicine* 188, 207 (in relation to victims of family violence).

200 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 48 [6.65]–[6.67].

201 Christine Forster, ‘Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes’ (2014) 22 *Journal of Law and Medicine* 188, 207.

202 Christine Forster, ‘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) 32 *University of Western Australia Law Review* 264, 284.

203 Ibid.

204 See, eg, Judith Cashmore and Rita Shackel, ‘Physical Health and Overall Development Outcomes’ in *The Long-term Effects of Childhood Sexual Abuse*, CFCA Paper No 11 (Child Family Community Australia, 2013) <<https://aifs.gov.au/cfca/publications/long-term-effects-child-sexual-abuse>>.

205 Christine Forster and Patrick Parkinson, ‘Compensating Child Sexual Assault Victims Within Statutory Schemes: Imagining a More Effective Compensatory Framework’ (2000) 23(2) *University of New South Wales Law Journal* 172, 189–90.

206 Ibid.

- 5.187 The emphasis on mental disorder and illness in the Act can also have a counter-therapeutic effect on victims of crime.<sup>207</sup> As Cook, David and Grant write, victims who are able to frame the harm that they have suffered as a mental illness or disorder, ‘might begin to see their natural reactions as pathological disorders, a perspective that might have long-term consequences for their self-esteem and ability to participate in society’.<sup>208</sup> For those victims who are unable to establish a mental illness or disorder, ‘they might be left with the feeling that their injuries are not real or serious, despite the ongoing impact that these injuries have on their lives’.<sup>209</sup>
- 5.188 This is a particular concern for victims of sexual assault, as Forster explains:
- That process of pathologising the harms of sexual abuse may require victims to portray themselves as vulnerable, helpless, ‘sick’ and shamed, which may not assist them in recovery. It also contributes to a historical connection between women and mental illness that a significant body of theorists argue reinforces a societal understanding of women as irrational, hysterical and helpless.<sup>210</sup>
- 5.189 Clark writes that focusing on harm rather than the criminal act ‘can be an unhelpful centre point for compensation’.<sup>211</sup> This is because it can ‘weigh victims against each other’<sup>212</sup> and reinforce ‘hierarchies of suffering’.<sup>213</sup>
- 5.190 Some victims may also be deterred from applying for assistance if it means that they must undergo a formal psychiatric assessment to establish that they are suffering from a mental disorder or illness.<sup>214</sup> Psychiatric assessments, which are distinct from psychological counselling, are a non-therapeutic tool used to assess the level of mental injury.<sup>215</sup> If administered poorly, there is a risk that psychiatric assessments could re-traumatise victims.<sup>216</sup>
- 5.191 In the first consultation paper, the Commission noted that the need to provide medical and psychological reports can lead to victims being directed away from frontline and community-based services.<sup>217</sup> Stakeholders noted that victims of family violence are sometimes redirected from family violence counselling and social work services, which may be of the greatest benefit to their recovery, to medical professionals so they can obtain medical reports that support their VOCAT application. This is a particular concern for victims living in rural or remote areas, where there are few practising psychiatrists or psychologists, as it can result in them needing to seek support outside their community.
- 5.192 There are also significant costs associated with proving injury. Obtaining reports from medical professionals and psychiatrists is costly for victims who make an application to VOCAT, and such expenses are a burden on VOCAT, which reimburses successful applicants. These costs may be considered to be ‘wasting resources’,<sup>218</sup> given the extensive literature that documents the kinds of harm that victims commonly experience, especially in relation to certain crimes, such as sexual assault.<sup>219</sup>

207 Bree Cook, Fiona David and Anna Grant, *Victims’ Needs, Victims’ Rights: Policies and Programs for Victims of Crime in Australia* (Australian Institute of Criminology, 1999) 67.

208 Ibid.

209 Ibid.

210 Christine Forster, ‘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) 32 *University of Western Australia Law Review* 264, 283.

211 Hayley Clark, *A Fair Way to Go: Criminal Justice for Victim/Survivors of Sexual Assault* (PhD Thesis, University of Melbourne, 2011) 121.

212 Ibid.

213 Ibid.

214 Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse 2010) 5.

215 Ibid.

216 Ibid.

217 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 49 [6.68].

218 Bree Cook, Fiona David and Anna Grant, *Victims’ Needs, Victims’ Rights: Policies and Programs for Victims of Crime in Australia* (Australian Institute of Criminology, 1999) 67.

219 Christine Forster, ‘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) 32 *University of Western Australia Law Review* 264, 294.

- 5.193 In addition, in preliminary consultations, the Commission was told that victims of family violence are sometimes unwilling to disclose a diagnosis of a psychological illness or disorder to VOCAT if they are also involved in parallel family law proceedings. This is because evidence of mental injury provided to VOCAT may be used as evidence in family law matters, where it can adversely impact the victim's prospects of a parenting order in their favour.

### Expanding the definition of injury

- 5.194 To address these issues, the definition of injury in the Act could be expanded in order to make the scheme more accessible to victims of crime who do not suffer from a recognised mental disorder or illness.
- 5.195 Meyering writes that the definition of mental injury in the Victorian Act is one of the most restrictive in Australia.<sup>220</sup> She contrasts it with other jurisdictions, which refer to 'psychological or psychiatric harm',<sup>221</sup> 'mental and nervous shock'<sup>222</sup> and 'impairment of ... mental health'.<sup>223</sup> Any one of these less restrictive variations could be adopted in Victoria. This would remove some of the barriers faced by victims of crime who do not develop a recognised psychiatric illness. It would also reduce the need to obtain a psychiatric assessment report, thereby allowing victims of crime to pursue counselling or other services that are suited to their needs, rather than medical reports geared only toward their legal application.
- 5.196 Alternatively, or additionally, the Act could be amended to include a broader range of injuries for victims of certain forms of violence. The schemes in both the Australian Capital Territory and Queensland recognise an expanded category of injuries for victims of sexual offences and family violence, including a sense of violation, a reduced sense of self-worth, increased fear or feelings of insecurity, and reduced capacity to participate in sexual activity.<sup>224</sup> The Victorian Act could also recognise such injuries in relation to victims of sexual offences, family violence and child abuse.

### Removing the requirement for proof of injury

- 5.197 Another option for reform is to remove the requirement for proof of injury for victims of certain crimes, such as sexual offences and family violence. This is the approach of the Northern Territory victims' financial assistance scheme in relation to sexual offences. The *Victims of Crime Assistance Regulations 2007* (NT) sets out a range of sexual offences that constitute 'compensable violent acts' for which a lump sum can be awarded to a victim without evidence of injury.<sup>225</sup>
- 5.198 Forster also advocates for this approach in relation to family violence as it would have 'the potential to provide victims of family violence with an easier and less traumatic means of accessing compensation'.<sup>226</sup>
- 5.199 Removing the requirement to prove injury in certain circumstances would also reduce some of the problems associated with the requirement that the injury is a direct result of the act of violence. The challenges associated with the need for a causal connection between injury and act of violence are discussed at [5.207]–[5.212] below.

220 Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse 2010) 5.

221 *Victims Rights and Support Act 2013* (NSW) s 18.

222 *Criminal Injuries Compensation Act 2003* (WA) s 3; *Victims of Crime Act 2001* (SA) s 4.

223 *Victims of Crime Assistance Act 1976* (Tas) s 2(2).

224 *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 9(1)(c); *Victims of Crime Assistance Act 2009* (Qld) s 27(f).

225 *Victims of Crime Assistance Regulations 2007* (NT) reg 17 and sch 1.

226 Christine Forster, 'Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes' (2014) 22 *Journal of Law and Medicine* 188, 207.

## The exclusion of property loss or damage

- 5.200 As noted above, property loss or damage does not constitute injury or a significant adverse effect under the Act.
- 5.201 This means that even victims of offences against the person are ineligible for assistance under the Act if the only injury or significant adverse effect that they suffer is property-related.
- 5.202 As discussed in the first consultation paper, the exclusion of injury arising from property loss or damage in the Act is a particular concern for victims of family violence.<sup>227</sup> This is because in some situations of family violence, the only tangible harm which the victim may be able to demonstrate is property damage.<sup>228</sup> Moreover, the economic harm that can flow from property damage or destruction can affect the independence and security of victims of family violence, as well as contribute to their long-term financial disadvantage.<sup>229</sup>
- 5.203 In order to better accommodate victims of crime who suffer property-based injury, the Act could be amended to remove the explicit exclusion of injury arising from property loss or damage.
- 5.204 Alternatively, there could be an exception to this exclusion only in relation to certain forms of violence, such as family violence.
- 5.205 However, there may be significant costs associated with extending the definition of 'injury' to include property loss and damage. As Kirby writes:
- the practical problems of providing a total form of compensation [that includes victims who suffer property loss or damage] are enormous and would appear to be so expensive as almost certainly to make them unacceptable and to delay unfairly the implementation of a scheme for victims of crimes causing death or bodily injury.<sup>230</sup>
- 5.206 These costs may weigh against extending the definition of injury to include property-related loss.

## Questions

- 6 How does the definition of 'injury' in the Act impact on people applying to VOCAT for financial assistance?
- 7 Should the definition of 'injury' in the Act be amended to include other forms of harm? If so, what forms of harm should be included?
- 8 Should the requirement for injury in the Act be removed for victims of certain crimes? If so, for which categories of victim should the requirement be removed?

227 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 49 [6.70].

228 For an illustration of a situation of family violence in which the only injury to which the victim could point was property damage, see *Purcell v Victims of Crime Assistance Tribunal* [2011] VCAT 1463 (3 June 2011). In that case, the Victorian Civil and Administrative Tribunal rejected the applicant's claim on the basis that she had only provided evidence of property damage.

229 For a discussion of the economic consequences of family violence, see generally Australia's National Research Organisation for Women's Safety, *Building Effective Policies and Services to Promote Women's Economic Security Following Domestic Violence*, State of Knowledge Paper No 7 (ANROWS Landscapes, 2015).

230 Michael Kirby, 'Compensation for Victims of Criminal Injuries in Australia' (Paper presented at the British Institute of International and Comparative Law Conference, Windsor Great Park, United Kingdom, 27 March 1981) 6.

## The causation requirement

- 5.207 This section of the paper discusses some of the challenges faced by victims of crime in establishing causation under the Act and sets out a number of options for reform.
- 5.208 Some victims of crime can encounter difficulties in establishing that their injury was a 'direct result' of the act of violence. This is particularly so if the injury for which the victim is making a claim is a mental disorder or illness and there are other contributing factors.
- 5.209 For example, the applicant in *NF v Victims of Crime Assistance Tribunal*<sup>231</sup> sought assistance on the basis that he had witnessed his father beat his step-father to death. VOCAT initially refused his claim for counselling costs on the grounds that the incident in question was only one of many causes of the difficulties that he faced. The other issues to which VOCAT pointed included a sexual assault, a period in residential care, and a period in youth detention. However, this decision was later set aside by VCAT, which found that the applicant's 'need for counselling [was] directly attributable to the act of violence, even if other layers of trauma in his life may have heightened the need'.<sup>232</sup>
- 5.210 Establishing causation for mental injury can be especially challenging for victims of child sexual abuse. As Forster and Parkinson write:
- It is extremely difficult to separate out those effects that are predicated directly on the sexual abuse and all the other factors such as poor family functioning, domestic violence, physical abuse, the quality of peer and family relationships ... all of which may impact upon the long term outcome for the child.<sup>233</sup>
- 5.211 This issue is illustrated by *CS v Victims of Crime Assistance Tribunal*.<sup>234</sup> In that case, both VOCAT and VCAT rejected the victim's application partly because there were a number of other very serious matters in her life that had contributed to her mental injury but which were unrelated to the sexual assaults that had been perpetrated against her when she was aged four to 14. VCAT stated that 'the State should not be required to pay unlimited counselling for treatment of issues that may be unrelated to any injury caused by the act of violence'.<sup>235</sup>
- 5.212 The causation requirement can also produce difficulties for victims of neglect. This is especially so for victims who are elderly or have disabilities, as it may sometimes be difficult to separate their own naturally occurring health problems from the omissions of their carers.<sup>236</sup>
- 5.213 As mentioned above at [5.199], one way of avoiding the difficulties associated with proving a causal connection between the act of violence and the injury is to remove the requirement of injury for certain acts of violence, such as sexual offences. This is the approach used in the Northern Territory.<sup>237</sup>
- 5.214 There are other ways to limit some of the problems associated with establishing causation. These include removing the word 'direct' from the causation test, creating a rebuttable presumption of a causal link in relation to certain offences or deeming causation in certain situations. These options are explored below.

231 [2012] VCAT 1740 (16 November 2012).

232 Ibid [56].

233 Christine Forster and Patrick Parkinson, 'Compensating Child Sexual Assault Victims Within Statutory Schemes: Imagining a More Effective Compensatory Framework' (2000) 23(2) *University of New South Wales Law Journal* 172, 189–90.

234 [2006] VCAT 1061 (9 June 2006).

235 Ibid [58].

236 For difficulties establishing a causal link in relation to neglect of an older person, see, eg, Australian Law Reform Commission, *Elder Abuse—A National Legal Response*, Report No 131 (2017) 368 [13.22]–[13.24].

237 *Victims of Crime Assistance Regulations 2007* (NT) reg 17 and sch 1.

### Removing the word 'direct' from the causation test

- 5.215 One option is to remove the word 'direct' from the definitions of primary victim, secondary victim and related victim so that injury or death need only be 'a result of' the act of violence rather than a 'direct result'. This would represent a return to Victoria's former approach, as neither of the Act's predecessors, both the *Criminal Injuries Compensation Act 1972* (Vic) and the *Criminal Injuries Compensation Act 1983* (Vic), contained the word 'direct'.<sup>238</sup>
- 5.216 The use of the words 'as a result of' in the *Criminal Injuries Compensation Act* led the High Court to decide in *Fagan v Crimes Compensation Tribunal*<sup>239</sup> that Victoria's scheme only required a causal connection between the criminal act and the injury, and that this could be satisfied even if there were other contributing factors.<sup>240</sup> As Justices Mason and Wilson stated:
- The fact that other unconnected events may also have had some relationship to the occurrence is not material if the criminal act was a cause, even if not the sole cause.<sup>241</sup>
- 5.217 In *Savage v Crimes Compensation Tribunal*,<sup>242</sup> the Victorian Court of Appeal also held that this test applied to the *Criminal Injuries Compensation Act*.<sup>243</sup>
- 5.218 As VCAT has provided, insertion of the word 'direct' in the Act has 'raised the bar' in relation to the test of causation since the cases of *Fagan* and *Savage* were decided. It noted that the test for causation in these cases was an easier standard to satisfy than the 'but for' test.<sup>244</sup>
- 5.219 Accordingly, if the Act were amended to revert to the previous formulation of causation through the removal of the word 'direct', it would overcome some of the difficulties experienced by victims of crime in establishing a causal connection between the act of violence and their injury.

### Presuming or deeming a causal connection

- 5.220 Another option is to amend the Act to include a rebuttable presumption of a causal connection in relation to injuries flowing from certain acts of violence. For example, this could be put in place for acts of violence for which it is usually much harder to establish causation, such as neglect of a child, an older person or a person with disability, or child sexual abuse.
- 5.221 Alternatively, the Act could be amended to deem that a causal connection exists where it can be proven that a certain act of violence occurred and that the victim suffered injury. This is the approach taken in the criminal law of Western Australia and Queensland in relation to the failure to provide 'the necessaries of life'. In both jurisdictions, if it can be established that the accused had a duty to provide the necessaries of life to another person and that they failed to fulfil that duty, they will be 'held to have caused any consequences which result to the life or health of the other person'.<sup>245</sup> A deeming provision of a similar nature could be inserted into the Act for criminal neglect and/or in relation to child sexual abuse.

238 Both statutes used the phrase 'as a result of': *Criminal Injuries Compensation Act 1972* (Vic) s 3(1) and *Criminal Injuries Compensation Act 1983* (Vic) s 15. For a discussion of the history of the causal test in Victoria's crime victims financial assistance legislation, see *JM v Victims of Crime Assistance Tribunal* [2002] VCAT 496 (17 June 2002) [10]–[11].

239 (1982) 150 CLR 666.

240 Ibid 673 [17].

241 Ibid.

242 [1990] VR 96.

243 Ibid [100].

244 *JM v Victims of Crime Assistance Tribunal* [2002] VCAT 496 (17 June 2002) [14].

245 *Criminal Code Act 1899* (Qld) ss 285, 286; *Criminal Code Act Compilation Act 1913* (WA) s 262.

## Question

- 9 How does the requirement for victims to establish that their injury was the 'direct result' of the act of violence impact on people applying to VOCAT for assistance? Should this causation requirement be amended? If so, what changes should be made to the causation requirement?

# Assistance available under the Victims of Crime Assistance Act

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## 6. Assistance available under the Victims of Crime Assistance Act

### Introduction

- 6.1 This chapter outlines the awards of financial assistance available to victims of crime under the *Victims of Crime Assistance Act 1996* (Vic) (the Act). In particular, this chapter considers:
- the quantum (amount) of awards, including the total financial assistance available to an applicant, as well as the total financial assistance available to groups of applicants applying as related victims
  - the categories of award, including awards for expenses incurred, additional awards of assistance in exceptional circumstances and awards of special financial assistance
  - the reduction of awards for ‘related criminal acts’.
- 6.2 This chapter relates to matters four, five and six of the supplementary terms of reference, which ask the Victorian Law Reform Commission (the Commission) to consider whether:
- the categories of assistance and structure of awards in the Act are appropriate and are adequate to account for harm, including harm caused by multiple acts such as family violence, or where there is a significant delay in reporting a crime
  - the basis of the formula used to quantify special financial assistance in the Act is the most appropriate way to calculate the amount payable by the state for harm arising from crime
  - it is appropriate and fair to award assistance to aid recovery in exceptional circumstances and whether there are other ways to promote the recovery of victims from the effects of crime.
- 6.3 This chapter explores the above matters raised by the terms of reference. This chapter then outlines options for reform to the category and quantum of award provisions so as to better account for the harm suffered by victims of crime and to better assist recovery. Finally, this chapter sets out questions for consideration.

### What assistance is available?

- 6.4 The categories and quantum of awards available to victims of crime depend on the victim category under which an applicant applies for assistance under the Act.
- 6.5 This section outlines the categories and quantum of awards available to each class of victim under sections 8, 10, 13 and 15 of the Act.
- 6.6 Special financial assistance for primary victims is dealt with under section 8A of the Act and the *Victims of Crime Assistance (Special Financial Assistance) Regulations 2011* (Vic) (the Regulations).

- 6.7 Section 56 of the Act provides for interim awards for urgent assistance.
- 6.8 Section 4 of the Act sets out how the Victims of Crime Assistance Tribunal (VOCAT) should treat 'related criminal acts'.

### Quantum of financial assistance available

- 6.9 The Act limits the amount of assistance that can be awarded to a particular victim in respect of an act of violence.
- 6.10 The maximum award for primary victims is \$60,000 plus \$10,000 of special financial assistance.<sup>1</sup>
- 6.11 The maximum award for any secondary victim is \$50,000.<sup>2</sup>
- 6.12 The maximum award for any one related victim is \$50,000.<sup>3</sup> However, the total maximum cumulative amount that may be awarded to all the related victims of any one primary victim, that is the 'pool' of related victims, is \$100,000.<sup>4</sup>
- 6.13 The maximum cumulative amount that may be awarded to a pool of related victims will also be reduced by an award made for funeral expenses, even if it was made to someone who was not a related victim.<sup>5</sup>
- 6.14 In exceptional circumstances, however, VOCAT may award assistance to a related victim in excess of the maximum cumulative amount.<sup>6</sup>

### Current categories of award

- 6.15 Depending on whether a person applies to VOCAT as a primary, secondary or related victim, there are different categories of award available.

#### Awards available to primary victims

- 6.16 There are three main categories of award that primary victims can access:
- an award for expenses actually incurred or reasonably likely to be incurred for:
    - reasonable counselling services
    - medical expenses as a direct result of the act of violence
    - loss of earnings of up to \$20,000 as a direct result of the act of violence
    - loss or damage to clothing worn at the time of the act of violence
    - safety-related expenses as a direct result of the act of violence<sup>7</sup>
  - in exceptional circumstances, an award for other expenses actually incurred or reasonably likely to be incurred to assist in the primary victim's recovery<sup>8</sup> (recovery expenses)
  - special financial assistance<sup>9</sup> (discussed further below).
- 6.17 The Act defines 'medical expenses' to include 'dental, optometry, physiotherapy, psychology treatment, hospital and ambulance expenses'.<sup>10</sup>
- 6.18 Other than claims made for safety-related expenses and clothing worn at the time of the act of violence, the Act explicitly excludes primary victims from applying for expenses incurred through loss or damage to property.<sup>11</sup>

1 *Victims of Crime Assistance Act 1996* (Vic) ss 8(1) and 8A.

2 *Ibid* s 10(1).

3 *Ibid* s 13(1).

4 *Ibid* s 12(1).

5 *Ibid*.

6 *Ibid* s 12(2).

7 *Ibid* s 8(2).

8 *Ibid* s 8(3).

9 *Ibid* s 8A.

10 *Ibid* s 3(1).

11 *Ibid* s 8(4).

## Awards available to secondary victims

6.19 Secondary victims are able to make a claim for assistance for:

- expenses actually incurred or reasonably likely to be incurred for:
  - reasonable counselling services
  - medical expenses incurred as a direct result of witnessing, or becoming aware of, the act of violence<sup>12</sup>
- in exceptional circumstances, and within the limit of the total sum available to secondary victims, an amount of up to \$20,000 for loss of earnings that is suffered or reasonably likely to be suffered as a direct result of the act of violence<sup>13</sup>
- in exceptional circumstances, and within the limit of the total sum available to secondary victims, other expenses actually and reasonably incurred or reasonably likely to be incurred to assist in the secondary victim's recovery where:
  - the secondary victim was under 18 at the time of the act of violence, the primary victim was their family member,<sup>14</sup> and the secondary victim was injured by witnessing the act of violence<sup>15</sup>
  - the secondary victim was a parent or guardian of the primary victim, the primary victim was under 18 at the time of the event, and the secondary victim was injured by subsequently becoming aware of the act of violence.<sup>16</sup>

## Awards available to related victims and the pool of related victims

6.20 Related victims can make a claim for assistance for the following:

- expenses actually incurred or reasonably likely to be incurred for:
  - reasonable counselling services
  - medical expenses or funeral expenses incurred as a direct result of the death of the primary victim
  - distress experienced or reasonably likely to be experienced as a direct result of the death of the primary victim
  - loss of money that the related victim, but for the death of the primary victim, would have been reasonably likely to receive from the primary victim during a period of up to two years after that death
  - other expenses incurred as a direct result of the primary victim's death<sup>17</sup>
- in exceptional circumstances, and within the limit of the total sum available to related victims, other expenses actually and reasonably incurred or reasonably likely to be incurred to assist in the related victim's recovery from the death of the primary victim.<sup>18</sup>

6.21 'Distress' is not defined in the Act. However, the Victorian Civil and Administrative Tribunal (VCAT) has considered that 'distress' should be given its ordinary dictionary meaning as 'great pain, anxiety, or sorrow; acute suffering; affliction; trouble'.<sup>19</sup> VCAT has also held that a related victim does not have to show that an injury in the medical sense has occurred to make a claim for distress.<sup>20</sup> In addition, it does not need to be established

12 Ibid s 10(2).

13 Ibid s 10(3).

14 A 'family member, in relation to a person' is defined in s 10A(3) of the Act as a spouse, domestic partner, former spouse, former domestic partner, a child who normally or regularly resides with that person, a person who is or has been ordinarily a member of the household of that person or a relative of that person. 'Relative' is further defined in s 10A(4) of the Act as a father, mother, grandfather, grandmother, step-father, step-mother, father-in-law, mother-in-law, son, daughter, grandson, granddaughter, step-son, step-daughter, son-in-law, daughter-in-law, brother, sister, half-brother, half-sister, brother-in-law, sister-in-law, uncle, aunt, uncle-in-law, aunt-in-law, nephew, niece, cousin, or anyone who would be a relative of the domestic partner if they were married.

15 *Victims of Crime Assistance Act 1996* (Vic) s 10A(1).

16 Ibid s 10A(2).

17 Ibid s 13(2).

18 Ibid s 13(4).

19 *Vita v Victims of Crime Assistance Tribunal* [2000] VCAT 2317 (30 November 2000).

20 *Krasauskas v Victims of Crime Assistance Tribunal* [2008] VCAT 1284 [7].

that an award for distress promotes the recovery of the related victim.<sup>21</sup>

- 6.22 The Act explicitly excludes applications for expenses incurred by related victims through loss or damage to property.<sup>22</sup>
- 6.23 As already noted, the Act limits the total financial assistance available to all the related victims of any one primary victim. The effect of this cap is discussed further later in this section.
- 6.24 A person who incurs the funeral expenses of a primary victim, but who is not a related victim, is also able to make a claim for assistance for those expenses.<sup>23</sup> However, as noted above, the maximum cumulative amount that may be awarded to a pool of related victims will be reduced by any award made in respect of funeral expenses.<sup>24</sup>

### Requirement for expenses to be 'reasonable'

- 6.25 As noted above, the Act expressly requires most expenses for which an application for financial assistance is made, to be 'reasonable'<sup>25</sup> or to be 'reasonably incurred'.<sup>26</sup>
- 6.26 The term 'reasonable' has been judicially considered. In *CS v Victims of Crime Assistance Tribunal*,<sup>27</sup> VCAT considered the meaning of 'reasonable' in the context of 'reasonable counselling services' under section 8(2)(a) of the Act. In that case VCAT referred to the definition of 'reasonable' in the *Oxford English Dictionary*: 'not greatly less or more than might be expected; inexpensive, not extortionate'. VCAT also drew assistance from the definition of 'reasonable' in the *Transport Accident Act 1986* (Vic), which requires the decision maker to have regard to the service actually rendered and the necessity of that service in the circumstances.<sup>28</sup>
- 6.27 In that case, VCAT concluded that the applicant's claim for counselling, which had been received on a weekly to fortnightly basis for five years, was unreasonable, due to there being little evidence of improvement, there having been no attempt to reduce the counselling sessions, and there being other factors in the applicant's life that VCAT considered had contributed to her need for counselling.<sup>29</sup>

### Awards for 'recovery expenses' in 'exceptional circumstances'

- 6.28 As already noted, the Act provides that in exceptional circumstances, a primary victim may also be awarded an amount for other expenses actually and reasonably incurred, or reasonably likely to be incurred, by the primary victim to assist in her or his recovery from the act of violence.<sup>30</sup>
- 6.29 Similarly, some secondary victims are eligible in exceptional circumstances for awards to assist recovery.<sup>31</sup>
- 6.30 Related victims are also eligible in exceptional circumstances for an award to assist their recovery from the death of the primary victim of the act of violence.<sup>32</sup>

21 Ibid. See also *Vita v Victims of Crime Assistance Tribunal* [2000] VCAT 2317 (30 November 2000).

22 *Victims of Crime Assistance Act 1996* (Vic) s 13(3).

23 Ibid s 15.

24 Ibid s 12(1).

25 The Act refers to 'reasonable counselling services': ss 8(2)(a), 10(2)(a) and 13(2)(a).

26 The Act refers to 'medical expenses actually and reasonably incurred': ss 8(2)(b), 10(2)(b), 13(2)(b); 'safety-related expenses actually and reasonably incurred': s 8(2)(e); and to 'other expenses actually and reasonably incurred': s 13(2)(e).

27 [2006] VCAT 1061 (9 June 2006).

28 Ibid [41]–[43].

29 Ibid [51]–[63].

30 *Victims of Crime Assistance Act 1996* (Vic) s 8(3).

31 Ibid s 10A.

32 Ibid s 14(4).

- 6.31 VCAT has interpreted ‘exceptional circumstances’ to mean ‘unusual, special, out of the ordinary’.<sup>33</sup> It has stated that whether or not such circumstances exist involves a consideration of ‘all of the circumstances, including the injury and the nature of the offending’.<sup>34</sup>
- 6.32 In order to make a claim for ‘recovery expenses’, the applicant must demonstrate that the expense will ‘go to the heart’ of assisting them in their recovery from a crime.<sup>35</sup> The therapeutic value of the particular expense sought is considered,<sup>36</sup> as well as whether there is a sufficient connection between the expense and recovery from the particular incident.<sup>37</sup>
- 6.33 Assistance can be awarded under the ‘recovery expenses’ category for a diverse range of items and services. For example, awards have been made for a gym membership,<sup>38</sup> Taekwondo classes,<sup>39</sup> computer training,<sup>40</sup> equipment for a beauty therapy course,<sup>41</sup> a laptop<sup>42</sup> and the removal of tattoos to assist the applicant to obtain employment.<sup>43</sup>

### Special financial assistance

- 6.34 In addition to assistance available for specific expenses incurred or likely to be incurred, the Act provides that primary victims can also be awarded special financial assistance.<sup>44</sup>
- 6.35 Special financial assistance is a lump-sum award that is made 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’.<sup>45</sup>
- 6.36 Special financial assistance is classified into four categories; A, B, C and D. These categories are based on the severity of the act of violence, with Category A covering the most serious offences and Category D covering the least serious.
- 6.37 The offences that fall into each category are set out in the schedule to the Regulations. They are as follows:
- Category A: offences involving sexual penetration and attempted murder
  - Category B: offences involving attempted sexual penetration, an indecent act, an indecent assault, armed robbery, aggravated burglary and deprivation of liberty for the purpose of sexual penetration or demanding a ransom
  - Category C: offences involving an attempt to commit any of the offences in Category B, a death threat, conduct endangering life, the infliction of serious injury and robbery
  - Category D: offences involving an attempt to commit any of the offences in Category C, a threat of injury, assault, attempted assault, deprivation of liberty (other than for sexual penetration or ransom) and any other act of violence.<sup>46</sup>

33 See *J v Victims of Crime Assistance Tribunal* [2002] VCAT 532 (24 July 2002) [90]; *RN v Victims of Crime Assistance Tribunal* [2005] VCAT 2651 (14 December 2005) [30].

34 *AVA v Victims of Crime Assistance Tribunal* [2010] VCAT 2078 (23 December 2010) [81]–[82]. See also *RN v Victims of Crime Assistance Tribunal* [2005] VCAT 2651 (14 December 2005) [30].

35 Victims of Crime Assistance Tribunal, *Other Expenses to Assist Recovery (2016)* <[www.vocat.vic.gov.au/assistance-available/financial-assistance-available/other-expenses-assist-recovery](http://www.vocat.vic.gov.au/assistance-available/financial-assistance-available/other-expenses-assist-recovery)>. See also Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 26.

36 See, eg, *MK v Victims of Crime Assistance Tribunal* [2013] VCAT 1582 (10 September 2013) [78]; *Mendez v Victims of Crime Assistance Tribunal* [2011] VCAT 1237 (8 July 2011) [49]–[51]; *JM v Victims of Crime Assistance Tribunal* [2002] VCAT 496 (17 June 2002) [31]; *Hay v Victims of Crime Assistance Tribunal* [2002] VCAT 45 (15 February 2002) [26]–[29].

37 See, eg, *ML v Victims of Crime Assistance Tribunal* [2006] VCAT 292 (28 February 2006) [29].

38 See, eg, *Mendez v Victims of Crime Assistance Tribunal* [2011] VCAT 1237 (8 July 2011) [50].

39 See, eg, *Gatto v Victims of Crime Assistance Tribunal* [2010] VCAT 966 (2 June 2010) [9]. An award was originally made by the Victims of Crime Assistance Tribunal (VOCAT) for one year of Taekwondo classes, but no award was made by the Victorian Civil and Administrative Tribunal for an additional year.

40 See, eg, the original award made by VOCAT in *ML v Victims of Crime Assistance Tribunal* [2006] VCAT 292 (28 February 2006) [6].

41 See, eg, *Mendez v Victims of Crime Assistance Tribunal* [2011] VCAT 1237 (8 July 2011) [50].

42 See, eg, the original award made by VOCAT in *ML v Victims of Crime Assistance Tribunal* [2006] VCAT 292 (28 February 2006) [6].

43 *Hay v Victims of Crime Assistance Tribunal* [2002] VCAT 45 (15 February 2002) [27]–[29].

44 *Victims of Crime Assistance Act 1996* (Vic) s 8A.

45 *Ibid* s 1(2)(b).

46 *Victims of Crime Assistance (Special Financial Assistance) Regulations 2011* (Vic) schedule.

6.38 The minimum and maximum amounts for each category are prescribed in section 8A(5) of the Act. They appear below in Table 2.

**Table 2: Minimum and maximum payments for each category of special financial assistance**

	Minimum amount	Maximum amount
Category A	\$4667	\$10,000
Category B	\$1300	\$3250
Category C	\$650	\$1300
Category D	\$130	\$650

6.39 The Regulations provide for three circumstances in which a higher maximum award of special financial assistance is available for acts of violence that would ordinarily fall within a category with a lower maximum award. In practice, this is often described as an 'uplift'.

#### Category A maximum amount available for category B, C or D acts of violence

6.40 Regulation 7 provides that the Category A maximum amount is available for acts of violence in Categories B, C and D where:

- the victim has suffered a very serious physical injury
- the victim has been infected with a very serious disease or
- the applicant has been the victim of related criminal acts, being acts of indecent assault or sexual penetration.

6.41 The Regulations define 'very serious injury' as 'actual physical bodily harm to the body of a permanent or long term duration that involves loss of a body function, disfigurement of a part of the body, total or partial loss of a part of the body, loss of a foetus or loss of fertility'.<sup>47</sup>

6.42 'Very serious disease' is defined as 'a disease that is life threatening in nature and includes HIV'.<sup>48</sup>

#### Category B maximum amount available for category C or D acts of violence

6.43 Regulation 8 provides that the Category B maximum is available for acts of violence in Category C or D where the victim was a child, elderly or impaired at the time of the act of violence and:

- the victim has suffered a serious injury
- the victim has suffered deprivation of liberty or
- the applicant has been the victim of related criminal acts of violence.

6.44 'Serious injury' is not defined in the Regulations. However, VCAT has held that 'serious' should be given its ordinary dictionary meaning of 'not slight or negligible'<sup>49</sup> or something more than 'superficial or trifling'.<sup>50</sup>

47 Ibid reg 5.

48 Ibid.

49 *Tucker v Victims of Crime Assistance Tribunal* [2009] VCAT 2453 (19 November 2009) [13].

50 *Moisisdis v Victims of Crime Assistance Tribunal* [2006] VCAT 1919 (20 September 2006) [17].

- 6.45 In *Moisidis v Victims of Crime Assistance Tribunal*,<sup>51</sup> VCAT found that the applicant suffered from a 'serious injury' in view of his ongoing need to take Panadeine Forte for neck pain, his difficulties moving his neck and the fact that he continued to experience a buzzing sound in his ears and had severe headaches approximately three to four times a week.<sup>52</sup> VCAT also took into account the fact that he had symptoms of post-traumatic stress, which could develop into a post-traumatic stress disorder.<sup>53</sup>
- 6.46 In contrast, in *Tucker v Victims of Crime Assistance Tribunal*,<sup>54</sup> VCAT found that a small bite wound requiring stitches and two courses of antibiotics did not constitute a 'serious injury'. This was because, despite leaving a residual mark, the injury presented no further complications nor was there any suggestion of a diagnosed mental disorder flowing from the incident.<sup>55</sup> VCAT also noted that the injury had not required any inpatient treatment and 'it was well on its way to healing in a single month'.<sup>56</sup>

### Category C maximum amount for category D acts of violence

- 6.47 Regulation 9 provides that the Category C maximum amount is available for Category D acts of violence where:
- the victim was a child, elderly or impaired at the time of the act of violence or
  - the applicant has been the victim of related criminal acts of violence.

### Interim awards for assistance

- 6.48 Under section 56 of the Act, applicants can make an application for an interim award of assistance pending the final determination of an application.
- 6.49 Interim awards form part of the total financial assistance available to victims up to the statutory limit of \$60,000 for primary victims and \$50,000 for secondary and related victims.
- 6.50 This means that in making a final award, VOCAT must deduct the amount of any interim award from the amount of assistance that it would otherwise have awarded.<sup>57</sup> Moreover, if an application is dismissed, VOCAT may order that the amount of any interim award is repaid.<sup>58</sup>
- 6.51 Interim awards can be awarded in any circumstances that VOCAT considers appropriate.<sup>59</sup> On its website, VOCAT states that the majority of interim awards are made in respect of counselling expenses and funeral expenses.<sup>60</sup> Since 2010, primary victims have also been able to access interim awards for safety-related expenses without needing to demonstrate exceptional circumstances.<sup>61</sup>
- 6.52 In the 2015–16 financial year, VOCAT made 3785 interim awards of financial assistance.<sup>62</sup> The average interim award for expenses already incurred in that financial year was \$972, while the average interim award for expenses not yet incurred was \$1638.<sup>63</sup>

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51 Ibid.  
52 Ibid [18].  
53 Ibid [19].  
54 [2009] VCAT 2453 (19 November 2009).  
55 Ibid [14].  
56 Ibid.  
57 *Victims of Crime Assistance Act 1996* (Vic) s 56(4).  
58 Ibid s 56(3).  
59 Ibid s 56(1).  
60 Victims of Crime Assistance Tribunal, *Urgent Financial Assistance* (2016) <[www.vocat.vic.gov.au/assistance-available/urgent-financial-assistance](http://www.vocat.vic.gov.au/assistance-available/urgent-financial-assistance)>.  
61 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 37. See also Victims of Crime Assistance Tribunal, *Safety-Related Expenses: Victims of Crime Assistance Tribunal*, Information Sheet (2010).  
62 Ibid 59–60.  
63 Ibid.

## Awards of assistance for ‘related criminal acts’

- 6.53 Under the Act, ‘related criminal acts’ can be treated as a single act of violence for the purposes of making an award.<sup>64</sup>
- 6.54 Criminal acts are considered to be related in the following circumstances:<sup>65</sup>
- they were committed against the same person and they occurred at approximately the same time
  - they were committed against the same person, they occurred over a period of time and they were committed by the same person or group of people
  - they were committed against the same person and they share some other common feature
  - they each contribute to the injury or death for which an application is made or
  - VOCAT considers that they ought to be treated as related criminal acts.
- 6.55 The effect of the related criminal acts provision is to reduce the amount of financial assistance payable to a victim of multiple related crimes.<sup>66</sup>
- 6.56 However, VOCAT has the discretion not to treat related criminal acts as a single act if it considers that in ‘the particular circumstances of [the] acts, they ought not to be treated as related’.<sup>67</sup>
- 6.57 Furthermore, as outlined above, there are circumstances in which the existence of a series of related criminal acts can increase the amount of special financial assistance available. To summarise, these circumstances are as follows:
- Where the applicant is a victim of a series of related criminal acts falling within Category D, the maximum award available is increased from the Category D maximum amount (\$650) to the Category C maximum amount (\$1300).<sup>68</sup>
  - Where the applicant is the victim of a series of related criminal acts and they were a child, elderly or impaired at the time that any of those acts was committed, the maximum award available for acts falling within Category C (\$1300) or Category D (\$650) is increased to the maximum available in Category B (\$3250).<sup>69</sup>
  - Where the applicant is a victim of a series of related acts of indecent assault or sexual penetration, the maximum award available for acts falling within Category B (\$3250), Category C (\$1300) or Category D (\$650) is increased to that of Category A (\$10,000).<sup>70</sup>

## Discussion and options for reform

- 6.58 This section considers whether the current categories and quantum of awards available under the Act are appropriate for victims of crime. It also considers a number of technical issues in relation to the categories and quantum of awards.
- 6.59 This section then sets out options for reform so as to ensure awards of financial assistance can better account for the harm suffered by victims and better assist victims in their recovery.
- 6.60 The Commission seeks the views of victims, persons affected, professionals, stakeholders and the community on what changes should be made to the Act on these matters. Specific questions are also set out below.

64 *Victims of Crime Assistance Act 1996* (Vic) s 4(4).

65 *Ibid* s 4(1)(a), (b) and (c).

66 Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse 2010) 9.

67 *Victims of Crime Assistance Act 1996* (Vic) s 4(1)(a) and (b).

68 *Victims of Crime Assistance (Special Financial Assistance) Regulations 2011* (Vic) reg 9(a).

69 *Ibid* reg 8(b).

70 *Ibid* reg 7(c).

## Prevalence of awards

6.61 Data from the VOCAT *Annual Report 2015–16* shows that applications for some criminal acts tend to be more successful than for others.<sup>71</sup> In particular, claims for family violence and violence occurring in the context of property offences are less successful than claims for other offences. (See Table 3).

**Table 3: Number of awards of assistance made by the Victims of Crime Assistance Tribunal in 2015–16 by category of offence<sup>72</sup>**

Category of offence	Number of applications lodged	Number of awards of assistance made	Percentage of successful applications
Homicide	490	329	67%
Rape	273	183	67%
Other sexual offences	864	662	76%
Robbery	313	240	76%
Assault	3092	2161	69%
Abduction/kidnap	35	29	82%
Criminal damage by fire	18	7	38%
Burglary	423	249	58%
Harassment	118	72	61%
Family violence	388	113	29%
Other	207	116	56%

6.62 These figures demonstrate that in 2015–16 an application for assistance for family violence was less than half as likely to succeed as an application in respect of sexual offences, assault and robbery.

6.63 Similarly, the figures show that in 2015–16, an application for financial assistance in relation to criminal damage by fire or burglary was less likely to succeed than offences against the person.

6.64 It is not clear why awards for assistance in relation to family violence and violence relating to property offences are less common than awards for other criminal acts. The difficulties that victims of family violence and victims of property offences encounter in relation to the eligibility test, as discussed in Chapter 5, may contribute to the relatively low number of successful applications for this group of victims.

6.65 However, as the Commission noted in its *Family Violence and the Victims of Crime Assistance Act 1996: Consultation Paper* (the first consultation paper), the data in relation to applications for family violence may not represent the full picture.<sup>73</sup> VOCAT noted in its *Annual Report 2015–16* that it only began recording the number of applications lodged in respect of family violence part way through the 2015–2016 financial year. This means that the numbers reported do not represent a full year of applications.

6.66 Preliminary consultations also indicated that the way that family violence matters are currently recorded is predominantly based on whether or not the applicant describes the ‘act of violence’ as ‘family violence’. This means that some applications identified as relating to physical or sexual assault may also relate to family violence.

<sup>71</sup> Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 50–1.

<sup>72</sup> This data is taken from the Victims of Crime Assistance Tribunal’s Annual Report: *ibid.*

<sup>73</sup> Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 64 [7.50].

## Quantum of awards

- 6.67 This section considers whether the quantum of awards available under the Act is adequate to account for the harm experienced by victims following an act of violence.
- 6.68 In particular, it discusses the adequacy of:
- the total assistance available to an individual victim
  - the total assistance available to a pool of related victims.
- 6.69 It also sets out options for reform to ensure that the quantum of awards under the Act meets victims' needs.
- 6.70 The Commission seeks the views of victims, persons affected, professionals, stakeholders and the community on what changes should be made to the Act to improve the sufficiency of the quantum of awards of assistance to victims. Specific questions are set out below.

## Total financial assistance available

- 6.71 As noted at [6.10] above, the maximum amount of financial assistance potentially available under the Act for primary victims is \$70,000 (\$60,000 plus \$10,000 special financial assistance).
- 6.72 This sum is consistent with the maximum award available for primary victims in other Australian jurisdictions, which ranges between \$30,000 in Tasmania<sup>74</sup> and \$100,000 in South Australia.<sup>75</sup> Victoria's maximum award is similar to that in Queensland and Western Australia, which both cap the award for primary victims at \$75,000.<sup>76</sup>
- 6.73 This analysis suggests that the maximum amount of financial assistance available under the Act may be appropriate, particularly having regard to the need for such schemes to be economically sustainable for the state.
- 6.74 However, for those suffering permanent and serious disability as a result of an act of violence, the maximum amount of financial assistance may not be adequate to meet the victim's needs. In particular, for victims who are unable to return to work because of their injuries, the total maximum of \$70,000 may not be able to assist them for very long.<sup>77</sup>
- 6.75 Moreover, it should be noted that the average award granted by VOCAT is much lower than the overall maximum available. In the 2015–16 financial year, the average award amount was \$7784, around one tenth of the total maximum award available.<sup>78</sup> This figure, however, is more likely to be a consequence of the categories of award available under the Act, rather than the total financial assistance available. Issues relating to the categories of award are discussed further below.

## Question

- 10 Are the maximum amounts of financial assistance available under the Act adequate to meet the needs of victims? If not, what should the maximum amounts be?

74 This is the maximum award for a primary victim of a single criminal act in Tasmania: *Victims of Crime Assistance Regulations 2010* (Tas) reg 4(1)(a).

75 This is the maximum award for a primary victim in South Australia: *Victims of Crime Act 2001* (SA) s 20(3)(c).

76 *Victims of Crime Assistance Act 2009* (Qld) s 38(1); *Criminal Injuries Compensation Act 2003* (WA) s 31.

77 See, eg, a recent media report concerning a victim of an assault who was badly injured and has been unable to return to work. The assault victim made an application for financial assistance to the Victims of Crime Assistance Tribunal in 2013 and was awarded \$70,000—the maximum amount available to a primary victim under the Act. Four years later, in 2017, the assault victim describes this money as 'drying up', see William Vallely, 'Damages Do Not Fit the Crime: Victim', *Bendigo Advertiser* (online), 21 July 2017, <[www.bendigoadvertiser.com.au/story/4804647/victims-plea-for-justice/](http://www.bendigoadvertiser.com.au/story/4804647/victims-plea-for-justice/)>.

78 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 33.

## Cap on quantum available for related victims

- 6.76 As mentioned above at [6.12]–[6.14], the Act limits the maximum amount of financial assistance payable to a pool of related victims to \$100,000 for one act of violence.<sup>79</sup>
- 6.77 This means that the process for assessing an application made by a related victim is often complex. For example, the application form requires a related victim applicant to list every other person who they believe may be a related victim, every other person who they believe may allege that he or she is a related victim, and any person who they believe may apply for funeral expenses for the primary victim.<sup>80</sup> VOCAT is then required to notify potential related victims who may have an entitlement to make an application for assistance under the Act.<sup>81</sup> VOCAT will attempt to wait until all related victims have lodged their applications for assistance before considering any related victim application.<sup>82</sup>
- 6.78 This process can cause significant delays in related victims receiving assistance under the Act. The Commission currently does not have data concerning processing times for the applications of related victims. However, the review of the Queensland victims of crime assistance legislation found that a similar use of pools for related victims under that scheme resulted in related victims receiving assistance around one month later than applicants in other victim categories.<sup>83</sup>
- 6.79 Another concern raised in the Queensland review was that the use of a finite pool of assistance for a group of victims can result in some victims being unable to make a claim for assistance if they do not do so in a timely manner.<sup>84</sup> Some related victims, such as children, may take a considerable amount of time to make an application.<sup>85</sup> However, if these victims apply later when, for example, they become aware of their injuries, the pool may be exhausted. Although VOCAT is able to exceed the pool in exceptional circumstances,<sup>86</sup> there is still no guarantee that such victims will be able to access financial assistance under the Act.
- 6.80 The fact that the related victims pool can be reduced by an award made in respect of funeral expenses is also problematic. In preliminary consultations the Commission was told that the average funeral cost has dramatically increased since the amounts of assistance under the Act were set and that the reduction of the overall pool for funeral expenses now operated to significantly decrease the awards received by related victims.
- 6.81 One option for reform is to remove the pool of assistance for related victims. This was recommended by the Queensland Department of Justice and Attorney-General in its review of the *Victims of Crime Assistance Act 2009* (Qld).<sup>87</sup> Queensland has since introduced an amendment removing the pools of assistance from its victims of crime assistance scheme.<sup>88</sup> Moreover, there are no pools of assistance in either the New South Wales or Australian Capital Territory schemes, which both have similar victim categories to Victoria.<sup>89</sup> This option would remove the complexity of the application process for related victims.
- 6.82 Alternatively, funeral expenses could be removed from the pool of assistance for related victims. This would prevent the assistance that is available to related victims being reduced by the costs of the funeral. Another option is to increase the total assistance available to related victims in order to account for the increased cost of funerals.

79 *Victims of Crime Assistance Act 1996* (Vic) s 12(1).

80 Victims of Crime Assistance Tribunal, *Application for Assistance Form* (2016) pt 10, see Appendix C.

81 See generally, Victims of Crime Assistance Tribunal, Melbourne Magistrates' Court, *Practice Direction No 1 of 2007—Notification by Tribunal to Potential Related Victims*, 27 June 2007.

82 The Act requires that VOCAT endeavour to hear and determine together all applications made by related victims of any one act of violence, see *Victims of Crime Assistance Act 1996* (Vic) s 32(2). On the Application Form, VOCAT provides that its practice is to wait until all related victims have lodged their applications in order for it to hear them together, Victims of Crime Assistance Tribunal, *Guide to Completing the Application for Assistance Form* (2016) s 10, see Appendix C.

83 Department of Justice and Attorney-General (Qld), *Final Report on the Review of the Victims of Crime Assistance Act 2009* (2015) 16.

84 Ibid.

85 Ibid.

86 *Victims of Crime Assistance Act 1996* (Vic) s 12(2).

87 Department of Justice and Attorney-General (Qld), *Final Report on the Review of the Victims of Crime Assistance Act 2009* (2015) 16 (Recommendation 4).

88 See *Victims of Crime Assistance and Other Legislation Amendment Act 2017* (Qld) s 38.

89 *Victims of Crime (Financial Assistance) Regulations 2016* (ACT) reg 5; *Victims Rights and Support Regulations 2013* (NSW) reg 10.

## Questions

- 11 Should the Act be amended to remove the pool of assistance for related victims? If not, should the total maximum cumulative amount of assistance available for a pool of related victims be increased?
- 12 Should the Act be amended to reflect the rising cost of funerals? If so, what amendments should be made? Should funeral expenses be excluded from the total maximum cumulative amount of assistance available under the Act for a pool of related victims?

### Categories of award

- 6.83 As noted above, under the Act the main categories for which awards of financial assistance are available are:
- expenses actually or reasonably likely to be incurred—such as for counselling and medical expenses
  - in exceptional circumstances, other expenses actually or reasonably likely to be incurred to assist recovery
  - for primary victims only—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’.<sup>90</sup>
- 6.84 This section explores potential issues relating to the categories of award that are available under the Act, and whether the current categories of award are still appropriate.
- 6.85 It also sets out options for reform to ensure that the categories of award under the Act meet the needs of victims.
- 6.86 The Commission seeks the views of victims, persons affected, professionals, stakeholders and the community on what changes should be made to the categories of award under the Act. Specific questions are also set out below.

### Are the current categories of award under the Act still appropriate?

- 6.87 Generally, the categories of award available under the Act appear to adequately meet victims’ needs. The Commission notes that the generous interpretations of ‘medical expenses’ and ‘counselling’ have enabled victims to make claims for a wide range of expenses. For example, in *NF v Victims of Crime Assistance Tribunal*,<sup>91</sup> martial arts therapy was found to constitute ‘counselling’, despite ‘differ[ing] from traditional counselling’.<sup>92</sup>
- 6.88 Moreover, in *Ractliffe v Victims of Crime Assistance Tribunal*,<sup>93</sup> the cost of an occupational therapy assessment provided for the purposes of regaining a driving licence was considered to be a ‘medical expense’.<sup>94</sup> In that case, the applicant was a victim of an assault, which had resulted in him suffering brain injury and having his driving licence removed, following a finding that he was unfit to drive.<sup>95</sup>

90 *Victims of Crime Assistance Act 1996* (Vic) s 1(2)(b).  
 91 [2012] VCAT 1740 (16 November 2012).  
 92 *Ibid* [40].  
 93 [2015] VCAT 205 (4 March 2015).  
 94 *Ibid*.  
 95 *Ibid* [15]–[21].

- 6.89 In addition, the introduction of awards for safety-related expenses in 2010 has been 'generally considered to be a positive step'.<sup>96</sup> This category of assistance is viewed as especially useful for victims of family violence,<sup>97</sup> who often face ongoing concerns for their safety.
- 6.90 However, the exclusion of assistance for expenses incurred through loss or damage to property can result in some awards being inadequate to meet victims' recovery needs. This exclusion can particularly affect victims of family violence, who may require property-related assistance in order to achieve the independence and security necessary to their recovery, both in the short and longer term.<sup>98</sup>
- 6.91 One option for reform is to include awards for expenses related to property loss or damage under the Act. This could be done generally, or only in relation to specific victims, such as victims of family violence. See Chapter 5 for a more detailed discussion of the option to provide financial assistance for property loss or damage.
- 6.92 Another gap in the current categories of award under the Act is the lack of award for childcare expenses. While childcare expenses may be claimed as safety-related expenses depending on the circumstances, there is no explicit category of award for expenses of this nature.
- 6.93 The lack of award for childcare expenses under the Act may affect the ability of victims who do not have access to affordable childcare to make practical arrangements for their safety.<sup>99</sup> It also may affect their ability to attend medical and counselling appointments to assist in their recovery.<sup>100</sup>
- 6.94 The Whittlesea Community Legal Service suggests the inclusion of childcare expenses in the Act as an expense that can be claimed under an interim award.<sup>101</sup> It notes this would be beneficial for victims of family violence as it would enable them to spend time making arrangements for their safety and that of their family by, for example, finding alternative accommodation or meeting lawyers.<sup>102</sup> However, it also notes that there may be practical difficulties with this suggestion, such as those involved in finding short-term childcare.<sup>103</sup>
- 6.95 An option for reform is to explicitly include assistance for childcare expenses in the Act.

## Question

- 13 Are the current categories of award under the Act still appropriate to meet the needs of victims of crime? If not, how should the categories of award under the Act be amended and what should be included?

96 Whittlesea Community Legal Service, *Victims of Crime Assistance Tribunal Capacity Building Project*, Discussion Paper (Whittlesea Community Connections, 2011) 48.

97 Ibid.

98 For a discussion of the economic consequences of family violence, see generally Australia's National Research Organisation for Women's Safety, *Building Effective Policies and Services to Promote Women's Economic Security Following Domestic Violence*, State of Knowledge Paper No 7 (ANROWS Landscapes, 2015). See also Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality after Family Violence—Report on the Stepping Stones Project* (Women's Legal Service Victoria, 2015).

99 Whittlesea Community Legal Service, *Victims of Crime Assistance Tribunal Capacity Building Project*, Discussion Paper (Whittlesea Community Connections, 2011) 48.

100 Ibid.

101 Ibid.

102 Ibid.

103 Ibid 49.

## Requirement for certain expenses to be reasonable

- 6.96 The Act requires most expenses to be reasonable. This applies to expenses for counselling services,<sup>104</sup> medical expenses,<sup>105</sup> safety-related expenses,<sup>106</sup> other expenses for related victims<sup>107</sup> and recovery expenses.<sup>108</sup>
- 6.97 In *CS v Victims of Crime Assistance Tribunal*,<sup>109</sup> VCAT considered whether the applicant's claim for counselling, which had been received on a weekly to fortnightly basis for five years, was 'reasonable'. It held that these counselling expenses were not reasonable because, among other things, there was little evidence of improvement in the applicant's mental health and the psychologist had not attempted to reduce the counselling sessions.<sup>110</sup> VCAT arrived at this conclusion despite accepting that the applicant believed that she 'would not be here now'<sup>111</sup> without the psychologist and that 'she was comforted by just knowing that she can call on her'.<sup>112</sup>
- 6.98 The view that counselling services are not reasonable if there is no evidence of improvement in the applicant's health is problematic. This is because some victims may never overcome the injuries that they suffer as a result of an act of violence. This is especially so for victims of child sexual abuse,<sup>113</sup> such as the applicant in *CS*. In these situations, it is questionable whether an applicant should be prevented from continuing with counselling due to it only being supportive in nature, rather than rehabilitative.
- 6.99 Moreover, if this interpretation of 'reasonable' is also applied to medical expenses under the Act, then victims may only be awarded assistance for medical procedures that are effective in the victim's recovery, rather than those that reduce pain or promote stability. This could result in victims being denied assistance for expenses that are fundamental to their quality of life.
- 6.100 In order to overcome this problem, the Act could define 'reasonable counselling services' in a way that ensures that the focus is on the benefit to the applicant rather than a tangible improvement in health.
- 6.101 Alternatively, the Act could be amended to remove the words 'reasonable' and 'reasonably incurred' from the categories of award.

## Question

- 14 Is it appropriate for the Act to require that the costs for certain expenses, such as counselling services, be reasonable? If not, what changes should be made to the Act?

104 *Victims of Crime Assistance Act 1996* (Vic) ss 8(2)(a), 10(2)(a) and 13(2)(a).

105 *Ibid* ss 8(2)(b), 10(2)(b), 13(2)(b).

106 *Ibid* s 8(2)(e).

107 *Ibid* s 13(2)(e).

108 *Ibid* ss 8(3), 10A and 13(4).

109 [2006] VCAT 1061 (9 June 2006).

110 *Ibid* [51]–[63].

111 *Ibid* [53].

112 *Ibid*.

113 Childhood sexual abuse can have a range of long-term effects, including adverse behavioural, developmental, physical, interpersonal and psychological outcomes, which not all victims may be able to overcome, see generally Judith Cashmore and Rita Shackel, *The Long-term Effects of Childhood Sexual Abuse*, CFCA Paper No 11 (Child Family Community Australia, 2013) <<https://aifs.gov.au/cfca/publications/long-term-effects-child-sexual-abuse>>.

## Additional awards to assist recovery and the need for ‘exceptional circumstances’

- 6.102 As noted above, under the Act, VOCAT can grant additional financial assistance to assist recovery in exceptional circumstances.
- 6.103 Primary victims and related victims can, in exceptional circumstances, make a claim for other expenses actually and reasonably incurred, or reasonably likely to be incurred, to assist in their recovery.<sup>114</sup>
- 6.104 Certain secondary victims can make a claim for recovery expenses in exceptional circumstances where:
- the secondary victim was under 18 at the time of the act of violence, the primary victim was their family member,<sup>115</sup> and the secondary victim was injured by witnessing the act of violence,<sup>116</sup> or
  - the secondary victim was a parent or guardian of the primary victim, the primary victim was under 18 at the time of the event, and the secondary victim was injured by subsequently becoming aware of the act of violence.<sup>117</sup>
- 6.105 In preliminary consultations the Commission was told that awards for recovery expenses in exceptional circumstances can be beneficial, allowing victims access to financial assistance tailored to their specific needs.
- 6.106 The Commission was informed that claims for recovery expenses can enable victims to make a claim for expenses that they would otherwise be unable to access under the Act. Specifically, the recovery expenses category is sometimes used to cover expenses flowing from financial abuse or property damage.
- 6.107 However, there are also some problems with awards for recovery expenses in exceptional circumstances. These relate to VOCAT’s broad discretion to make such awards and the interpretation of exceptional circumstances. These issues are considered below.

### Broad discretion to award recovery expenses

- 6.108 VOCAT has a very wide discretion in making awards for recovery expenses in exceptional circumstances under the Act, both in relation to the applicant’s eligibility for an award under this category and the kinds of expenses that will be covered. This can result in inconsistency in awards for different victims. In some cases an application for financial assistance for a gym membership is successful, whereas in others it is not.<sup>118</sup>
- 6.109 One option for reform is to limit the discretion of the decision maker when making awards for recovery expenses in exceptional circumstances by putting in place guiding principles. For example, the administration of the flexible support packages (FSPs), which are government-funded packages to assist family violence victims, is guided by funding principles.<sup>119</sup> These principles outline the goals for which FSPs can be provided, such as ‘moving to independent living’, ‘improving employment opportunities’ or ‘having better health and well-being’.<sup>120</sup> They also include certain requirements, such as that the funding must be the most relevant option to meet that person’s needs, as well as certain prohibitions, such as that FSPs cannot be used for gambling.<sup>121</sup>

114 *Victims of Crime Assistance Act 1996* (Vic) ss 8(3), 13(4).

115 A ‘family member, in relation to a person’ is defined in s 10A(3) of the Act as a spouse, domestic partner, former spouse, former domestic partner, a child who normally or regularly resides with that person, a person who is or has been ordinarily a member of the household of that person or a relative of that person. ‘Relative’ is further defined in s 10A(4) of the Act as a father, mother, grandfather, grandmother, step-father, step-mother, father-in-law, mother-in-law, son, daughter, grandson, granddaughter, step-son, step-daughter, son-in-law, daughter-in-law, brother, sister, half-brother, half-sister, brother-in-law, sister-in-law, uncle, aunt, uncle-in-law, aunt-in-law, nephew, niece, cousin, or anyone who would be a relative of the domestic partner if they were married.

116 *Victims of Crime Assistance Act 1996* (Vic) s 10A(1).

117 *Ibid* s 10A(2).

118 For example, the applicant’s claim for a gym membership was successful in *Mendez v Victims of Crime Assistance Tribunal* [2011] VCAT 1237 (8 July 2011), but was unsuccessful in *ML v Victims of Crime Assistance Tribunal* [2006] VCAT 292 (28 February 2006).

119 Department of Health and Human Services (Vic), *Flexible Support Packages Guidelines* (2013) Appendix 1, available at <[www.dhs.vic.gov.au/about-the-department/documents-and-resources/policies,-guidelines-and-legislation/flexible-support-packages-guidelines](http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/policies,-guidelines-and-legislation/flexible-support-packages-guidelines)>.

120 *Ibid*.

121 *Ibid*.

- 6.110 A similar set of guidelines could be implemented for VOCAT awards for recovery expenses to improve consistency in awards while also retaining flexibility.

### The requirement for 'exceptional circumstances' for recovery expenses

- 6.111 VCAT has interpreted exceptional circumstances as 'out of the ordinary'. This means that only victims who suffer an unusual or uncommon reaction to a crime seem to be eligible for an award for recovery expenses. For example, in *RN v Victims of Crime Assistance*,<sup>122</sup> in which the applicant had been the victim of a rape in her own bedroom, VCAT found that exceptional circumstances did not exist. This was because it held that her resulting post-traumatic stress disorder, anxiety and depression were 'depressingly common'<sup>123</sup> for victims of rape and therefore not 'unusual, special or out of the ordinary'.<sup>124</sup>
- 6.112 By comparison, in *Mendez v Victims of Crime Assistance Tribunal*,<sup>125</sup> the fact that the applicant continued to suffer from her injuries long after she was physically assaulted was considered to constitute 'exceptional circumstances' for the purposes of section 8(3). VCAT considered that:
- the persistence of the conditions of depression and post-traumatic stress disorder more than 12 years after the assault, along with the continued disfigurement to the nose, constitute circumstances out of the ordinary course.<sup>126</sup>
- 6.113 This emphasis on whether the applicant's response is abnormal or uncommon, rather than on the severity of the act of violence or the harm suffered, may mean that awards for recovery expenses are not always made to those who need them the most.
- 6.114 An option for reform is to define exceptional circumstances in the Act so that the emphasis is on severity of the harm suffered or the nature of the act of violence, instead of whether a victim's injuries are abnormal or uncommon.
- 6.115 Alternatively, the requirement that exceptional circumstances exist in order to be awarded assistance for recovery expenses could be removed. This would enable all victims to be able to make a claim for recovery expenses.

## Questions

- 15 Is it appropriate for the Act to limit awards for recovery expenses to 'exceptional circumstances'? If not, what changes should be made to the Act?
- 16 In addition to the financial assistance available under the Act, are there other ways to promote the recovery of victims from the effects of crime? If so, is there a need for these other ways to be supported by the Act?

### Interim awards

- 6.116 The Commission is unaware of any concerns relating to the quantum of interim awards or the types of expenses for which an interim award can be claimed.
- 6.117 However, the Commission is aware of possible problems relating to interim awards and timeliness. Timeliness of awards is discussed in Chapter 10.
- 6.118 There are also issues relating to the nature of interim awards. The fact that interim awards

122 [2005] VCAT 2651 (14 December 2005).  
 123 Ibid [35].  
 124 Ibid [37].  
 125 [2011] VCAT 1237.  
 126 Ibid [49].

are not final and may be required to be later reimbursed, deducted from awards or varied can result in uncertainty for applicants and inefficiency for the Tribunal.

- 6.119 An alternative model is provided by the victims' assistance scheme in New South Wales. Under the *Victims Rights and Support Act 2013* (NSW), final awards can be granted to primary victims for immediate needs up to a maximum of \$5000 to 'cover expenses for treatment or other measures that need to be taken urgently, as a direct result of that act of violence, to secure the victim's safety, health or well being'.<sup>127</sup> This category of award exists alongside the other three categories of assistance available to primary victims for counselling services, economic loss and recognition payments.<sup>128</sup>
- 6.120 An option for reform is to adopt a similar model to that in New South Wales. This approach would enable victims to access assistance for urgent expenses without the need for readjustments. Moreover, it would allow for an award for such expenses to be considered together with expenses to meet the victim's needs in the longer term.
- 6.121 However, without an administrative system like that in New South Wales, it may be difficult to ensure that such awards are provided to victims speedily. The benefits of an administrative model are discussed below in Chapters 10 and 15.

## Question

- 17 Are the interim awards available under the Act adequate to meet victims' needs, including with respect to quantum and timeliness? If not, how should they be improved?

### Limitations of the special financial assistance provision

- 6.122 In the first consultation paper, the Commission considered the limitations of the special financial assistance categories for family violence victims. In particular, it explored whether the categories accounted for the impact of cumulative harm caused to victims by persistent and protracted patterns of abuse, as well as the impact of such acts on children, as a particularly vulnerable class of victim.<sup>129</sup>
- 6.123 However, these issues are also relevant for other classes of victim, such as victims of child abuse, elder abuse and abuse of people with disability. Therefore they are also considered in this paper.
- 6.124 In addition, this section explores whether the formula in the Act used to determine awards of special financial assistance is the most appropriate way to calculate the amount payable to primary victims for harms arising from crime. This section then sets out options for reform.
- 6.125 The Commission seeks the views of victims, persons affected, professionals, stakeholders and the community on what changes should be made to the special financial assistance categories and uplift provisions, if any, to ensure that the Act recognises the harm suffered by victims. Specific questions are set out below.

127 *Victims Rights and Support Act 2013* (NSW) s 26(1)(b).

128 *Ibid* s 26(1).

129 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 66 [7.61]–[7.70].

## Recognising cumulative harm

- 6.126 The Victorian Royal Commission into Family Violence (the Royal Commission into Family Violence) noted that the special financial assistance categories in the Act do ‘not sufficiently take into account the cumulative harm of individual acts of violence as a result of experiencing persistent and protracted violence’.<sup>130</sup>
- 6.127 This is because the relevant categories of special financial assistance are based on the severity of a single offence, rather than the overall impact of a pattern of abuse.<sup>131</sup>
- 6.128 While the maximum award for a category of special financial assistance can be increased where there has been a series of ‘related criminal acts’, this can only be done in limited circumstances.<sup>132</sup> As mentioned above, these circumstances are as follows:
- Where the applicant is a victim of a series of related criminal acts falling within Category D, the maximum award available is increased from the Category D maximum amount (\$650) to the Category C maximum amount (\$1300).<sup>133</sup>
  - Where the applicant is the victim of a series of related criminal acts and they were a child, elderly or impaired at the time that any of those acts was committed, the maximum award available for acts falling within Category C (\$1300) or Category D (\$650) is increased to the maximum available in Category B (\$3250).<sup>134</sup>
  - Where the applicant is a victim of a series of related acts of indecent assault or sexual penetration, the maximum award available for acts falling within Category B (\$3250), Category C (\$1300) or Category D (\$650) is increased to that of Category A (\$10,000).<sup>135</sup>
- 6.129 As the first consultation paper discussed, this is a problem for victims of family violence, who often experience violence over long periods of time.<sup>136</sup> The Royal Commission into Family Violence found that victims of family violence who are not victims of criminal acts in the higher categories, such as attempted murder or offences involving sexual penetration (Category A):
- may only be eligible for the amount tied to the ‘less serious’ offences in perhaps category D or C—despite potentially having endured these ‘less serious’ offences over a long period of time.<sup>137</sup>
- 6.130 The limited circumstances in which the special financial assistance categories account for cumulative harm are also a concern for other victims who experience repeated violence, including victims of elder abuse, child abuse and abuse of people with disability.
- 6.131 As noted above, an ‘uplift’ is available for a series of related criminal acts falling within Category C or D if the primary victim was a child, elderly or impaired at the time of any of those acts. However, the maximum amount available is only increased to that of Category B (\$3250), rather than Category A (\$10,000).<sup>138</sup> This sum may still not reflect the severe impact that protracted violence can have on such vulnerable victims.

130 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 4, 78.

131 Women’s Legal Service Victoria, Submission 940 (No 1) to Royal Commission into Family Violence, *Royal Commission into Family Violence*, 19 June 2015, 53.

132 This was noted by the Victorian Magistrates’ Court and Children’s Court in their submission to the Royal Commission into Family Violence: Magistrates’ Court of Victoria and Children’s Court of Victoria, Submission No 978 to Royal Commission into Family Violence, *Royal Commission into Family Violence*, June 2015, 59.

133 *Victims of Crime Assistance (Special Financial Assistance) Regulations 2011* (Vic) reg 9(a).

134 *Ibid* reg 8(b).

135 *Ibid* reg 7(c).

136 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 55-7 [7.61]–[7.70].

137 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 4, 79.

138 *Victims of Crime Assistance (Special Financial Assistance) Regulations 2011* (Vic) reg 8(b).

## A higher award for a series of any related criminal acts

- 6.132 One way to ensure that the Act takes into account the cumulative harm of persistent and protracted violence is to amend the special financial assistance categories so that a higher award is available for a series of related criminal acts.
- 6.133 Regulation 7 could be amended so that being the victim of a series of *any* related criminal acts is a circumstance in which the Category A maximum amount is available. This could be achieved by removing the words ‘being acts of indecent assault or sexual penetration’ from regulation 7(c).
- 6.134 An alternative option is that a series of related criminal acts could be considered an ‘aggravating factor’ that results in an uplift to different amounts, depending on the nature of the criminal acts involved. This is the approach of the Australian Capital Territory scheme, which lists ‘a series of offences that are related’ as a ‘circumstance of aggravation’.<sup>139</sup> Under the Australian Capital Territory scheme, the existence of a ‘circumstance of aggravation’ gives rise to higher ‘recognition payments’ which vary for different offences.<sup>140</sup> For example, for a sexual offence punishable by imprisonment for 14 years or more, the ordinary recognition payment available is \$15,000, whereas it is \$18,750 if a circumstance of aggravation existed.<sup>141</sup> For offences involving deprivation of liberty, the ordinary recognition payment is \$2000, whereas it is \$2500 if there was a circumstance of aggravation, such as the existence of a series of related acts.<sup>142</sup>
- 6.135 This approach could be incorporated into the Victorian scheme by providing, for example, that the existence of a series of related criminal acts that would ordinarily fall into Category D gives rise to the maximum available for Category B, while a series of related criminal acts that would ordinarily fall into Categories C and B entitles a victim to the maximum available for Category A. Alternatively, something even more similar to the Australian Capital Territory approach could be adopted, with set higher amounts for each offence and a list of aggravating factors.

## Expanding the circumstances in which a higher award is available for a series of related criminal acts

- 6.136 Another option is to maintain the availability of an uplift to Category A for a series of related acts to only some circumstances, but to expand those circumstances to include additional situations, such as family violence.
- 6.137 In their submission to the Royal Commission on Family Violence, the Magistrates’ Court and Children’s Court recommended that the Regulations be amended to include a series of acts of family violence as a circumstance in which the Category A maximum is available.<sup>143</sup> As the first consultation paper noted, this could be achieved by adding ‘family violence’ to regulation 7(c) of the Regulations as one of the circumstances (along with indecent assault and sexual penetration) in which a series of criminal acts can be compensated by the Category A maximum award.<sup>144</sup>
- 6.138 Regulation 7 could also be amended to include victims of a series of related criminal acts who were children, elderly or impaired at the time of any of the acts. This would mean that the Category A maximum award would be available for such victims, instead of the Category B maximum award, as is currently the case under regulation 8.

139 *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 8(1)(b).

140 *Victims of Crime (Financial Assistance) Regulations 2016* (ACT) reg 8 table 8.

141 *Ibid.*

142 *Ibid.*

143 Magistrates’ Court of Victoria and Children’s Court of Victoria, Submission No 978 to Royal Commission into Family Violence, *Royal Commission into Family Violence*, June 2015, 50.

144 *Ibid.* (Recommendation 25). See also Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 68 [7.84].

## Recognising a pattern of abuse within a higher category of special financial assistance

- 6.139 An alternative option would be to explicitly recognise a pattern of certain forms of violence within one of the higher categories of special financial assistance. The Northern Territory victims' assistance scheme recognises 'domestic violence injuries' as a distinct compensable category of injury for which a victim can receive a lump sum.<sup>145</sup> 'Domestic violence injuries' are defined as injuries resulting from a series of three or more related criminal acts committed by an offender with whom the victim is in a domestic relationship, or stalking in contravention of a domestic violence order.<sup>146</sup> For this category of compensable injury, victims can be awarded between \$7500 and \$10,000.<sup>147</sup>
- 6.140 This approach could be adopted in the Victorian Regulations by including as a circumstance a 'series of related acts' of family violence as an 'act of violence' falling in Category A or B. This could also be done for a series of related criminal acts that occur in the context of child abuse, elder abuse or abuse of people with disability. Alternatively, 'a series of related acts of family violence' could be defined to include violence that is perpetrated by carers and other residents in a place of residential care in order to ensure that most abuse encountered by children, older people or people with disability is encompassed by this provision.<sup>148</sup>

## Removing the categories of special financial assistance

- 6.141 Another way to improve the Victorian scheme's recognition of cumulative harm, as discussed in the first consultation paper, is to remove the categories of special financial assistance and instead require VOCAT to have regard to certain factors in determining an appropriate award.<sup>149</sup> These factors could include an assessment of whether there was a pattern of abuse, as well as of the severity of the criminal acts and the injuries suffered. Under this approach, the maximum amount of special financial assistance for any application would be \$10,000.
- 6.142 This approach would mean that VOCAT could make an assessment of all the circumstances without being confined to set categories. It would also enable a consideration of the existence of a pattern of violence to occur at the same point in the decision-making process as the nature of the criminal act. However, this option would also give VOCAT a considerable amount of discretion in relation to awards of special financial assistance. The problems associated with special financial assistance and the decision maker having a wide discretion are discussed further below at [6.153]–[6.163].

## Question

- 18 Should the special financial assistance formula be amended to take into account the cumulative harm of a series of related criminal acts? If so, how should the formula be amended?

145 *Victims of Crime Assistance Regulations 2007* (NT) sch 3 pt 2.

146 *Ibid* reg 5(1)(a).

147 *Ibid* sch 3 pt 2.

148 See, eg, People with Disability Australia (PWDA), Submission to Department of Justice (NSW), *New South Wales Statutory Review of the Victims Rights and Support Act 2013 No 37*, July 2016, 4, recommending the continued inclusion of the definition of 'domestic violence', as it encompasses 'relationships and forms of residence in which people with disability experience disproportionate violence'.

149 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 69 [7.88].

## Recognising vulnerability

6.143 Another concern is that the categories of special financial assistance do not sufficiently account for the vulnerability of certain victims, such as children, people with disability, or the elderly. This is also an issue for victims of offences committed by a person in a position of power, trust or authority over them.

### Accounting for the harm suffered by victims who are children, older people and people with disability

- 6.144 The Regulations explicitly provide for an uplift for a victim who was a child, elderly or impaired at the time of the act of violence in limited circumstances. These are:
- where the act of violence, or related acts of violence, would ordinarily fall in Category D, giving rise to the availability of the maximum amount for Category C (\$1300)<sup>150</sup>
  - where the act of violence, or related acts of violence, would ordinarily fall in Category C or D and the victim also suffered a serious injury, was the victim of a series of related criminal acts of violence or suffered a deprivation of their liberty.<sup>151</sup> This gives rise to the availability of the maximum amount for Category B (\$3250).
- 6.145 However, it is possible that being subjected to *any* offence as a child, an older person or a person with a physical, psychological or cognitive impairment is reason alone for an uplift to one of the higher categories of special financial assistance, such as Category A or B. This is because experiencing an act of violence can cause very serious harm to these vulnerable groups.<sup>152</sup>
- 6.146 In order for the special financial assistance categories to better take into account the experience of vulnerable victims, the Regulations could be amended so that being a child, an older person or a person with disability is a factor that alone enables an uplift for any offence.
- 6.147 One way of doing this is to follow the Australian Capital Territory approach of including 'circumstances of aggravation', which allow for an uplift of the amount available for every offence for which a 'recognition payment' is available. The Australian Capital Territory scheme includes the age of the victim at the time of the act of violence (if they were under 18 or over 65) and the fact that a victim suffered from impaired physical, psychological or intellectual capacity at the time as 'circumstances of aggravation'.<sup>153</sup> This means that if a victim was a child, older person or person with disability when the act of violence occurred, they will always be entitled to a higher lump-sum payment.
- 6.148 Furthermore, the Australian Capital Territory approach of 'circumstances of aggravation' allows for an even greater uplift if there was a combination of two or more 'circumstances of aggravation'. This means that a child, elderly person, or person with disability would be entitled to a higher award if they were also the victim of a related series of criminal acts or if they also suffered a serious injury. If Victoria adopted a similar approach to the Australian Capital Territory, it would be able to maintain its current recognition of the combined effects of aggravating factors.

150 *Victims of Crime Assistance (Special Financial Assistance) Regulations 2011* (Vic) reg 9(b).

151 *Ibid* reg 8.

152 Violent crimes can have a serious impact on older victims, child victims and victims with a disability due to such victims often being physically weaker and more emotionally and/or psychologically vulnerable than other victims: see Etienne G Krugg et al, *World Report on Violence and Health* (World Health Organisation, 2002), especially Chapter 3, 'Child Abuse and Neglect by Parents and Other Caregivers' and Chapter 5, 'Abuse of the Elderly'.

153 *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 8(1)(f)(i) and (ii).

## Special financial assistance for children who hear, witness or are otherwise exposed to violence

- 6.149 Another potential issue with the availability of special financial assistance under the Act is that it can only be awarded to primary victims. This means that children who hear, witness or are exposed to violence are unable to access it because such child victims are currently classified as secondary victims under the Act. As noted in Chapter 5, this is problematic because special financial assistance can be particularly valuable for child victims due to difficulties in anticipating their future level of injury and suffering.<sup>154</sup>
- 6.150 An option for reform is to amend the Act so that all child victims are entitled to special financial assistance, whether or not they are classified as primary victims under the Act. This would enable children to be able to access a lump-sum payment no matter what form their experience of violence takes.<sup>155</sup>

## 'Uplift' where perpetrator is in a position of power, trust or authority in relation to them

- 6.151 There is currently no uplift available in the Regulations for victims of an act of violence that is perpetrated by an offender who was in a position of power, trust or authority in relation to the primary victim. Accordingly, the Regulations may not adequately account for the increased harm that victims can suffer when they are in a relationship of dependence or influence with the perpetrator. In addition, victims of a single act of family violence, as well as victims of other forms of violence that involve an abuse of power but who were not children, elderly or impaired, may not currently be eligible for any form of uplift under the Regulations.
- 6.152 One way to address this issue is to amend the Regulations so that they provide for an uplift where the perpetrator was in a position of power, trust or authority in relation to the victim. Again, the Australian Capital Territory scheme includes this as a 'circumstance of aggravation' which entitles a victim to a higher recognition payment.<sup>156</sup> Victoria could also adopt this approach.

## Questions

- 19 Should the special financial assistance formula be amended to take into account the experiences of vulnerable victims, including child victims, elderly victims, victims with disability and victims of an act of violence perpetrated by someone in a position of power, trust or authority? If so, how should the special financial assistance formula be amended?
- 20 Who should be eligible for special financial assistance under the Act?

154 For the difficulties in anticipating the future injuries of child victims of sexual assault, see, eg, Christine Forster and Patrick Parkinson, 'Compensating Child Sexual Assault Victims Within Statutory Schemes: Imagining a More Effective Compensatory Framework' (2000) 23(2) *University of New South Wales Law Journal* 172, 189.

155 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 69 [7.89].

156 *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 8(1)(e).

## VOCAT discretion and the prescribing of minimum and maximum amounts for each category of special financial assistance

- 6.153 As detailed above in Table 2, the Act prescribes minimum and maximum payments for each category of special financial assistance. In each category, there is a significant difference between the minimum and maximum amount specified. The minimum amount is usually less than half of the maximum amount. For example, for Category A, the maximum amount is \$10,000, whereas the minimum amount is \$4667. This gap is even more pronounced in relation to Category D, where the maximum amount is \$650 and the minimum amount is \$130.
- 6.154 The Act does not provide any guidance as to how a decision is made regarding the quantum to be awarded.
- 6.155 In practice, and as illustrated by *RBA v Victims of Crime Assistance Tribunal*, a higher amount is usually granted where the applicant has suffered an injury, whereas the lower amount is more likely to be granted when the applicant has only suffered a significant adverse effect.<sup>157</sup>
- 6.156 However, within the range of each category, VOCAT has substantial discretion as to the exact quantum of special financial assistance that it awards an applicant. This can lead to inconsistent outcomes.
- 6.157 This problem was noted by the Queensland Department of Justice and Attorney-General in its review of the *Victims of Crime Assistance Act 2009* (Qld). At the time of the review, the Queensland scheme had a similar approach to Victoria and outlined maximum and minimum amounts of 'special assistance' that could be awarded to victims of particular categories of offence.
- 6.158 However, the review found that this framework resulted in:  
the assessor having to use their discretion to .... determine what specific amount should be paid within the range of the relevant category. This process leads to inconsistency in decisions as there is no specific formulation for making decisions about what amount a victim should be paid within the broad range.<sup>158</sup>
- 6.159 Accordingly, the Queensland Department of Justice and Attorney-General recommended that 'the prescribed maximum and minimum amounts for special financial assistance should be removed and replaced with one amount for each category'.<sup>159</sup>
- 6.160 Queensland has since passed amending legislation replacing the maximum and minimum awards of special assistance with one set amount for each category of offence.<sup>160</sup>
- 6.161 However, in line with the views of many stakeholders that assessors should still be able to consider the particular circumstances of the case,<sup>161</sup> the Queensland scheme retains its uplift provisions.<sup>162</sup>
- 6.162 Two other Australian jurisdictions use a similar system of lump-sum payments in their victims of crime financial assistance schemes; New South Wales and the Australian Capital Territory. Both of these jurisdictions set one amount for the recognition payment available for each offence or category of offence.<sup>163</sup> However, the Australian Capital Territory scheme also provides for fixed increased amounts for each offence where one or more 'circumstance of aggravation' exists.<sup>164</sup>

157 *RBA v Victims of Crime Assistance Tribunal* [2009] VCAT 2225 (26 October 2009) [32].

158 Department of Justice and Attorney-General (Qld), *Final Report on the Review of the Victims of Crime Assistance Act 2009* (2015) 17.

159 *Ibid* 18 (Recommendation 5).

160 *Victims of Crime Assistance Act 2009* (Qld) sch 2 s 2. This amendment was inserted by *Victims of Crime Assistance and Other Legislation Amendment Act 2017* (Qld) s 95(5).

161 Department of Justice and Attorney-General (Qld), *Final Report on the Review of the Victims of Crime Assistance Act 2009* (2015) 17.

162 See *Victims of Crime Assistance Act 2009* (Qld) sch 2 s 1.

163 *Victims Rights and Support Regulations 2013* (NSW) reg 12; *Victims of Crime (Financial Assistance) Regulations 2016* (ACT) regs 8, 9 and 10.

164 *Victims of Crime (Financial Assistance) Regulations 2016* (ACT) reg 8.

- 6.163 As in Queensland, an option for reform in Victoria is to remove the minimum and maximum amounts for each category of special financial assistance and replace them with one amount for each category in order to improve efficiency and consistency in decision making. Like the Queensland approach, the Victorian scheme could maintain uplift provisions, whether in their current form or a different form, so that individual circumstances can be taken into account.

## Question

- 21 Should the prescribed maximum and minimum amounts of special financial assistance be removed and replaced with one amount for each category? If so, what changes should be made to the Act and what should the amounts be?

### The adequacy of amounts of special financial assistance available

- 6.164 The amounts of special financial assistance that are available under the Act may not adequately recognise the harm experienced by victims of violent crime.
- 6.165 In particular, preliminary consultations indicated that the amounts available for offences that come within Categories C and D are considered low. For Category C, the maximum amount is \$1300 and the minimum amount is \$650.<sup>165</sup> For Category D, the maximum amount is \$650 and the minimum amount available is \$130.<sup>166</sup>
- 6.166 The Commission was informed that in some cases the awarded amounts are so low that the costs awarded to an applicant's legal representatives are higher than the special financial assistance awarded to the applicant.
- 6.167 Moreover, as part of its review of Queensland's victims of crime financial assistance legislation, the Queensland Department of Justice and Attorney-General considered that similar maximum amounts in its scheme were inadequate. At the time of the review, the *Victims of Crime Assistance Act 2009* (Qld) had four categories of 'special assistance', which were very similar to Victoria's categories of 'special financial assistance'. The maximum amount available under Category C was \$1300, while the minimum amount was \$651. The maximum amount for Category D was \$650 and the minimum amount was \$130. The review found that the 'maximum amounts for these two categories [did] not sufficiently recognise the harm caused to the victim in these instances'.<sup>167</sup>
- 6.168 Consequently, the final report of the review recommended that the maximum amount for Category C be increased to \$2000 and the maximum amount for Category D be increased to \$1000. As noted above at [6.159], it also recommended removing the minimum amounts for each category of special assistance. Queensland has since passed amendments implementing these recommendations into its scheme.<sup>168</sup>
- 6.169 In addition, in the Australian Capital Territory and New South Wales, the other Australian jurisdictions with a similar system of lump-sum payments to Victoria, the minimum recognition payment available is \$1000<sup>169</sup> and \$1500,<sup>170</sup> respectively. This means that the overall minimum recognition payment (\$1500) in New South Wales is higher than the maximum award of special financial assistance for Category C (\$1300) under the Victorian Act.

165 *Victims of Crime Assistance Act 1996* (Vic) s 8A(5).

166 *Ibid.*

167 Department of Justice and Attorney-General (Qld), *Final Report on the Review of the Victims of Crime Assistance Act 2009* (2015) 18.

168 *Victims of Crime Assistance Act 2009* (Qld) sch 2 s 2. This amendment was inserted by *Victims of Crime Assistance and Other Legislation Amendment Act 2017* (Qld) s 95(5).

169 *Victims of Crime (Financial Assistance) Regulations 2016* (ACT) reg 8.

170 *Victims Rights and Support Regulations 2013* (NSW) reg 12(e).

- 6.170 The maximum award of special financial assistance available under the Victorian Act of \$10,000 may also be too low. While Queensland has maintained its maximum award of special assistance as \$10,000, the New South Wales scheme can award lump-sum payments of up to \$15,000<sup>171</sup> and the Australian Capital Territory scheme of up to \$26,250.<sup>172</sup>
- 6.171 Given the divergence in the quantum of special financial assistance available in Victoria as compared to other Australian jurisdictions, it may be that the maximum and minimum amounts of special financial assistance available to victims under the Act need to be increased.

## Question

- 22 Should the amounts of special financial assistance in the Act be increased? If so, what should the amounts be?

### Treatment of related criminal acts

- 6.172 As discussed above at [6.53]–[6.56], related criminal acts can be treated as a single act of violence for the purposes of making an award under the Act.<sup>173</sup>
- 6.173 Preliminary consultations undertaken by the Commission indicated that the fact that the ‘related criminal acts’ provision enables victims to make a single application, rather than multiple ones, can benefit the applicant by simplifying the process.
- 6.174 However, as noted in the first consultation paper, the ‘related criminal acts’ provision can also operate to disproportionately reduce the awards of financial assistance made to certain cohorts of victims, such as victims of family violence.<sup>174</sup> This is because ‘domestic violence, almost by definition, will involve repeated acts of abuse by the same offender’.<sup>175</sup>
- 6.175 This means that awards of financial assistance for family violence victims may often not reflect the cumulative harm caused by a pattern of abuse. As the Magistrates’ Court and Children’s Court jointly submitted to the Royal Commission on Family Violence, the related criminal acts provision means:
- that a victim of long-term, chronic family violence (a series of related acts) is placed on an equivalent footing to someone who has been injured in a one-off assault, for example in a brawl between strangers.<sup>176</sup>
- 6.176 The ‘related criminal acts’ provision can also unfairly affect victims of other forms of long-term abuse, such as child abuse, elder abuse and abuse of people with disability. This is because these forms of abuse are also often perpetrated by the same offender and in the same location.<sup>177</sup> As such, they are likely to be treated as ‘related’.

171 Ibid reg 12(a).

172 *Victims of Crime (Financial Assistance) Regulations 2016* (ACT) reg 8. This is the amount awarded for a sexual offence punishable by imprisonment for 14 years or more or attempt or conspiracy to commit homicide and the victim suffers a very serious injury that is likely to be permanent.

173 *Victims of Crime Assistance Act 1996* (Vic) s 4(4).

174 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 65 [7.55]–[7.60].

175 Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse 2010) 9.

176 Magistrates’ Court of Victoria and Children’s Court of Victoria, Submission No 978 to Royal Commission into Family Violence, *Royal Commission into Family Violence*, June 2015, 59.

177 See, eg, Australian Law Reform Commission, *Elder Abuse—A National Legal Response*, Report No 131 (2017) 20 [1.16], for the context in which elder abuse usually occurs. See also Australian Institute of Health and Welfare, *Child Protection Australia 2015–16*, Child Welfare Series No. 66 (2017) for data relating to child abuse occurring within the home.

- 6.177 In contrast, a victim of a series of robberies by different offenders is unlikely to have their claim reduced because the criminal acts are less likely to be considered ‘related’.<sup>178</sup>
- 6.178 The disparity between multiple offences committed by the same offender and multiple offences committed by different offenders was described as ‘grossly unfair and unjust’ in a submission to the Australian Law Reform Commission and New South Wales Law Reform Commission by the Wirringa Baiya Aboriginal Women’s Legal Centre Inc.<sup>179</sup>

### Amending the related criminal acts provision

- 6.179 One way to overcome some of these issues is to reframe the ‘related criminal acts’ provision so that it does not unfairly affect victims of long-term abuse.
- 6.180 The Australian Law Reform Commission and New South Wales Law Reform Commission in their joint report, *Family Violence—A National Legal Response*,<sup>180</sup> recommended that victims’ compensation schemes should not provide that acts are ‘related’ merely because they are committed by the same offender in order to mitigate the unfair effect on victims of family violence<sup>181</sup>
- 6.181 As noted in the first consultation paper, this recommendation could be implemented in the Act by removing the reference to the same perpetrator or perpetrators in subsection 4(a)(ii) of the Act.<sup>182</sup> Alternatively, other criteria could be added to the circumstances in which acts carried out by the same perpetrator or group of perpetrators are considered ‘related’. For example, section 4(a) of the Act could be amended to require that the acts were committed by the same person *and* that they share some other common factor in order to be ‘related’, rather than these being separate and distinct criteria as is currently the case under the Act.<sup>183</sup>
- 6.182 However, Forster argues that the recommendation of the Australian Law Reform Commission and New South Wales Law Reform Commission does not go far enough to address concerns relating to victims of family violence. She writes that the other grounds that are used to collapse multiple crimes into a single crime would still disproportionately affect victims of family violence.<sup>184</sup> This is because acts of family violence frequently share other ‘common factors’. For example, ‘the acts of violence are often similar (whether physical, sexual, emotional or economic) and typically occur ... in the same location (the family home)’.<sup>185</sup> The same is also true of some other forms of abuse, including child abuse, elder abuse and abuse of people with disability.
- 6.183 An alternative approach can be found in the Australian Capital Territory scheme. Section 44(2) of the *Victims of Crime (Financial Assistance) Act 2016* (ACT) provides two examples of when criminal acts may be considered ‘related’. The first is offences that involve the same offender and same primary victim; the second is offences that happen at the same time, or nearly so. However, section 44(3) of that Act only *requires* that related acts of violence be treated as a single act in three circumstances:
- where the series of offences are (or are likely to be) part of a single ongoing offence

178 Christine Forster, ‘Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes’ (2014) 22 *Journal of Law and Medicine* 188, 200.

179 Wirringa Baiya Aboriginal Women’s Legal Centre Inc, cited in Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response: Final Report*, Report No 114 and NSWLRC Report No 128 (2010) 1392.

180 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response: Final Report*, ALRC Report No 114 and NSWLRC Report No 128 (2010).

181 Ibid 1395 (Recommendation 29-5). The ALRC reiterated this recommendation in its submission to the VLRC in relation to the Victims of Crime in the Criminal Trial Process Reference: Australian Law Reform Commission, Submission No 1 to Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, 18 August 2015, 2.

182 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 66 [7.75].

183 Ibid [7.74].

184 Christine Forster, ‘Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes’ (2014) 22 *Journal of Law and Medicine* 188, 199.

185 Ibid 199–200.

- where treating the acts separately would result in the applicant receiving an amount of financial assistance that is disproportionate to the totality of harm that they suffered
  - in circumstances prescribed by regulation.
- 6.184 This model addresses some of the unfairness of the Victorian Act by separating the circumstances in which multiple acts are considered related, and those in which they must be treated as a single act. This shifts the emphasis away from the similarity between the acts, to a consideration of the nature of the crime and the severity of the harm suffered. In doing so, this approach is less likely to result in victims of family violence, child abuse, elder abuse and abuse of people with disability having their claims reduced. This is because, while the acts comprising these forms of abuse might be related, their cumulative harm can be significant.

### **Increasing the maximum award of financial assistance for victims of a series of related criminal acts**

- 6.185 Another option is to set a higher amount for the total financial assistance available for a victim of a series of related criminal acts. For example, in Tasmania the maximum award for a primary victim of a single offence is \$30,000, whereas the maximum award for a primary victim of multiple offences is \$50,000.<sup>186</sup> This way, an applicant only needs to make one application for financial assistance in relation to a series of related criminal acts, but their award can reflect the cumulative harm of a pattern of abuse.

## **Questions**

- 23 Should the definition of 'related criminal acts' be amended to have regard to the cumulative harm of long-term abuse? If so, what should the definition be?
- 24 Should the Act be amended to give victims an opportunity to object if claims are to be treated as 'related'?
- 25 Should there be a higher maximum for awards of financial assistance under the Act for victims of a series of related criminal acts? If so, what changes should be made to the Act?

# Time limits for making an application to VOCAT

- 98** Introduction
- 98** Time limits under section 29 of the Act
- 101** Discussion and options for reform

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## 7. Time limits for making an application to VOCAT

### Introduction

- 7.1 This chapter considers the time limit for making an application under section 29 of the *Victims of Crime Assistance Act 1996* (Vic) (the Act).
- 7.2 This chapter relates to issues raised in the first, second and fourth matters in the supplementary terms of reference which concern:
- whether the Act can be simplified to make it easier for applicants to understand all their potential entitlements and quickly and easily access the assistance offered by the scheme without necessarily requiring legal support
  - whether the Act recognises the appropriate people as victims
  - whether the time limits and structure and timing of awards are appropriate and are adequate to account for harm, including harm caused by multiple acts such as family violence, or where there is a significant delay in reporting a crime.
- 7.3 The effect of section 29 of the Act is that the Victims of Crime Assistance Tribunal (VOCAT) is required to assess a victim's behaviour in making a delayed application to it for assistance.
- 7.4 Questions posed in this chapter relate to the current time limit requirements under section 29, and whether they are clear and working as intended, as well as whether the policy rationale underpinning the time limit requirement is still justifiable.

### Time limits under section 29 of the Act

- 7.5 Under section 29 of the Act, an application for financial assistance must be made within two years of the act of violence occurring.<sup>1</sup> VOCAT must strike out applications made outside this time limit unless 'it considers that, in the particular circumstances, the application ought not to be struck out'.<sup>2</sup>
- 7.6 Where an applicant wishes to lodge an application outside the two-year time limit, she or he must request leave from VOCAT in addition to completing the usual form. An application for an extension of time must be made by a statutory declaration in the prescribed form.<sup>3</sup>

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1 *Victims of Crime Assistance Act 1996* (Vic) s 29(1).

2 *Ibid* s 29(2).

3 Victims of Crime Assistance Tribunal, Melbourne Magistrates' Court, *Practice Direction No. 2 of 2016—Extension of Time for Lodgement*, 1 May 2016.

- 7.7 The form requires the applicant to set out her or his reasons for not lodging the application within the time limit and to attach supporting documentation.<sup>4</sup> The applicant can state whether she or he wishes the time extension to be decided without appearing before VOCAT.<sup>5</sup>

### Consideration of the ‘particular circumstances’ of the case

- 7.8 In deciding whether an out-of-time application ought not to be struck out in the ‘particular circumstances’, VOCAT must have regard to the following factors:<sup>6</sup>
- the age of the applicant when the act of violence occurred
  - whether the applicant is intellectually disabled<sup>7</sup> or mentally ill<sup>8</sup>
  - whether the perpetrator of the act of violence was in a position of power, influence or trust in relation to the applicant
  - the physical or psychological effect of the act of violence on the applicant
  - whether the delay in making the application threatens VOCAT from being able to make a fair decision
  - whether the applicant was a child at the time of the act of violence and she or he made the application for assistance within a reasonable time after turning 18 years old
  - all other circumstances that VOCAT considers relevant.
- 7.9 VOCAT’s discretion to consider ‘all other circumstances’<sup>9</sup> is used to consider factors such as the prospect of success of the substantive case.<sup>10</sup> It can also be used to consider circumstances such as:<sup>11</sup>
- whether the applicant can show an acceptable explanation for the delay
  - whether it would be fair and equitable to extend the time
  - whether VOCAT has been prejudiced by the delay
  - whether the delay might result in the ‘unsettling’ of other people
  - considerations of fairness to affected individuals.
- 7.10 The Act also expressly provides that VOCAT must not decide to further hear and determine an out-of-time application only because the applicant was unaware of Victoria’s victims of crime financial assistance scheme or the time limit.<sup>12</sup> The effect of this is that a victim’s lack of knowledge of the scheme, or the time limit, is itself a barrier to accessing the scheme. Awareness and accessibility of VOCAT is discussed further in Chapter 12 of this supplementary consultation paper.
- 7.11 *FG v Victims of Crime Assistance Tribunal*<sup>13</sup> provides an example of how these factors are used to determine whether an application should be heard out of time. In that case, VOCAT struck out the applicant’s claim because it was lodged approximately 25 to 30 years after the alleged occurrence of sexual abuse by her grandfather. However, the Victorian Civil and Administrative Tribunal (VCAT) set aside VOCAT’s decision, taking into account the fact that the applicant was between five and 10 years old at the time of the alleged offences and her grandfather had been in a position of power and trust. VCAT

4 Victims of Crime Assistance Tribunal, *Application for Extension of Time Form* (2016) <[www.vocat.vic.gov.au/application-extension-time-form](http://www.vocat.vic.gov.au/application-extension-time-form)>.

5 Ibid.

6 *Victims of Crime Assistance Act 1996* (Vic) s 29(3).

7 ‘Intellectually disabled’ within the meaning of the *Disability Act 2006* (Vic).

8 ‘Mentally ill’ within the meaning of the *Mental Health Act 2014* (Vic).

9 *Victims of Crime Assistance Act 1996* (Vic) s 29(3)(g).

10 See, eg, *BFK v Victims of Crime Assistance Tribunal* [2017] VCAT 289 (15 March 2017); *J v Victims of Crime Assistance Tribunal* [2002] VCAT 532 (24 July 2002).

11 *BFK v Victims of Crime Assistance Tribunal* [2017] VCAT 289 (15 March 2017) [11].

12 *Victims of Crime Assistance Act 1996* (Vic) s 29(4).

13 [2011] VCAT 2449 (1 September 2011).

- also considered the psychological effect of the abuse, which resulted in the delay, and concluded that the delay did not threaten the Tribunal's capacity to make a fair decision.
- 7.12 Similarly, in *J v Victims of Crime Assistance Tribunal*,<sup>14</sup> VCAT overturned VOCAT's decision to strike out an application made 35 years after the alleged sexual abuse by the victim's brother-in-law. VCAT considered the fact that the applicant was between 13 and 18 years old when the acts of violence took place and noted the brother-in-law's position of power. VCAT also took into account psychological evidence that the trauma of the violence had contributed to the applicant's delay in making a claim.
- 7.13 In contrast, in *S v Victims of Crime Assistance Tribunal*<sup>15</sup> and *BFK v Victims of Crime Assistance Tribunal*,<sup>16</sup> VCAT upheld VOCAT's decision to strike out the applications for being out-of-time. This was despite both applicants being a similar age to the applicant in *J v Victims of Crime Assistance Tribunal*<sup>17</sup> when the acts of violence took place (17 and 18 respectively).
- 7.14 In *S v Victims of Crime Assistance Tribunal*,<sup>18</sup> VCAT distinguished that case from *J v Victims of Crime Assistance Tribunal*<sup>19</sup> on the basis that the perpetrator had not been in a position of power, influence or trust over the applicant and that there was no psychiatric evidence linking the trauma of the rape to the applicant's delay in making an application.<sup>20</sup>
- 7.15 In *BFK v Victims of Crime Assistance Tribunal*,<sup>21</sup> VCAT affirmed VOCAT's decision to strike out the application under section 29, finding that the perpetrator had not been in a position of power, influence or trust over the applicant—despite being her boyfriend—due to the fact that he was not significantly older than her and was 'troubled' rather than 'calculating and controlling'.<sup>22</sup>
- 7.16 In that case, VCAT upheld VOCAT's decision, stating that the 23-year delay between the alleged act of violence and the application denied VOCAT the opportunity to make a fair decision:
- This delay raises questions as to the accuracy of memories of events long past, particularly in the context of conflicting evidence and all potential corroborating evidence being no longer available.<sup>23</sup>
- 7.17 In *Knight v Victims of Crime Assistance Tribunal*,<sup>24</sup> the applicant required leave of the Supreme Court of Victoria to apply to VOCAT due to his status as a vexatious litigant.<sup>25</sup>
- 7.18 In order to grant leave to apply to VOCAT, the Supreme Court was required to determine, among other things, that the VOCAT application had reasonable grounds—that is, a real or reasonable prospect of success—in order to determine whether leave should be granted.<sup>26</sup>
- 7.19 In order to assess this, the Supreme Court considered whether, despite the VOCAT application being made 30 years out of time, VOCAT would likely allow the 'out of time' application. The applicant alleged that he was sexually assaulted by a stranger on public transport in 1981, at the age of 13 years.

14 [2002] VCAT 532 (24 July 2002).

15 [2002] VCAT 1257 (7 November 2002).

16 [2017] VCAT (15 March 2017).

17 [2002] VCAT 532 (24 July 2002).

18 [2002] VCAT 1257 (7 November 2002).

19 [2002] VCAT 532 (24 July 2002).

20 *S v Victims of Crime Assistance Tribunal* [2002] VCAT 1257 (7 November 2002) [22].

21 [2017] VCAT 289 (15 March 2017).

22 *BFK v Victims of Crime Assistance Tribunal* [2017] VCAT 289 (15 March 2017) [117].

23 *Ibid* [121].

24 [2017] VSC 133 (30 March 2017) [6].

25 As per the *Vexatious Proceedings Act 2014* (Vic). See also, *Knight v Victims of Crime Assistance Tribunal* [2017] VSC 133 (30 March 2017) [6].

26 *Knight v Victims of Crime Assistance Tribunal* [2017] VSC 133 (30 March 2017) [9].

- 7.20 The Supreme Court determined that a number of factors weighed heavily against the proposed application surviving section 29 of the Act, including that:<sup>27</sup>
- the ‘very lengthy delay’ would threaten the capacity of the Tribunal to make a fair decision
  - the delay was compounded by the fact the alleged assault was not reported to police
  - VOCAT would be unlikely to be able to obtain material from a police investigation which would assist it in making a fair decision and ameliorate the effect of the delay
  - there was no significant corroborative evidence that would assist VOCAT to judge the veracity of his allegations
  - although the applicant was a child at the time of the alleged assault, there had been a further delay of 29 years since the applicant had turned 18 years of age
  - the applicant had not pointed to any effect of the alleged assault in causing the delay in making the application.<sup>28</sup>
- 7.21 The court also considered the applicant’s litigation history of attempting to commence over 50 legal proceedings, actions which appeared to contradict his account that he had thought more about the alleged assault, and therefore the VOCAT application, only because of the Royal Commission into Institutional Responses to Child Sexual Abuse.
- 7.22 In conclusion, the court stated ‘[the applicant’s] substantive application has no significant merit. In combination, these reasons result in the overwhelming likelihood that if this proposed application were allowed to proceed it would be struck out by the Tribunal pursuant to s 29 of [the Act]’.<sup>29</sup>

## Discussion and options for reform

- 7.23 This section sets out options for reform to address concerns that some victims of crime are unfairly disadvantaged by the two-year application time limit.
- 7.24 The Commission seeks the views of victims, persons affected, professionals, stakeholders and the community on whether the time limit provisions in section 29 of the Act should be amended. Possible options for reform and questions are set out below.

### Is the time limit a barrier for victims of crime?

- 7.25 VOCAT frequently grants applications for an extension of time and, as noted above, the considerations listed in section 29 of the Act require VOCAT to consider some specific vulnerabilities of victims.<sup>30</sup>
- 7.26 However, as the Commission discussed in the first consultation paper, the time limit requirements under section 29 of the Act create specific barriers for family violence victims, given the time it can take victims to identify, disclose and report their abuse.<sup>31</sup>
- 7.27 Many of these barriers may also apply to other victims of crime, who may face similar challenges in identifying, disclosing and reporting acts of violence, including victims of child sexual assault, victims of abuse or neglect in care, victims with disability and adult victims of sexual assault.<sup>32</sup>

27 Ibid [18].

28 Ibid.

29 Ibid.

30 See, eg, *Victims of Crime Assistance Act 1996* (Vic) s 29(3)(a)–(d), (f).

31 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 78–9 [8.34]–[8.40]

32 For example, recent research by the Royal Commission into Institutional Responses to Child Sexual Abuse found that for victims aged approximately 11 years at the time of alleged sexual abuse, the average time taken to make a complaint to the Catholic Church was 33 years, see Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Analysis of Claims of Child Sexual Abuse Made with Respect to Catholic Church Institutions in Australia* (2017) 14. See also Family and Community Development Committee, *Parliament of Victoria, Inquiry into Abuse in Disability Services: Final Report* (2016) 59, discussing reasons why victims with disability may face barriers to reporting abuse.

- 7.28 Additionally, regardless of crime type, the time limit for making an application can be a barrier for more vulnerable groups of the community such as those with disability, members of the LGBTIQ community, Aboriginal and Torres Strait Islanders, children and those from non-English-speaking backgrounds.<sup>33</sup>
- 7.29 Although VOCAT may frequently grant extensions of time, as discussed in the first consultation paper, the mere existence of the time limit may itself also be a barrier for some victims.<sup>34</sup> This is supported by judicial comments in *BFK v Victims of Crime Assistance Tribunal*.<sup>35</sup> In that case, VCAT noted that section 29 of the Act is ‘couched in strong terms’, given the Act states the Tribunal ‘must strike out’ an application made out of time. This ‘strong’ language is contrasted with the more flexible and neutral language employed in other provisions of the Act using terminology such as ‘may’.<sup>36</sup>
- 7.30 In addition, while section 29(3) of the Act allows VOCAT to consider certain factors that may account for delayed applications, such as whether the perpetrator was in a position of power, trust or influence over the applicant, these factors have been interpreted narrowly in some circumstances by the courts.
- 7.31 For example, in *BFK v Victims of Crime Assistance Tribunal*,<sup>37</sup> VCAT held that the alleged perpetrator was not in a position of power, trust or influence over the applicant even though he was her boyfriend at the time of the alleged act of violence and allegations included that he sexually assaulted her while barricading the bedroom door, forcefully pushing the applicant and making threats of self-harm.<sup>38</sup>
- 7.32 Similarly, while VOCAT can have regard to ‘whether the applicant was a child at the time of the occurrence of the act of violence and the application was made within a reasonable time after he or she reached the age of 18’,<sup>39</sup> this provision is unlikely to assist child victims who may not identify or disclose abuse until much later in life. Underpinning this provision is an assumption that once a person turns 18 years old, they will be able to promptly address the trauma associated with such violence.
- 7.33 For some victims, some acts of violence may not be able to be processed until much later in life. Recent research by the Royal Commission into Institutional Responses to Child Sexual Abuse found that for victims aged approximately 11 years old at the time of alleged sexual abuse, the average time taken to make a complaint to the Catholic Church was 33 years.<sup>40</sup> In *BFK v Victims of Crime Assistance Tribunal*,<sup>41</sup> for example, the applicant stated she had repressed her emotions despite remembering the alleged sexual assault.<sup>42</sup>
- 7.34 The Supreme Court’s comments in *Knight v Victims of Crime Assistance Tribunal* raise questions about how delayed childhood sexual assault applications might be treated by VOCAT given that many of these cases, without the complication of vexatious litigation considerations, would involve almost identical circumstances to those outlined in *Knight v Victims of Crime Assistance Tribunal*, including:
- ‘very lengthy delays’, often over 30 years, with no report made to police
  - lack of available material from a police investigation to ameliorate any effects of the delay

33 See, eg, Angela Dwyer, ‘Policing Lesbian, Gay, Bisexual and Transgender Young People: a Gap in the Research Literature’ (2011) 22(3) *Current Issues in Criminal Justice* 415, 416, discussing the unwillingness to report to police among LGBTIQ victims of crime. See also Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 5, 145–6, discussing the unwillingness to involve authorities among LGBTIQ victims of family violence. See also Victims of Crime Assistance Tribunal, *Koori VOCAT List Pilot, Review and Recommendations* (2010) 11, discussing the unwillingness to report to police among Aboriginal and Torres Strait Islander victims of crime.

34 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 79.

35 *BFK v Victims of Crime Assistance Tribunal* [2017] VCAT 289 (15 March 2017).

36 Ibid [12].

37 [2017] VCAT 289 (15 March 2017).

38 Ibid [117].

39 *Victims of Crime Assistance Act 1996* (Vic) s 29(3)(f).

40 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Analysis of Claims of Child Sexual Abuse Made with Respect to Catholic Church Institutions in Australia* (2017) 14. This research report refers to ‘claims’ of sexual abuse, defined as either ‘claims’ or ‘complaints’ of sexual abuse made against Catholic Church personnel either related or unrelated to a redress scheme, such as the Catholic Church’s ‘Towards Healing’ or ‘Melbourne Response’ redress schemes.

41 [2017] VCAT 289 (15 March 2017).

42 Ibid [50].

- no corroborative evidence that would assist VOCAT to judge the veracity of allegations.<sup>43</sup>
- 7.35 These issues have prompted the Department of Justice and Regulation to state in their consultation paper, *A Victorian Redress Scheme for Institutional Child Abuse*, that if VOCAT was to be used for a national redress scheme for historical childhood sexual abuse, the standard of proof might need to be modified and the evidentiary burden placed on claimants 'softened'.<sup>44</sup>
- 7.36 Although ultimately taken into account by VCAT on appeal, the first instance decisions of VOCAT in *FG v Victims of Crime Assistance Tribunal*<sup>45</sup> and *J v Victims of Crime Assistance Tribunal*<sup>46</sup> indicate section 29 may not adequately take into account the trauma associated with childhood sexual assault and its impact on timely VOCAT applications.
- 7.37 However, it is difficult to ascertain whether matters are being unfairly struck out under section 29. In 2015–16, 1644 applications were either withdrawn or struck out, close to 30 per cent of all applications. The data does not distinguish between those withdrawn or struck out, so it is difficult to quantify how many applications might be struck out under section 29 in circumstances where it might be considered reasonable to allow an out-of-time application. This limits the ability of the Commission to understand the way in which section 29 is operating in many circumstances.
- 7.38 Options to address concerns that some victims of crime are unfairly disadvantaged by the two-year time limit on applications are set out below, along with specific questions for consideration.

### Increasing the application time limit

- 7.39 One option is to increase the time period prescribed in section 29 of the Act.
- 7.40 Victoria's two-year time limit is consistent with New South Wales and Northern Territory. However, the Australian Capital Territory, Queensland, South Australia, Tasmania and Western Australia all prescribe a three-year time limit.<sup>47</sup>
- 7.41 A variation of this option is to increase the time limit for specific crime types. This option recognises that some groups of victims face increased barriers to disclosing or reporting abuse and consequently, making an application to VOCAT. As discussed above, these are commonly accepted to be victims of acts of violence perpetrated against children, sexual assault (including historical child sexual abuse), family violence, elder abuse and violence or abuse in care.
- 7.42 New South Wales has adopted a similar approach in its legislation, which provides for a 10-year time limit for the bringing of an application by victims of domestic violence, child abuse or sexual assault.<sup>48</sup> If the victim was a child at the time of the act of violence, then the 10-year time limit starts running from the day that they turn 18, rather than from the date of the act of violence.<sup>49</sup>

43 *Knight v Victims of Crime Assistance Tribunal* [2017] VSC 133 (30 March 2017) [18].

44 Department of Justice and Regulation (Vic), *A Victorian Redress Scheme for Institutional Child Abuse*, Public Consultation Paper (5 August 2015) 34.

45 [2011] VCAT 2449 (1 September 2011).

46 [2002] VCAT 532 (24 July 2002).

47 See the comparative table of Australian jurisdictions at Appendix B.

48 *Victims Rights and Support Act 2013* (NSW) s 40(5).

49 *Ibid.*

## Question

- 26 Is the two-year time limit to make an application to VOCAT under section 29 of the Act still appropriate? If not, what would be an appropriate application time limit? Alternatively, should different application time limits apply for different types of crime?

### Removing the application time limit

- 7.43 Alternatively, the time limit could be removed entirely for some types of offences. This approach was previously recommended by the Inquiry into the Handling of Child Abuse by Religious and other Non-Government Organisations (*Betrayal of Trust* report) where it was recommended that the Act be amended so that no time limits apply for applications by victims of abuse in organisational settings.<sup>50</sup>
- 7.44 An example of this can be seen in New South Wales where there is no time limit for the primary victim of a sexual offence against the person when the person is under 18.<sup>51</sup>
- 7.45 Similarly, in Nova Scotia (Canada), no time limit applies for victims of sexual offences committed by people in a position of trust or authority or by people upon whom the victim was financially, emotionally, physically or otherwise dependent.<sup>52</sup> In addition, no time limit applies in British Columbia (Canada) where the application relates to sexual offences.<sup>53</sup>
- 7.46 This approach acknowledges that victims of some kinds of violence may need more time to make an application for assistance. However, this approach may not assist victims of other types of crime who might not make a timely application because of other personal factors unrelated to the type of crime, such as culture or ethnicity, socio-economic status or the victim's past interactions with authorities. These are typically victims experiencing other forms of disadvantage or vulnerability.
- 7.47 Another option is to have time limits for some components of assistance—like special financial assistance—but no time limit for others. This has been implemented in the New South Wales scheme where victim support and financial support are provided through a combined Victim Support Scheme administered by Victims Services, part of the New South Wales' Department of Justice.<sup>54</sup>
- 7.48 Under this scheme, there are no time limits to the provision of information, victim support and referral services, as well as counselling to assist recovery. However, financial loss and recognition payments have a two-year time limit, except when victims of sexual assault were children at the time of the offence.

## Question

- 27 Should some types of crime be excluded from application time limit provisions entirely? Should some time limits start after a victim turns 18? Alternatively, should some components of victim support and financial assistance not have a time limit?

50 Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (2013) vol 2, 553.  
51 *Victims Rights and Support Act 2013* (NSW) s 40(7).  
52 *Victims' Rights and Services Act*, RSNS 1989, c 14 (Nova Scotia) s 11B(2).  
53 *Crime Victim Assistance Act*, SBC 2001, c 38 (British Columbia) s 3(4).  
54 Victims Services, Department of Attorney General and Justice (NSW), *About Us* (2016) <[www.victimsservices.justice.nsw.gov.au/Pages/vss/vs\\_aboutus/vs\\_aboutus.aspx](http://www.victimsservices.justice.nsw.gov.au/Pages/vss/vs_aboutus/vs_aboutus.aspx)>.

### Granting an extension of time—is there a need for additional considerations?

- 7.49 Another option is to add additional considerations to the list of factors in section 29(3) of the Act that VOCAT must consider when making a decision about whether or not to strike out a late application.
- 7.50 Additional factors might include further matters relating to increased vulnerability and acknowledgment of community diversity, as well as specific factors related to the effects of particular types of crime.

### Question

- 28 Are the factors VOCAT may currently consider in determining whether to hear an application out of time sufficient? Should other factors be included in the Act? If so, what additional factors should be included?

### Improving transparency in the decision-making process

- 7.51 Another option, which could be considered alongside the above-mentioned options, is to increase the transparency of the decision-making process under section 29 by requiring VOCAT to publish data on applications struck out under section 29 and the reasons for these decisions. This would give victims and their legal or support representatives clearer guidelines and understanding of the factors the Tribunal takes into account. This would help improve certainty for victims and help ensure greater consistency in decision making by VOCAT.
- 7.52 However, this option does not address the substantive issues with section 29.

### Question

- 29 Should VOCAT be required to publish data and reasons for decisions made in relation to section 29 of the Act? If yes, what data should be provided and how should it be published?



# Making a VOCAT award to victims of crime

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## 8. Making a VOCAT award to victims of crime

### Introduction

- 8.1 This chapter outlines the circumstances in which the Victims of Crime Assistance Tribunal (VOCAT) may make an award for financial assistance under sections 52, 53 and 54 of the *Victims of Crime Assistance Act 1996* (Vic) (the Act).
- 8.2 This includes consideration of the circumstances in which VOCAT may refuse to make an award of assistance,<sup>1</sup> as well as matters VOCAT must have regard to in determining whether or not to make an award, or how much to award.<sup>2</sup>
- 8.3 This chapter relates to issues raised in the first, second and fourth matters in the supplementary terms of reference which concern:
- whether the Act can be simplified to make it easier for applicants to understand all their potential entitlements and quickly and easily access the assistance offered by the scheme without necessarily requiring legal support
  - whether the Act recognises the appropriate people as victims
  - whether the structure and timing of awards are appropriate and are adequate to account for harm where there is a significant delay in reporting a crime.
- 8.4 As will be discussed in this chapter, the effect of sections 52, 53 and 54 of the Act require VOCAT to assess a victim's behaviour in:
- reporting, or not reporting, or making a delayed report, of an act of violence
  - providing assistance, or not providing assistance, to police and prosecution
  - their everyday life, including potential and/or past criminal activity and/or drug and alcohol use
  - maintaining contact with a perpetrator, including where the perpetrator may be an intimate partner, friend or family member.
- 8.5 Questions posed in this chapter relate both to the extent to which the current provisions are clear and working as intended, as well as whether the policy rationale underpinning these provisions is still justifiable.

## When can an award be made?

- 8.6 VOCAT may award financial assistance to a victim of crime where it is satisfied that an act of violence has occurred, that the applicant is a victim of that act of violence, and that the applicant is eligible to receive the assistance.<sup>3</sup> The Act does not require someone to have been charged with or convicted of an offence for an award to be made.<sup>4</sup>
- 8.7 However, even if VOCAT determines that a victim is eligible for an award, section 52 of the Act requires that in some circumstances VOCAT must nevertheless refuse to make an award of assistance.
- 8.8 In addition, section 54 of the Act requires that in determining whether to make an award of assistance, or the amount of assistance to award, the tribunal must consider a number of specified factors which may reduce an award amount or result in an award not being made at all.
- 8.9 In practice, the effect of sections 52 and 54 of the Act is that VOCAT must consider a victim's character and behaviour before, during and after a crime. These considerations are broad and may be unrelated to the act of violence itself.
- 8.10 The Magistrates' Court of Victoria has stated that these provisions in the Act allow VOCAT to balance competing factors when making a decision about financial assistance.<sup>5</sup> For example, they enable VOCAT to refuse to make an award where it would be inconsistent with the purpose and objectives of the Act, such as denying special financial assistance to applicants who have been convicted of violent crimes, as they may not be considered appropriate recipients of a symbolic expression by the state of the community's sympathy.<sup>6</sup>
- 8.11 However, such considerations can also operate to unfairly limit some victims from accessing awards under the Act. These issues are discussed further below.

## Mandatory refusal of an award under section 52 of the Act

- 8.12 VOCAT figures indicate that for 2015–16, 105 applications were refused, comprising almost two per cent of all applications to VOCAT.<sup>7</sup>
- 8.13 Under section 52 of the Act there are two circumstances where VOCAT must refuse to make an award of assistance:
- if it is satisfied the application has been made in collusion with the perpetrator of the act of violence
  - if an earlier application for assistance has been made by the applicant from the same act of violence.<sup>8</sup>
- 8.14 These mandatory refusal provisions have not been raised as problematic, either in literature, case law or during preliminary consultations conducted by the Commission.
- 8.15 However, under section 52 of the Act, there are two further circumstances where VOCAT must refuse to make an award of assistance, unless there are 'special circumstances'. These are if VOCAT is satisfied that:

3 Ibid s 50(1). The Act also enables a victim to '...assign to the State their right to recover from any other person, by civil proceedings, damages or compensation in respect of the injury or death to which the award relates.' Ibid s 51. This right is discussed further in Chapter 14 in relation to the operation of the Act as a recourse to financial assistance where compensation is unavailable from other sources and in relation to offenders contributing to state-funded financial assistance schemes.

4 Ibid s 50(4).

5 Magistrates' Court of Victoria and Children's Court of Victoria, Submission No 978 to Royal Commission into Family Violence, *Royal Commission into Family Violence*, June 2015, 57.

6 For example, in *Larson v Victims of Crime Assistance Tribunal* [2012] VCAT 1162 (6 August 2012), the applicant had a significant criminal history, with prior convictions for violent offences including murder, armed robbery and reckless conduct endangering life as well as prior convictions for dishonesty, property and driving offences. The Victims of Crime Assistance Tribunal (VOCAT) refused an award for assistance on the basis of his criminal history, which was upheld on appeal to the Victorian Civil and Administrative Tribunal (VCAT).

7 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 36.

8 *Victims of Crime Assistance Act 1996* (Vic) ss 52(b)–(c).

- an act of violence was not reported to police within a reasonable time
- the applicant failed to provide reasonable assistance to any person or body engaged in the investigation, arrest or prosecution of the perpetrator (the investigatory or prosecutorial body).<sup>9</sup>

8.16 Section 52 of the Act therefore provides an exception to mandatory refusal where VOCAT considers that there are special circumstances resulting in either a failure to report to police within reasonable time, or a failure to provide reasonable assistance to police or the prosecution.

### Act of violence not reported to police within a reasonable time

8.17 In determining whether an act of violence was reported to police within a reasonable time for the purposes of section 52(a)(i) of the Act, section 53 provides that VOCAT 'may have regard to any matters that it considers relevant' including:

- the age of the victim at the time of the act of violence
- whether the victim has an intellectual disability, within the meaning of the *Disability Act 2006* (Vic)
- whether the victim has a mental illness, within the meaning of the *Mental Health Act 2014* (Vic)
- whether the perpetrator was in a position of power, influence or trust in relation to the victim
- whether the victim was threatened or intimidated by the perpetrator
- the nature of the victim's injury.<sup>10</sup>

8.18 The case law varies in its interpretation of what constitutes a 'reasonable time' for reporting, as well as what might result in special circumstances mitigating an 'unreasonable' delay.

8.19 For example, in *J v Victims of Crime Assistance Tribunal*,<sup>11</sup> the Victorian Civil and Administrative Tribunal (VCAT) held that a delay of approximately 35 years in reporting alleged sexual abuse to police was reasonable given the circumstances of the case. VCAT considered the way sexual assault was viewed at the time of the offences and the power dynamics in the family relationship. VCAT noted '[the perpetrator] was an adult member of the family and a teacher. In that position he was more ... likely to be believed over the Applicant.'<sup>12</sup>

8.20 In contrast, a narrower interpretation is found in *S v Victims of Crime Assistance Tribunal*<sup>13</sup> where VCAT affirmed the decision of VOCAT to refuse an application on the grounds of, among other things, not reporting to police within a reasonable time under section 52. The applicant had not reported an alleged rape to police until 22 years after the alleged offence occurred. VCAT determined the applicant had not reported the alleged rape to police within a reasonable time despite the victim's admission that she did not report to police at the time because she did not know what to do, was frightened and ashamed, felt dirty and was scared of the perpetrators.<sup>14</sup> The victim was 17 years old at the time of the alleged offence.

8.21 Where VOCAT determines that a report was not made to police within a reasonable time, section 52 of the Act enables VOCAT to consider any special circumstances that may have brought about that delay.

9 Ibid s 52(a).

10 Ibid.

11 [2002] VCAT 532 (24 July 2002).

12 Ibid [61].

13 [2002] VCAT 1257 (7 November 2002).

14 Ibid [10].

- 8.22 The phrase ‘special circumstances’ is not defined in the Act. However VCAT has found that for the purposes of section 52, special circumstances must be something ‘out of the ordinary’.<sup>15</sup>
- 8.23 In cases of child sexual abuse, a victim’s age at the time of the offence has previously been interpreted as constituting special circumstances mitigating an ‘unreasonable’ delay in reporting to police.<sup>16</sup> However, for some other types of victim, the circumstances that may give rise to a finding of special circumstances is less clear.
- 8.24 For example, in *TUN v Victims of Crime Assistance Tribunal*,<sup>17</sup> VOCAT refused an application for assistance on the basis of section 52(a)(i), as the applicant had not made a report to police. The application related to an alleged assault and threat to kill by the applicant’s former de facto partner. While VCAT did overturn VOCAT’s decision and find that special circumstances existed, VCAT distinguished the applicant’s experience from ‘others faced with domestic violence’, indicating special circumstances only existed in that case because of the criminal profile of the applicant’s former partner, who was a member of a motorcycle gang with seven convictions for manslaughter.
- 8.25 The case law precedent necessitating that something be ‘out of the ordinary’<sup>18</sup> for it to constitute special circumstances can also be problematic for crimes that may be ‘common’, but because of their unique dynamics and characteristics, create additional barriers to reporting, such as victims of family violence and sexual assault.
- 8.26 In *TUN v Victims of Crime Assistance Tribunal*,<sup>19</sup> VOCAT considered the circumstances of family violence did not constitute special circumstances because such factors ‘were nothing out of the ordinary or special; it was common for such victims to fear reprisals’.<sup>20</sup>
- 8.27 Further complicating considerations under section 52(a)(i) are circumstances that raise questions of whether the act of violence was in fact ‘reported’ to police, for example where police may have been told about an incident or attended the scene but no official police record was made.
- 8.28 An example of this can be seen in *Haddara v Victims of Crime Assistance Tribunal*<sup>21</sup> where the victim’s brother made several attempts to report an assault to police, including visiting two different police stations within hours of his brother being assaulted on the street. The victim’s brother believed that in providing this information to police, they would contact his brother, who was in hospital as a result of the assault, to pursue the matter. After no such contact was made by police, the victim’s brother visited police for a third time. On each of these occasions, an official police report was not recorded.
- 8.29 Approximately 20 days later, the victim reported the matter to police. It was only at this point that the complaint was recorded on the police database, LEAP. Police advised the victim at this time that due to a lack of evidence, the matter could not proceed any further.
- 8.30 On appeal to VCAT, VOCAT submitted that the act of violence was not reported to police within reasonable time and also submitted that the victim failed to provide reasonable assistance to police. VCAT overturned VOCAT’s decision, observing that reporting to police three weeks after an incident appeared reasonable and concluding that for the purposes of section 52, the victim’s brother had reported the matter to police within reasonable time.<sup>22</sup>

15 *Nichol v Victims of Crime Assistance Tribunal* [2000] VCAT 840 (30 April 2000) [23].

16 See, eg, *CS v Victims of Crime Assistance Tribunal* [2006] VCAT 1061 (9 June 2006).

17 [2009] VCAT 1599 (10 August 2009).

18 See, eg, *Nichol v Victims of Crime Assistance Tribunal* [2000] VCAT 840 (30 April 2000) [23].

19 [2009] VCAT 1599 (10 August 2009).

20 *Ibid* [10]. In making this submission to VCAT, counsel for VOCAT was referencing VCAT’s previous decision in *Nichol v Victims of Crime Assistance Tribunal* [2000] VCAT 840 (30 April 2000) [23], in which it had held that for the purposes of s 52, what must be demonstrated for ‘special circumstances’ is something ‘out of the ordinary’.

21 [2010] VCAT 1133 (29 June 2010).

22 *Ibid* [9].

- 8.31 In *Sanders v Victims of Crime Assistance Tribunal*, VCAT determined on appeal that the provision of details to police orally at the scene of an alleged assault was sufficient to constitute a report to police.<sup>23</sup> VCAT also held that ‘what constitutes a report to police must depend on the circumstance of each particular case’.<sup>24</sup>
- 8.32 Therefore, both the legislation and case law provide limited guidance about what constitutes a report to police, and what circumstances will amount to making a report to police within a ‘reasonable time’.

### Failure to provide reasonable assistance to an investigatory or prosecutorial body

- 8.33 Except where there are special circumstances, the failure to provide reasonable assistance to an investigatory or prosecutorial body requires VOCAT to refuse an application for financial assistance.<sup>25</sup>
- 8.34 However, unlike the ‘failure to report’ provisions, the Act does not provide any guidance about what VOCAT should have regard to in considering whether there are ‘special circumstances’.
- 8.35 In addition, under section 52(a)(ii) of the Act, there are no prescribed positive actions a victim must perform to satisfy ‘reasonable assistance’, such as providing a witness statement or participating in a criminal trial. However, guidance in the VOCAT application form states:

In most cases, calling the police to attend the scene of a crime is not enough. You should make a formal report, including a sworn statement (if requested), so the police can fully investigate the matter. You should give the Tribunal full details of the relevant police officer’s station, rank and registration number.<sup>26</sup>

- 8.36 In *Rajah v Victims of Crime Assistance Tribunal*,<sup>27</sup> VCAT found the existence of special circumstances to mitigate what might otherwise be viewed as failure to assist the police—not providing a written statement to police. In that case, the applicant was a victim of sexual and physical abuse by her mother’s former de facto partner and the circumstances of the offending and the vulnerability of the victim were accepted as giving rise to special circumstances.<sup>28</sup>
- 8.37 In *Nichol v Victims of Crime Assistance Tribunal*,<sup>29</sup> the applicant assisted police in the initial stages of their investigation but the day before the hearing she withdrew the complaint and the police subsequently withdrew the charges. On review, VCAT held that, although the applicant had rendered appropriate assistance in the initial stages of the police investigation, by later withdrawing her complaint, she had not rendered reasonable assistance for the purposes of section 52 of the Act. Accordingly, VCAT refused the application noting ‘the proper characterisation of what happened is that [the applicant] pulled the rug out from under the police at the last minute’.<sup>30</sup> VCAT determined that the applicant had neither provided reasonable assistance nor were there special circumstances mitigating the applicant’s failure.
- 8.38 In *Gray v Victims of Crimes Assistance Tribunal*,<sup>31</sup> the 16-year-old applicant had been stabbed at a train station. VOCAT denied his application under section 52 for failure to cooperate with police because he had refused to give police a statement immediately after the stabbing, although he did give a statement months later. VCAT stated ‘it is always a matter of significant concern where a victim of crime does not immediately cooperate with Victoria Police. If [the applicant] had been aged 18 at the time of the

23 *Sanders v Victims of Crime Assistance Tribunal* [2003] VCAT 396 (3 March 2003) [43].

24 *Ibid* [42].

25 *Victims of Crime Assistance Act 1996* (Vic) s 52(a)(ii).

26 *Victims of Crime Assistance Tribunal, Guide to Completing the Application for Assistance Form* (2016) s 4, see Appendix C.

27 [2002] VCAT 1422 (6 December 2002).

28 *Ibid* [21].

29 [2000] VCAT 840 (30 April 2000).

30 *Ibid* [21].

31 [2014] VCAT 1002 (12 August 2014).

offence, I would probably have affirmed VOCAT's decision.<sup>32</sup> However, VCAT overturned VOCAT's decision on the basis the applicant had provided reasonable, although delayed, assistance and that earlier cooperation with police would likely not have made a difference to the police investigation.

### **Additional factors VOCAT must consider under section 54 of the Act**

8.39 Once VOCAT has determined that an act of violence has occurred, that the applicant is a victim eligible for assistance, and that there are no circumstances giving rise to mandatory refusal under section 52 of the Act, section 54 of the Act requires VOCAT to consider a number of additional matters before determining whether or not to make an award, or in determining the amount of the award. These include:

- 'the character, behaviour (including past criminal activity and the number and nature of any findings of guilt or convictions) or attitude of the applicant at any time, whether before, during or after the commission of the act of violence'<sup>33</sup>
- 'whether the applicant provoked the commission of the act of violence and, if so, the extent to which the act of violence was in proportion to that provocation'<sup>34</sup>
- 'any condition or disposition of the applicant which directly or indirectly contributed to his or her injury or death'<sup>35</sup>
- 'whether the person by whom the act of violence was committed will benefit directly or indirectly from the award'<sup>36</sup>
- 'any other circumstances that it considers relevant'.<sup>37</sup>

8.40 These considerations are discussed below.

### **Character, behaviour and attitude of applicant**

8.41 Section 54 of the Act requires VOCAT to have regard to the character, behaviour and attitude of an applicant in determining whether or not to make an award or the amount of assistance to award. This provision is broad, and includes considering the applicant's character, behaviour and attitude before, during or after the act of violence. The Act specifically includes a requirement for consideration of past criminal activity.<sup>38</sup> However, the considerations required are much broader than that, given VOCAT can consider the character, behaviour or attitude of the victim 'at any time, whether before, during or after the commission of the act of violence'.<sup>39</sup>

8.42 For related victims, section 54 of the Act requires VOCAT to have regard to the character, behaviour and attitude of the deceased primary victim of the act of violence; any obligations owed to the applicant by the deceased primary victim; the financial resources and financial needs of the applicant and any other related victim applicants; and the nature of the relationship.<sup>40</sup>

8.43 Victoria's 'character and behaviour' provisions are much broader than other Australian jurisdictions. This is because the considerations VOCAT can take into account are not required to be directly related to the circumstances of the current victimisation.

8.44 In contrast, the equivalent provision in New South Wales considers 'any behaviour (including past criminal activity), condition, attitude or disposition' of the applicant, however, this is considered only in the context of whether these factors 'directly or indirectly contributed to the injury or death sustained'.<sup>41</sup>

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32 Ibid [26].  
 33 *Victims of Crime Assistance Act 1996* (Vic) s 54(a).  
 34 Ibid s 54(c).  
 35 Ibid s 54(d).  
 36 Ibid s 54(e).  
 37 Ibid s 54(f).  
 38 Ibid s 54(a).  
 39 Ibid.  
 40 Ibid s 54(b).  
 41 *Victims Rights and Support Act 2013* (NSW) s 44(1)(a).

- 8.45 Similarly, in Western Australia, the government assessor can refuse or reduce an award only if the behaviour, condition, attitude or disposition of the victim contributed to their injury or death.<sup>42</sup>
- 8.46 In the Australian Capital Territory, an applicant's character and behaviour are only relevant to whether the applicant 'conspired with the person responsible for the act of violence', 'the applicant was involved in a serious crime when the act of violence that is the subject of the application occurred', 'the applicant has unreasonably failed to give assistance to the police' or 'the applicant has been involved in contributory conduct'.<sup>43</sup>
- 8.47 In Queensland, a grant can only be denied if the applicant conspired with the perpetrator to commit the act of violence, if the main reason the act of violence was committed was because of the involvement in criminal activity, or if they did not report to police or provide reasonable assistance.<sup>44</sup>
- 8.48 These provisions in other jurisdictions therefore causally link the consideration of character and behaviour to the current circumstances of victimisation and are more akin to 'provocation' or 'contributory conduct' provisions which are discussed in detail below. There is no broader consideration of the applicant's character or behaviour 'at any time'<sup>45</sup> as there is in Victoria.
- 8.49 Analysis of case law shows that the practical application of section 54 results in the past criminal activity of a VOCAT applicant being closely scrutinised.<sup>46</sup> As this may not be causally connected to the subject of the application, this sets Victoria apart from other jurisdictions.
- 8.50 As noted in the first consultation paper, this is significant for victims of family violence as research indicates a connection between family violence victimisation and criminal activity.<sup>47</sup> In particular, the Royal Commission into Family Violence found that a substantial majority of Victorian female criminal offenders had experienced family violence.<sup>48</sup>
- 8.51 Recent research has also found a link between childhood sexual abuse and later offending behaviour.<sup>49</sup> In a sample of 2759 childhood sexual abuse victims, it was found these victims were almost five times more likely than the general population to be charged with criminal offences later in life.<sup>50</sup> The study found that both male and female child sexual abuse victims were significantly more likely than non-abused people to be charged with offences of all types but in particular with violence and sexual offences.<sup>51</sup> Moreover, child sexual abuse victims were not only more likely than others to offend, they had a greater number of charges, more custodial sentences and they continued offending to an older age.<sup>52</sup>
- 8.52 Recent analysis of VOCAT decisions has also highlighted drug use and addiction as a potential obstacle to assistance under this section of the Act.<sup>53</sup>

42 *Criminal Injuries Compensation Act 2003* (WA) s 41(a).

43 *Victims of Crime (Financial Assistance) Act 2016* (ACT) ss 45(b)–(e), 47(d).

44 *Victims of Crime Assistance Act 2009* (Qld) ss 79–82.

45 *Victims of Crime Assistance Act 1996* (Vic) s 54(a).

46 See, eg, *RUM v Victims of Crime Assistance Tribunal* [2016] VCAT 367 (10 March 2016); *TNX v Victims of Crime Assistance Tribunal* [2014] VCAT 1234 (30 September 2014); *Rajah v Victims of Crime Assistance Tribunal* [2002] VCAT 1422 (6 December 2002); *MK v Victims of Crime Assistance Tribunal* [2013] VCAT 1582 (10 September 2013).

47 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 100 [10.41]–[10.42].

48 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 5, 239.

49 James Ogloff et al, *Child Sexual Abuse and Subsequent Offending and Victimisation: A 45 Year Follow-Up Study*, Trends and Issues in Crime and Criminal Justice No. 440 (Australian Institute of Criminology, 2012) 5.

50 *Ibid.*

51 *Ibid.*

52 *Ibid.*

53 Kate Seear and Suzanne Fraser, 'The Addict as Victim: Producing the "Problem" of Addiction in Australian Victims of Crime Compensation Laws' (2014) 25 *International Journal of Drug Policy* 826, 831.

- 8.53 *RUM v Victims of Crime Assistance Tribunal*<sup>54</sup> provides an example of the operation of these provisions. In this case, VCAT considered the fact that the applicant was a serious sex offender, lacking remorse and insight in relation to his offending. In determining not to award financial assistance, VCAT held that the objectives of the Act 'require consideration of whether an applicant is an appropriate recipient of a symbolic expression by the state of the community's sympathy'.<sup>55</sup>
- 8.54 Similarly, in *TNX v Victims of Crime Assistance Tribunal*,<sup>56</sup> VCAT considered the applicant's prior convictions for causing serious injuries, his failure to render assistance and the limited remorse shown by the applicant in relation to his offending behaviour. Taking into account all those circumstances, VCAT determined it was appropriate to reduce the special financial assistance available from \$10,000 to \$8500.<sup>57</sup>
- 8.55 In *Nguyen v Victims of Crime Assistance Tribunal*,<sup>58</sup> VCAT determined that despite the applicant's criminal history, it was appropriate to make a 'modest' award for medical expenses and clothing replacement. VCAT considered that his prior offences did not involve violence and the application was only for expenses incurred.
- 8.56 A similar rationale can be seen in *White v Victims of Crime Assistance Tribunal*<sup>59</sup> where VCAT upheld VOCAT's decision not to award special financial assistance because of the applicant's past criminal history, indicating the provision of special financial assistance would 'offend the conscience of the people of Victoria'.<sup>60</sup> However, VCAT determined it would be appropriate to provide assistance for medical expenses and overturned VOCAT's decision not to make an award for reasonable medical expenses.<sup>61</sup>
- 8.57 Case law analysis indicates that in some cases an applicant's past criminal behaviour may be viewed within a broader context of disadvantage or victimisation. In *Rajah v Victims of Crime Assistance Tribunal*,<sup>62</sup> VCAT accepted that the applicant was a victim of sexual and physical abuse by her mother's former partner from three years of age. The applicant later abused drugs and had a significant criminal record, mostly related to her drug and alcohol abuse. In that case, VCAT accepted the circumstances of the offending and the vulnerability of the victim as giving rise to special circumstances.
- 8.58 However, in *MK v Victims of Crime Assistance Tribunal*,<sup>63</sup> VCAT declined to award the applicant special financial assistance because she had failed to report to Centrelink that she was in a de facto relationship with her partner, who she reported was abusive, despite describing the financial abuse as part of the violence perpetrated by her partner.
- 8.59 In the case of related victims, the deceased primary victim's character, behaviour and past criminal conduct are considered. For example in *Tighe v Victims of Crime Assistance Tribunal*,<sup>64</sup> the siblings of a person with a substantial criminal record who was murdered during a drug deal made an application to VOCAT. On appeal, VCAT held that the past criminal activities of the deceased should reduce the assistance to be awarded, rather than result in a refusal of an award.
- 8.60 Research conducted by Kate Seear and Suzanne Fraser in 2014 found that victims of crime who use drugs and/or alcohol face considerable obstacles in accessing VOCAT awards because of the character and behaviour considerations under section 54 of the Act.<sup>65</sup> Seear and Fraser examined available VOCAT decisions in relation to how drug and alcohol use was considered. In the cases they examined, drug use and addiction were found to

54 [2016] VCAT 367 (10 March 2016).

55 Ibid [18].

56 [2014] VCAT 1234 (30 September 2014).

57 Ibid [22].

58 [2001] VCAT 2028 (28 September 2001).

59 [2010] VCAT 455 (19 April 2010).

60 Ibid [18].

61 Ibid [15] and [18].

62 [2002] VCAT 1422 (6 December 2002).

63 [2013] VCAT 1582 (10 September 2013).

64 [2014] VCAT 1386 (15 October 2014).

65 Kate Seear and Suzanne Fraser, 'The Addict as Victim: Producing the "Problem" of Addiction in Australian Victims of Crime Compensation Laws' (2014) 25 *International Journal of Drug Policy* 826, 833.

be directly relevant to the question of whether or not the applicant was 'deserving' of an award of assistance. In some cases, consideration of drug and alcohol use was combined with consideration of past criminal activity. For example, referring to *Hassell v Victims of Crime Assistance Tribunal*, Seear and Fraser contend that:

the court has clearly problematised [the applicant's] drug use and addiction in association with his criminal history under the character provisions, producing it [as] a potential obstacle to the provision of compensation. The possibility that being a heroin addict might be incompatible with being an eligible victim is raised.<sup>66</sup>

### Whether the applicant 'provoked the commission of the act of violence' and any 'condition or disposition of the applicant'

- 8.61 As outlined above, in determining whether to award financial assistance or how much to award, section 54 of the Act requires VOCAT to consider:
- 'whether the applicant provoked the commission of the act of violence and, if so, the extent to which the act of violence was in proportion to that provocation'<sup>67</sup>
  - 'any condition or disposition of the applicant which directly or indirectly contributed to his or her injury or death'.<sup>68</sup>
  - Together, these are sometimes referred to as 'contributory conduct' or 'provocation' clauses.<sup>69</sup> Some commentary suggests these provisions relate to '... the extent to which the applicant was the author of their misfortune'.<sup>70</sup>
- 8.62 In *Fallon v Victims of Crime Assistance Tribunal*,<sup>71</sup> VCAT affirmed VOCAT's decision to deny the applicant assistance due to provocation, despite finding the applicant a victim of an act of violence:
- There is no doubt in my mind that the inflammatory words uttered by [the victim] set in motion the chain of events ... In my view she invited retaliation. Her behaviour was provocative and entirely out of proportion with the circumstances.<sup>72</sup>
- 8.63 Accordingly, given the victim's 'provocative' actions, VCAT determined that the incident did not 'give rise to circumstances where there should be any expression, symbolic or otherwise, by "the State of the community's sympathy and condolence"'.<sup>73</sup>
- 8.64 In *Heron v Victims of Crime Assistance Tribunal*,<sup>74</sup> VCAT upheld VOCAT's decision not to make an award of assistance. VCAT stated that the applicant's comments to the perpetrator were 'provocative'.
- 8.65 However, in that case, consideration of the applicant's 'provocative' comments appears to have been under the provision in section 54(a) dealing with 'the character, behaviour or attitude of the applicant at any time' rather than the specific provision on provocation in section 54(c).<sup>75</sup> Overall, VCAT considered that the provocative comments, combined with the consumption of alcohol as well as a history of altercations with the alleged perpetrator were all relevant consideration under section 54 of the Act: of the applicant's behaviour and attitude before and during the incident.<sup>76</sup>

66 Ibid 831.

67 *Victims of Crime Assistance Act 1996* (Vic) s 54(c).

68 Ibid s 54(d).

69 Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse 2010) 8; Law Reform Commission of Western Australia, *Enhancing Family and Domestic Violence Laws*, Discussion Paper, Project No 104 (2013) 154. 'Provocation' under the Act is distinguished from the defence of provocation that was available in homicide matters prior to 2005 in Victoria. The defence of provocation was abolished in Victoria by the *Crimes (Homicide) Act 2005* (Vic) and is no longer an available defence to homicide: Thomson Reuters Westlaw, *Criminal Law, Investigation and Procedure Victoria* (at 7 August 2017) [GPOCL.4000].

70 Thomson Reuters Westlaw, *Criminal Law, Investigation and Procedure Victoria* (at 7 August 2017) [VCAA.54.20].

71 [2009] VCAT 414 (12 March 2009).

72 Ibid [19].

73 Ibid.

74 [2005] VCAT 961 (27 May 2005).

75 Ibid [29].

76 Ibid [28]–[29].

- 8.66 In practice there may be little distinction made between consideration under the broader ‘character and behaviour’ provisions of section 54(a) of the Act and the more specific ‘provocation’ provisions of section 54(c) of the Act. This may be because section 54(a) is broad—‘the character, behaviour or attitude of the applicant at any time’—and may capture other actions or behaviours of the applicant, such as actions that might be deemed ‘provocative’.
- 8.67 In *Mendez v Victims of Crime Assistance Tribunal*,<sup>77</sup> which involved family violence, VOCAT and VCAT took different views of the victim’s role in allegedly provoking the act of violence. In that case, VOCAT relied on the applicant’s ‘alleged role in starting the fight during which she was assaulted, as factors under s.54 of the VOCA Act which militated against a further award of assistance’.<sup>78</sup>
- 8.68 However, VCAT ultimately determined that although the applicant may have ‘provoked’ the assault, the applicant’s ‘provocation’ was outweighed by the actions of the perpetrator:
- I turn to consider the relevant factors under s.54(a) of the VOCA Act ... As for her role in provoking the assault, I consider that any provocation by Ms Mendez is outweighed by the role of her assailant ... I note that the assailant was charged, inter alia, with intentionally cause serious injury, and that Ms Mendez was not charged with any offence arising from the incident.<sup>79</sup>
- 8.69 As demonstrated by the cases discussed above, it appears that VOCAT may consider section 54 matters as a whole, rather than considering each sub-section individually. Commentary suggests that the requirement to have regard to ‘any condition or disposition of the applicant which directly or indirectly contributed to his or her injury or death’ may relate to ‘behaviour falling short of provocation [but that] could include a psychiatric condition which affected the interaction with the assailant’.<sup>80</sup>

### Perpetrator benefit

- 8.70 In determining whether to make an award or the amount of an award, VOCAT must consider whether the alleged perpetrator will benefit directly or indirectly from the award.<sup>81</sup>
- 8.71 The Act provides no guidance about what might be considered a direct or indirect benefit to a perpetrator.
- 8.72 The Commission has not found VOCAT appeal decisions on this point. However, some stakeholders and academics have raised concerns that the perpetrator benefit provision unfairly prejudices some classes of victim, particularly victims of family violence who may have an ongoing relationship with the perpetrator. Further discussion of these matters can be found in Chapter 10 of the Commission’s first consultation paper.<sup>82</sup>

## Discussion and options for reform

- 8.73 This section discusses the operation of sections 52, 53 and 54 of the Act and sets out options for reform to address concerns that some victims of crime are unfairly disadvantaged by the operation of these provisions. Options for reform and some questions are set out below.
- 8.74 The Commission seeks the views of victims, persons affected, professionals, stakeholders and the community on whether sections 52, 53 and 54 should be amended.

77 [2011] VCAT 1237 (8 July 2011).

78 Ibid [31].

79 Ibid [53].

80 Thomson Reuters Westlaw, *Criminal Law, Investigation and Procedure Victoria* (at 7 August 2017) [VCAA.54.20].

81 *Victims of Crime Assistance Act 1996* (Vic) s 54(e).

82 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 109 [10.101]–[10.103].

## Requirement to report to police within reasonable time

- 8.75 The effect of the requirement on victims of family violence to report to police within a reasonable time was considered in the first consultation paper. In particular, the Commission noted that victims of family violence are less likely to report to police due to fear, shame or economic disadvantage.<sup>83</sup>
- 8.76 However, victims of other types of crime are equally vulnerable to such factors, for example victims of certain types of crime associated with low reporting rates, such as sexual assault or historical child sexual assault.<sup>84</sup>
- 8.77 In addition, the experience in the VOCAT Koori List is that some victims would prefer to deal with issues ‘in house’ rather than involve police.<sup>85</sup> This attitude reflects the often violent and disempowering history of police interactions with the Aboriginal population since colonisation, despite improvements to police culture in recent times.<sup>86</sup>
- 8.78 Research indicates that homophobia and heterosexism may contribute to a reluctance within the LGBTIQ community to also report victimisation to police.<sup>87</sup> The Royal Commission into Family Violence found that people from LGBTIQ communities are less likely to report family violence to police because of actual or perceived discrimination and harassment.<sup>88</sup>
- 8.79 For victims with disability, additional barriers might relate to living environments, physical and financial independence and barriers to reports of violence being believed.<sup>89</sup> Victoria’s 2016 Parliamentary Inquiry into Abuse in Disability Services found that many instances of assault, including sexual assault, were not reported to police, although, they may have been reported as ‘incidents’ by the service provider.<sup>90</sup>
- 8.80 Victims may ultimately make a report to police, but the report may be significantly delayed. This is a known characteristic of childhood sexual abuse victims where disclosure can take several decades.<sup>91</sup>
- 8.81 While section 53 of the Act provides guidance on the factors VOCAT may have regard to in determining whether the act of violence was reported to police within a reasonable time, the first consultation paper also noted that case law offers differing interpretations of what might be considered reasonable in the context of family violence.<sup>92</sup>
- 8.82 In addition, ‘special circumstances’ is not defined in the Act, which can lead to uncertainty. Case law indicates that special circumstances must be something ‘out of the ordinary’.<sup>93</sup> While child sexual abuse has previously been considered special circumstances mitigating an unreasonable delay in reporting to police,<sup>94</sup> the meaning of special circumstances is less clear for other types of victim.

83 Ibid 105.

84 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Analysis of Claims of Child Sexual Abuse Made with Respect to Catholic Church Institutions in Australia* (2017) 14.

85 Victims of Crime Assistance Tribunal, *Koori VOCAT List Pilot, Review and Recommendations* (2010) 11.

86 Clear Horizon Consulting, *Evaluation of the Koori Family Violence Police Protocols: Ballarat, Darebin and Mildura* (Victoria Police, 2015) 3.

87 Angela Dwyer, ‘Policing Lesbian, Gay, Bisexual and Transgender Young People: A Gap in the Research Literature’ (2011) 22(3) *Current Issues in Criminal Justice* 415, 416.

88 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 5, 145–6.

89 Sue Salthouse and Carolyn Frohmader, ‘Double the Odds—Domestic Violence and Women with Disabilities’ (Paper presented at the Home Truths Conference, Melbourne, 15–17 September 2004) <<http://wwda.org.au/issues/viol/viol2001/odds/>>.

90 Family and Community Development Committee, Parliament of Victoria, *Inquiry into Abuse in Disability Services: Final Report* (2016) 59.

91 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Analysis of Claims of Child Sexual Abuse Made with Respect to Catholic Church Institutions in Australia* (2017) 14.

92 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 106 [10.78].

93 *Nichol v Victims of Crime Assistance Tribunal* [2000] VCAT 840 (30 April 2000) [23].

94 *CS v Victims of Crime Assistance Tribunal* [2006] VCAT 1061 (9 June 2006).

- 8.83 Most Australian state and territory financial assistance schemes for victims of crime require a victim to report to police within a reasonable time.<sup>95</sup> Aside from the evidentiary benefits for supporting compensation or financial assistance claims, such provisions encourage victims to come forward to enable the state to prosecute offences.<sup>96</sup>
- 8.84 As in Victoria, other state and territory legislative frameworks allow the relevant decision-making body to consider factors that may have resulted in failure to report within a reasonable time. For example, the Northern Territory provisions are similar to those in Victoria.<sup>97</sup> In South Australia the court cannot make a compensation order if the applicant failed to report the offence ‘without good reason’.<sup>98</sup>
- 8.85 However, in New South Wales, Queensland and the Australian Capital Territory, an act of violence can also be reported to other professionals, including government agencies and health professionals such as a counsellor, psychologist or doctor.<sup>99</sup> Furthermore, in 2017, the Queensland Parliament passed an amendment to its legislation to explicitly extend its alternative reporting provision to domestic violence services.<sup>100</sup>
- 8.86 Provisions like those in New South Wales, Queensland and the Australian Capital Territory acknowledge that reporting to police may still be a barrier for many victims of crime. Options to address these barriers are set out below, along with specific questions for consideration.

### Providing more guidance about what constitutes a report to police

- 8.87 One option is to amend the Act to specify the positive actions a victim can take that would constitute a report to police for the purposes of section 52(a)(i) of the Act.
- 8.88 This option would help to address issues with victims believing they have made a report to police, where the matter has not been officially recorded.

### Removing the requirement to report to police entirely

- 8.89 As an alternative option, consideration could be given to removing the requirement to report to police entirely. This could apply to all victims, or specific classes of victims only.
- 8.90 A further option could be to replace the requirement to report to police with a requirement to make a report to either police or other recognised agencies or professionals. For example, in the Australian Capital Territory, New South Wales and Queensland, special classes of victims may make a report to their doctor or social worker.<sup>101</sup>
- 8.91 Research indicates that low rates of reporting to police do not necessarily mean that a victim has not disclosed the crime to other agencies or organisations, such as a women’s or family violence service.<sup>102</sup>
- 8.92 This option would help to overcome some of the difficulties and barriers experienced by some victims of crime in being required under the Act to make a report to police only.

95 See comparative table of Australian jurisdictions at Appendix B. See also Christine Forster, ‘Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes’ (2014) 22 *Journal of Law and Medicine* 188, 194.

96 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response: Final Report*, ALRC Report No 114 and NSWLRC Report No 128 (2010) 183.

97 *Victims of Crime Assistance Act 2006* (NT) ss 43(b)–(c).

98 *Victims of Crime Act 2001* (SA) s 20(7).

99 *Victims Rights and Support Act 2013* (NSW) s 44(c); *Victims of Crime (Financial Assistance) Act 2016* (ACT) ss 31(3)–(4).

100 *Victims of Crime Assistance and Other Legislation Amendment Act 2017* (Qld) s 54.

101 *Victims Rights and Support Act 2013* (NSW) s 44(c); *Victims of Crime (Financial Assistance) Act 2016* (ACT) ss 31(3)–(4); *Victims of Crime Assistance Act 2009* (Qld) ss 81(1)(a)(ii), (2).

102 See, eg, Emma Birdsey and Lucy Snowball, *Reporting Violence to Police: A Survey of Victims Attending Domestic Violence Services*, Issues Paper No 91 (New South Wales Bureau of Crime Statistics and Research, 9 December 2013) 2.

## Question

- 30 Should the requirement to report incidents to police be explicitly excluded for some types of crime? Alternatively, should reports made by victims to other professionals or agencies be recognised? If so, how would this work in practice?

### Requirement to provide reasonable assistance to police and prosecution

- 8.93 As already noted, there are no prescribed positive actions a victim must undertake to satisfy the 'reasonable assistance' requirement. However, VOCAT advises victims that they should call police to attend the scene of a crime, make a formal statement (including sworn statement if requested) and provide full details of the police office's station, rank and registration number.<sup>103</sup>
- 8.94 There are many reasons why these requirements will be difficult for some victims. The instructions given to victims by VOCAT may be more applicable to one-off acts of stranger violence than to acts of violence that involve patterns of abuse, multiple incidents over a period of time and no single crime scene.
- 8.95 Satisfying this requirement may therefore be much more difficult for victims of historical childhood sexual abuse, family violence, sexual assault and violence in care facilities.
- 8.96 As discussed in the first consultation paper, it is common in circumstances where perpetrators of violence exercise power and control over a victim for victims to report a matter to police, then fail to assist with prosecution by withdrawing the complaint or refusing to give evidence in court.<sup>104</sup> This is particularly the case where the perpetrator and victim are known to each other, for example, in circumstances of family violence and cases of sexual assault. Victims may fear the perpetrator or they may have reconciled after a violent incident. The victim may also be financially reliant on the perpetrator.
- 8.97 The Act does not provide guidance about whether these factors can be taken into account by VOCAT. Case law offers differing interpretations of what may constitute reasonable assistance.
- 8.98 Most Australian state and territory schemes require victims to assist police and prosecution. However, Queensland has recently amended its legislation to enable consideration of whether an act of violence involves domestic violence, in recognition of the particular dynamics in these circumstances that might prevent victims from assisting police and prosecution.<sup>105</sup>
- 8.99 Options to address concerns that some victims of crime are unfairly disadvantaged by the operation of sections 52 and 53 are set out below, along with questions for consideration.

### Removing the requirement to provide reasonable assistance for some victims

- 8.100 Consideration could be given to amending the Act to remove the requirement to provide reasonable assistance to police and prosecution for some categories of victim, in recognition of the challenges some victims may face in cooperating with authorities.

103 Victims of Crime Assistance Tribunal, *Guide to Completing the Application for Assistance Form* (2016) s 4, see Appendix C.  
104 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 106 [10.79].  
105 *Victims of Crime Assistance Act 2009* (Qld) s 82(3)(e). Inserted by *Victims of Crime Assistance and Other Legislation Amendment Act 2017* (Qld) s 55(4).

## Question

- 31 Should the requirement to provide reasonable assistance to police and prosecution be explicitly excluded for some categories of victim? If yes, what categories?

### Specifying additional factors for consideration in determining reasonable assistance

- 8.101 Another option is for the Act to be amended to specify additional factors VOCAT may, or must, consider in determining whether the applicant has provided reasonable assistance to police and prosecution. These factors could also apply to the consideration of whether a report was made to police within reasonable time.
- 8.102 In addition, or alternatively, section 52 of the Act could be amended to explicitly define 'special circumstances' for the purposes of this section.
- 8.103 This would help clarify the legislative intent of the special circumstances provision which has been interpreted by the courts as something 'out of the ordinary'. This appears to sit uneasily with some victimisation circumstances which are ordinary—such as family violence or sexual assault—but which give rise to specific vulnerabilities which may not have been envisaged at the time the Act was introduced.

## Questions

- 32 How do the 'reasonable assistance' requirements impact on victims of crime?
- 33 Should the Act be amended to improve the operation of the 'reasonable assistance' provisions for victims of crime? If so, what changes should be made to the Act?

### Character and behaviour considerations

- 8.104 As outlined above, section 54 of the Act requires a victim's character and behaviour to be considered. Case law analysis indicates a victim's character and behaviour will be particularly considered with respect to:
- prior criminal offending
  - current or previous drug and alcohol use or other lifestyle factors interpreted as 'problematic'
  - 'contributory conduct' or 'provocation'.
- 8.105 Case law demonstrates that a victim's eligibility for financial assistance is not solely based on the act of violence. Broad discretionary factors in relation to the character and behaviour of the victim also inform decision making. These factors appear to be a reflection of community expectations that the victim must be an appropriate recipient of 'sympathy'. Some academics have suggested that victims must demonstrate they are exhibiting behaviours typically associated with 'responsible citizenship'.<sup>106</sup>

- 8.106 In *Hassell v Victims of Crime Assistance Tribunal*,<sup>107</sup> VCAT cites the original decision of VOCAT: ‘the Act is designed to assist victims of crime, not persons who become victims because of their involvement in the drug industry’.<sup>108</sup>
- 8.107 In relation to prior criminal offending, the United Kingdom has an overt acknowledgment of these considerations and a more prescriptive approach than Australian states and territories, refusing awards or reducing awards where applicants have an unspent conviction, calculated on a sliding scale.<sup>109</sup>
- 8.108 Even though Victoria is not as prescriptive as the United Kingdom, some victims with past criminal records in Victoria may find it difficult to secure an award, or the award of assistance may be reduced.<sup>110</sup> While the first consultation paper considered whether such provisions disadvantaged victims of family violence as compared to other victims of crime,<sup>111</sup> the supplementary terms of reference require the Commission to consider the appropriateness of such provisions for all victims, particularly where a victim’s character and behaviour may have no obvious link to the circumstances surrounding the act of violence.
- 8.109 For example, should consideration of provocation or contributory conduct—actions that might reasonably be viewed as causally linked to the acts of violence—be given the same weight as unrelated criminal convictions from 10 years prior to the act of violence? Similarly, should the fact a victim uses drugs and alcohol be a relevant factor if entirely unrelated to the act of violence?
- 8.110 The Act currently provides wide discretion for VOCAT to determine the weight given to these types of matters.
- 8.111 However, research highlights the problematic nature of such broad discretion:  
section 54 offers no guidance to what might be a relevant consideration, what weight should be given to relevant considerations in deciding whether or not to make an award, and how those considerations impact on decisions about the kind or size of an award to make ... judges have considerable scope for determining what is both ‘relevant’ and ‘problematic’.<sup>112</sup>
- 8.112 The relevance of criminal history appears to be considered both in the context of whether the past offences are violent,<sup>113</sup> as well as whether their commission can be justified by issues relating to drug and alcohol addiction.<sup>114</sup>
- 8.113 Further complicating such considerations is the known link between victimisation and offending behaviour—that is, victims of crime who end up in contact with the justice system as offenders, and therefore have a criminal record, but whose offending is directly related to the trauma associated with prior victimisation:  
Very often, women and children who have been victims of violence have self-medicated their mental health and trauma with drugs and alcohol which inevitably results in adding to the chaos of their lives and increases their contact with the criminal justice system.<sup>115</sup>

107 [2011] VCAT 2106 (10 November 2011).

108 Ibid [29].

109 Ministry of Justice and Criminal Injuries Compensation Authority (UK), *Criminal Injuries Compensation: A Guide* (2014) <[www.gov.uk/guidance/criminal-injuries-compensation-a-guide#co-operation-with-the-police-and-the-criminal-justice-system](http://www.gov.uk/guidance/criminal-injuries-compensation-a-guide#co-operation-with-the-police-and-the-criminal-justice-system)>.

110 See, eg, *RUM v Victims of Crime Assistance Tribunal* [2016] VCAT 367 (10 March 2016); *TNX v Victims of Crime Assistance Tribunal* [2014] VCAT 1234 (30 September 2014); *Rajah v Victims of Crime Assistance Tribunal* [2002] VCAT 1422 (6 December 2002); *MK v Victims of Crime Assistance Tribunal* [2013] VCAT 1582 (10 September 2013). See also Whittlesea Community Legal Service, *Victims of Crime Assistance Tribunal: Best Practice Manual* (Whittlesea Community Connections, 2011) 49.

111 See Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 107–8 [10.96]–[10.94].

112 Kate Seear and Suzanne Fraser, ‘The Addict as Victim: Producing the “Problem” of Addiction in Australian Victims of Crime Compensation Laws’ (2014) 25 *International Journal of Drug Policy* 826, 830.

113 See, eg, *Nguyen v Victims of Crime Assistance Tribunal* [2001] VCAT 2028 (28 September 2001); *Larson v Victims of Crime Assistance Tribunal* [2012] VCAT 1162 (6 August 2012).

114 See, eg, *Hay v Victims of Crime Assistance Tribunal* [2002] VCAT 45 (15 February 2002); *Rajah v Victims of Crime Assistance Tribunal* [2002] VCAT 1422 (6 December 2002).

115 Community Legal Centres NSW, Submission to New South Wales Department of Attorney General and Justice, *Review of NSW’s Victims Compensation Scheme*, 30 April 2012, 47.

- 8.114 Smart Justice has stated that consideration of past criminal behaviours further disadvantages vulnerable victims of crime, resulting, for example, in Koori victims facing unfair barriers to accessing compensation:
- Some of these victims have been victims of family violence or sexual assault as children which has led to drug use and a criminal record. However, the current law requires the Victims of Crime Assistance Tribunal (VOCAT) to have regard to a victim's past criminal activity when making an award or when assessing the amount of the award.<sup>116</sup>
- 8.115 This disadvantage may be more pronounced for particular cohorts of victims, such as victims of child sexual abuse, who may be more likely than the general population to go on to commit criminal offences.<sup>117</sup>
- 8.116 The operation of section 54 raises concerns that the Act unfairly judges victims' past criminal behaviour, which may itself result from disadvantage and trauma associated with previous victimisation.
- 8.117 David Miers has observed that although the underlying philosophy of victim compensation schemes has always relied on a differentiation between 'deserving' and 'undeserving' victims, this philosophy becomes problematic because it is confounded by the reality of criminal victimisation—the fact that many victims have also been offenders.<sup>118</sup>
- 8.118 Is the Act fulfilling its aim of assisting victims of crime if victims are judged by past criminal behaviour resulting from disadvantage and trauma associated with previous victimisation?
- 8.119 In all Australian jurisdictions, there is some form of 'provocation' or 'contributory conduct' clause in the relevant legislation.<sup>119</sup> Despite their prevalence, such provisions are not without controversy, given the potential for 'victim blaming', particularly in the context of family violence.<sup>120</sup>
- 8.120 During preliminary consultations, the Commission was informed that there may be circumstances where victims are charged with criminal offences as a result of defensive actions taken against perpetrators. The Royal Commission into Family Violence was told that police sometimes inaccurately identify victims as 'primary aggressors' when attending family violence incidents, particularly where a victim may use violence in self-defence.<sup>121</sup> Such actions may have an adverse impact on VOCAT applications.
- 8.121 Matthew Hall states that Australian schemes have long been concerned with compensating 'deserving' victims who cooperate with authorities, are in no way responsible for their injuries and are generally free of past criminal convictions.<sup>122</sup> However, Julie Stubbs and Jane Wangmann have highlighted that binary oppositions entrenched within the legal system, such as 'innocent' victims and 'wicked' offenders, can disadvantage victims who do not fit these strict categories, such as female victims of family violence who 'fight back', have a criminal history, or abuse drugs and alcohol.<sup>123</sup>

116 Smart Justice, *Better Support for Victims of Crime*, Factsheet (2010).

117 James Ogloff et al, *Child Sexual Abuse and Subsequent Offending and Victimisation: A 45 Year Follow-Up Study*, Trends and Issues in Crime and Criminal Justice No 440 (Australian Institute of Criminology, 2012) 5.

118 David Miers, 'Compensating Deserving Victims of Violent Crime: The Criminal Injuries Compensation Scheme 2012' (2014) 34(2) *Legal Studies* 24, 258.

119 See the comparative table of Australia jurisdictions at Appendix B. See also New South Wales Department of Attorney General and Justice, *Review of the Victims Compensation Fund* (PricewaterhouseCoopers Australia, 2012) 98.

120 Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse 2010) 8.

121 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 3, 18–21.

122 Matthew Hall, *Victims and Policy Making: A Comparative Perspective* (Willan Publishing, 2010) 180.

123 Julie Stubbs and Jane Wangmann, 'Competing Conceptions of Victims of Domestic Violence Within Legal Processes' in Dean Wilson and Stuart Ross (eds) *Crime, Victims and Policy: International Contexts, Local Experiences* (Palgrave MacMillan, 2015) 107.

## Providing more guidance in the Act about relevant section 54 factors

- 8.122 As discussed above, the Act provides little legislative guidance to enable VOCAT to exercise its discretion under section 54 in a consistent way. This is particularly significant given the broad discretion afforded to VOCAT to consider the character, behaviour or attitude of the applicant 'at any time, whether before, during or after the commission of the act of violence'.<sup>124</sup>
- 8.123 One option is to define some section 54 considerations to limit the discretion available to decision makers under the Act.
- 8.124 Alternatively, additional guidance could be provided in the Act about the factors and considerations that are relevant, including being more specific about the relevance of past criminal convictions. This could relate to time periods, such as when a criminal conviction is still relevant, or crime types. For example, the Queensland legislation expressly provides guidance for decision makers with respect to a victim's past criminal history, stating that the government assessor may have regard to the circumstances of the offences to which the convictions mentioned in the victim's criminal history relate, including—:<sup>125</sup>
- when the offences happened
  - the seriousness of the offences
  - the primary victim's age when the offences happened
  - the regularity of the offences.
- 8.125 Consideration could also be given to being more prescriptive like the UK so as to increase transparency and certainty. The United Kingdom has an unspent conviction system which is calculated on a sliding scale. For example, a 10 per cent reduction is applied for unspent convictions of one penalty point, moving up to a 100 per cent reduction for unspent convictions of 10 penalty points.<sup>126</sup>
- 8.126 The Manitoba (Canada) scheme also provides specific guidance in its regulations. Victims with a conviction for offences under the Criminal Code or the Controlled Drugs and Substances Act are ineligible for compensation unless their conviction was more than 10 years prior and they have not subsequently been convicted of another such offence.<sup>127</sup>

## Question

- 34 What are the effects of the section 54 considerations for victims? Are they operating fairly and appropriately? Should the Act continue to consider the 'character and the behaviour' of the victim 'at any time' as currently required under section 54(a) of the Act, or at all? If not, what changes should be made to the Act to address this?

124 *Victims of Crime Assistance Act 1996* (Vic) s 54(a).

125 *Victims of Crime Assistance Act 2009* (Qld) s 80(4)(b).

126 Ministry of Justice and Criminal Injuries Compensation Authority (UK), *Criminal Injuries Compensation: A Guide* (2014) <<https://www.gov.uk/guidance/criminal-injuries-compensation-a-guide#co-operation-with-the-police-and-the-criminal-justice-system>>.

127 *Victims' Rights Regulation*, Man Reg 214/98 (Manitoba) r 54.1(1)(3).

### Removing consideration of some section 54 factors

- 8.127 One option is to remove consideration of some of the section 54 factors. For example, it may no longer be appropriate to consider broad ‘character and behaviour’ considerations when such behaviours have no bearing on the current circumstances of victimisation.
- 8.128 Alternatively, character and behaviour considerations could be limited to those behaviours relevant to the current circumstances of victimisation, as in most other Australian jurisdictions.<sup>128</sup>
- 8.129 A further option could be to limit behaviour considerations only to whether the applicant was committing an offence at the time or colluding with an alleged perpetrator, like the provisions in Queensland and Northern Territory.<sup>129</sup> Under this approach, broader ‘contributory’ conduct or ‘provocation’ would not be a relevant consideration.
- 8.130 Another option could be for some, or all, of the section 54 considerations to be excluded for some categories of victim. In addition, some categories of crime could be specified as factors VOCAT must have regard to in exercising its discretion under section 54 so as to take into account the particular dynamics and characteristics of certain types of crime.

### Question

- 35 Are there some section 54 factors, such as whether the applicant provoked the act of violence or the applicant’s past criminal record, which should no longer be relevant for the consideration of award applications?

### Removing the perpetrator benefit provision

- 8.131 So as not to unfairly disadvantage victims of crime who may still be in a relationship with, or in contact with, an alleged perpetrator, consideration could be given to removing the perpetrator benefit provision for some categories of victim.

### Question

- 36 How do the perpetrator benefit provisions under section 54 of the Act currently affect some categories of victim? Are these provisions operating fairly and appropriately? If not, what changes should be made to the Act to address this?

128 See, eg, *Criminal Injuries Compensation Act 2003* (WA) s 41; *Victims of Crime (Financial Assistance) Act 2016* (ACT) ss 45, 46 and 47; *Victims of Crime Assistance Act 2009* (Qld) ss 79, 80.

129 See, eg, *Victims of Crime Assistance Act 2009* (Qld) s 80(1)(a); *Victims of Crime Assistance Act 2006* (NT) s 41(1)(b).



# Review, variation and refund of awards by VOCAT

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## 9. Review, variation and refund of awards by VOCAT

### Introduction

- 9.1 This chapter discusses the process for review of awards of financial assistance under the *Victims of Crime Assistance Act 1996* (Vic) (the Act).
- 9.2 This chapter also considers when the Victims of Crime Assistance Tribunal (VOCAT) may vary an award or determine that an award needs to be refunded.
- 9.3 This chapter relates to issues raised in the first, fourth and eight matters in the supplementary terms of reference which concern whether:
- the Act can be simplified to make it easier for applicants to understand all their potential entitlements and quickly and easily access the assistance offered by the scheme without necessarily requiring legal support
  - the time limits, categories of assistance and structure and timing of awards are appropriate and are adequate to account for harm, including harm caused by multiple acts such as family violence, or where there is a significant delay in reporting a crime
  - any processes, procedures or requirements under the Act cause unnecessary delay to the provision of assistance to victims of crime.
- 9.4 Questions posed in this chapter relate both to the extent to which the provisions in the Act related to review, variation and refund are clear and working as intended, as well as whether these provisions are still appropriate.

### Review of VOCAT decisions

- 9.5 Any person whose 'interests are affected' can apply to the Victorian Civil and Administrative Tribunal (VCAT) for review of a final VOCAT decision.<sup>1</sup> Reviews may relate to:
- VOCAT refusing to make an award of assistance
  - the amount of assistance awarded
  - VOCAT refusing to vary an award
  - the amount of assistance awarded when varying an award
  - a decision that a person is required to make a refund to VOCAT
  - the amount VOCAT determines must be refunded.<sup>2</sup>

- 9.6 An application for review must be made within 28 days after the final decision is made.<sup>3</sup>
- 9.7 A person may not apply under section 59(1) for review of a final decision if the final decision was made by a judicial registrar as a delegate of the Tribunal.<sup>4</sup> Instead, a review of a delegated Tribunal decision is to be conducted as a hearing ‘de novo’—that is, heard at a new hearing as though the first decision had not been made.<sup>5</sup>
- 9.8 In practice, those affected for the purposes of section 59 by VOCAT decisions are usually applicants, and so reviews usually relate to matters like VOCAT refusing to make an award, the amount of an award or VOCAT refusing to vary an award.<sup>6</sup>
- 9.9 There are relatively few reviews, with only 11 applications for review made to VCAT in the 2015–16 financial year. In six of these matters, the application for review was struck out, withdrawn or abandoned. In three of these cases, the original award was set aside and a new award made on review.<sup>7</sup>
- 9.10 *Practice Direction No 1 of 2017—Response to Applications for Review of Decisions* outlines the procedure to be followed by VOCAT upon receipt of a Notice of Review to VCAT.<sup>8</sup>
- 9.11 The Practice Direction notes that ‘where a decision of VOCAT is subject to review by VCAT, VOCAT, as primary decision-maker, will actively participate in the VCAT review of its decision’.<sup>9</sup>
- 9.12 When a Notice of Review is received, the registrar must record the date that the Notice of Review was received from VCAT on VOCAT’s case management system.
- 9.13 The registrar also notifies the VOCAT Principal Registrar and provides a copy of the Notice of Review to the VOCAT member who made the decision subject to review (referred to as the ‘primary decision-maker’), together with a request for:<sup>10</sup>
- written reasons for the decision under review, as required by section 49(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic)
  - a list of documents in VOCAT’s possession that the primary decision-maker considers relevant to the review of the decision (referred to as ‘relevant documents’)
  - the identification of any relevant documents containing sensitive material and which may require consideration by a VCAT member prior to being released to any person.
- 9.14 Different processes apply to the provision of ‘sensitive’ materials to the various parties—VCAT, VOCAT’s legal representative, the applicant or their legal representative and other third parties.<sup>11</sup>
- 9.15 During preliminary consultations the Commission was not told of any current issues with respect to the review provisions under the Act.

## Refund of VOCAT awards

- 9.16 The Act also enables VOCAT to require applicants to refund some or all of the financial assistance awarded to them if they later receive damages, compensation, assistance or other payments of any kind for injuries suffered as a result of a violent crime.<sup>12</sup> Any money not refunded as required may be recovered as a debt due to the state.<sup>13</sup>

3 Ibid s 59(2).

4 Ibid s 59(1A).

5 Ibid s 59A(2).

6 See, for example, *Ractliffe v Victims of Crime Assistance Tribunal* [2015] VCAT 205 (4 March 2015) relating to a review of VOCAT’s refusal to pay \$405 for an occupational therapy assessment.

7 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 61.

8 Victims of Crime Assistance Tribunal, Melbourne Magistrates’ Court, *Practice Direction No 1 of 2017—Response to Applications for Review of Decisions*, 1 May 2017, 1.

9 Ibid 2.

10 Ibid 3.

11 Ibid 4.

12 *Victims of Crime Assistance Act 1996* (Vic) s 62.

13 Ibid s 62(4).

- 9.17 Limited data is available on how often refunds are required, as VOCAT's annual report does not state how often refunds are required and whether, in practice, the refund provisions are used, including the enforcement of debts.
- 9.18 As with the review provisions, the Commission was not informed of any current issues with respect to the review provisions under the Act during preliminary consultations.

## Variation of an award

- 9.19 Under the Act, only the person to whom, or for whose benefit, an award of assistance has been made can apply for a variation of their award.<sup>14</sup> However, under section 60(1) of the Act, VOCAT has very broad discretion and can vary awards 'in any manner that the Tribunal thinks fit'.<sup>15</sup> VOCAT may vary the terms of an award or increase or decrease the amount of an award.<sup>16</sup>
- 9.20 In considering an application for variation, VOCAT must have regard to:
- any fresh evidence
  - any change of circumstances
  - any other payments received by the applicant
  - any other relevant factors.<sup>17</sup>
- 9.21 VOCAT must not vary an award if the application for variation is made more than six years after the original award, unless the applicant was then under 18 years of age.<sup>18</sup>
- 9.22 Although there is broad provision for variation, variations must still be consistent with the Act. For example, an award for 'other expenses actually and reasonably incurred' under section 83 must still assist a victim's recovery from the act of violence.<sup>19</sup>
- 9.23 In 2015–16, VOCAT varied 986 awards for expenses already incurred and 588 for expenses not yet incurred.<sup>20</sup>
- 9.24 Case law confirms that the variation powers under section 60(1) are wide.<sup>21</sup> Variations can be made in situations 'where new evidence is forthcoming that enables an award to be made either where no award was made at all or at a higher rate than could have been made on the material previously available'.<sup>22</sup>
- 9.25 The application of the variation provision in section 60(1) can be seen in *Davis v Victims of Crime Assistance Tribunal*,<sup>23</sup> where VCAT noted the 'numerous' awards of assistance made to the victim by way of variation for counselling, medical costs and education expenses.<sup>24</sup>
- 9.26 While the variation provisions under section 60(1) are broad, section 60(2) limits the window in which these variations can occur. This is evident in *Bonner v Victims of Crime Assistance Tribunal*.<sup>25</sup>
- 9.27 In that case, the applicant was awarded compensation in February 2008. In March 2014, the applicant sought to have the award increased to cover dental treatment she claimed was required as a direct result of her injury. VOCAT denied the application under section 60(2) of the Act because the application for variation was made more than six years after the making of the award of assistance. Despite the applicant being only one month

14 Ibid s 60(1).

15 Ibid. However, the Tribunal is still bound by the provisions of the Act relating to the payment of and amounts of assistance: s 60(4).

16 Ibid s 60(1).

17 Ibid s 60(3).

18 Ibid s 60(2).

19 See, eg, *Davis v Victims of Crime Assistance Tribunal* [2008] VCAT 2535 (10 December 2008) [24].

20 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 60.

21 See, eg, *GDE v Victims of Crime Assistance Tribunal* [2009] VCAT 914 (27 May 2009).

22 Ibid [10].

23 [2008] VCAT 2535 (10 December 2008).

24 Ibid [16].

25 [2014] VCAT 1438 (19 November 2014).

beyond the six-year variation window, a strict application of the provision was required due to the lack of discretion in section 60(2).

- 9.28 On appeal to VCAT, the applicant submitted that VCAT had jurisdiction to extend the six-year variation time limit under the *Victorian Civil and Administrative Tribunal Act 1998* (Vic). However, VCAT found it did not have jurisdiction, as well as reaffirming that the Act does not give VOCAT any power to extend the six-year time limit.<sup>26</sup>
- 9.29 In the first consultation paper, a case study relating to a victim of family violence demonstrated the way in which the variation process can be used in a positive way to meet the changing needs of a victim.<sup>27</sup> In the first instance, the victim was awarded 24 sessions of counselling, \$1300 in special financial assistance, \$5500 for a vehicle to assist with her recovery and \$1000 for a computer to assist her in achieving her study goals. Six months later, a variation of the award enabled the victim and her children to go on a family holiday to assist with recovery.<sup>28</sup>
- 9.30 The case study illustrates the flexibility of VOCAT in providing additional awards as situations change or new needs emerge. Variation of awards acknowledges that a victim's journey is not always predictable, and needs may change over time.
- 9.31 However, the process of applying for a variation is not always smooth. In preliminary consultations the Commission was told that each variation might require the hiring of a solicitor and the collection of reports and evidence from counsellors or psychologists. Many variations relate to additional counselling, where the variation is required for therapeutic purposes rather than for 'other expenses' such as holidays or study assistance. These types of issues are not confined to victims of family violence.
- 9.32 The Commission was told that it would be more useful and beneficial if practitioners could provide more counselling sessions at their discretion, rather than victims having to re-engage lawyers to seek financial assistance to pay for it.

## Discussion and options for reform

- 9.33 This section discusses the operation of the variation provisions in section 60 of the Act. It also sets out options for reform to address concerns that the variation provisions may be adversely affecting victims of crime.
- 9.34 The Commission seeks the views of victims, persons affected, professionals, stakeholders and the community on whether the variation provisions should be amended. Possible options for reform and questions are set out below.
- 9.35 The Commission also seeks views on the current operation of review and refund provisions, although no options are proposed in relation to these matters.

### How are the variation provisions affecting victims of crime?

- 9.36 The main issues with respect to variations are:
- The variation process—most variations require the applicant to file additional paperwork via lawyers and other professionals, increasing delays and limiting flexibility and continuity in provision of services such as counselling.
  - The variation window—VOCAT must not vary an award if the application for variation is made more than six years after the original award was made, unless the applicant was then under 18.<sup>29</sup>

26 Ibid [15].

27 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 129–130 [12.16]–[12.17].

28 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 18.

29 *Victims of Crime Assistance Act 1996* (Vic) s 60(2).

- 9.37 Research by the Victims Support Agency in 2011 found that some victims considered the process of seeking variation of an award to obtain further counselling frustrating because it involves many visits to lawyers. One victim stated: ‘you want it to be over and that dragged it on substantially longer ... which is why I think a lot of people wouldn’t go through with it.’<sup>30</sup> During preliminary consultations the Commission was informed that the process was overly legalistic and burdensome, that solicitors should not need to be involved and that an administrative process would be simpler.
- 9.38 In the final report of the Victorian Inquiry into the Handling of Child Abuse by Religious and other Non-Government Organisations, *Betrayal of Trust*, the limitations of VOCAT to provide ongoing financial support to victims of child sexual abuse was also noted. As outlined above, VOCAT must not vary an award if the application for variation is made more than six years after the original award was made, unless the applicant was then under 18 years of age.<sup>31</sup>
- 9.39 The *Betrayal of Trust* report noted other compensation schemes that, while not designed to cater indefinitely to ongoing costs, cover costs to assist victims to recover from their injury over a longer period of time. One victim stated these schemes provided a more appropriate ‘safety net’ for victims.<sup>32</sup>
- 9.40 The strict application of section 60(2) is evident in *Bonner v Victims of Crime Assistance Tribunal*<sup>33</sup> where the applicant was only one month beyond the six-year variation window but VOCAT was required to deny her variation application because of the lack of discretion in the Act.

### Amending the variation ‘window’

- 9.41 To address concerns with respect to the variation window, one option is to increase the variation time limit.
- 9.42 However, there is little precedent for increasing the time frame beyond Victoria’s six years, given the time limits do not extend beyond seven years in other Australian jurisdictions.<sup>34</sup> The time frames in other jurisdictions vary between three and seven years.<sup>35</sup>
- 9.43 Alternatively, the variation time limit could be amended for some types of crime or injury. This could be in recognition of the ongoing needs associated with certain crime types, as outlined in the *Betrayal of Trust* report in relation to historical child sexual assault.
- 9.44 A further option is to amend the variation window but only for certain types of assistance, for example, counselling or medical costs associated with an injury. This would meet some longer-term costs, but only related to expenses incurred.

## Question

- 37 Should the six-year time period for variation of an award be extended to account for victims of crime with long-term needs? If yes, how long should the time limit be extended and should this be for specific crimes or specific types of award only?

30 Victims Support Agency, Department of Justice and Regulation (Vic), *Counselling for Victims of Crime* (2011) 33.

31 *Victims of Crime Assistance Act 1996* (Vic) s 60(2).

32 Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (2013) vol 2, 558.

33 [2014] VCAT 1438 (19 November 2014).

34 See, eg, *Victims Rights and Support Act 2013* (NSW) s 40(6); *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 49 (2); *Victims of Crime Assistance Act 2009* (Qld) s 101(3); *Victims of Crime Assistance Act 2006* (NT) s 46(1).

35 See the comparative table of Australian jurisdictions at Appendix B.

### Reducing the administrative burden and delay in seeking variations

- 9.45 An option to address concerns about the procedural and administrative burden of the variation process would be to make variations simpler for certain types of assistance, such as counselling or medical expenses incurred.
- 9.46 The variation process for these types of expenses could better align with an administrative process and have time limits for decision making to enable continuity of service delivery for victims who, for example, are awaiting a decision so that they can continue counselling.
- 9.47 This could be supported by other possible reform options discussed in Chapter 10, such as implementing an administrative triage or case management function in the VOCAT registry to assess and prioritise VOCAT applications.
- 9.48 This would probably require additional funding and a specialist coordination team with appropriate expertise in assessing victim needs. An alternative approach might involve co-locating staff from the Victims Assistance Programs (VAPs) as support coordinators within VOCAT. VAP workers would have the expertise to prioritise variation applications which require swift decisions to support victim recovery.

### Questions

- 38 How does the variation process impact on victims of crime?
- 39 Is there a need to make the variation process more accessible and timely for victims? If so, what changes should be made to the Act and/or VOCAT processes?

### How are the review and refund provisions affecting victims of crime?

- 9.49 In addition to questions relating to variation, the Commission seeks the views of victims, persons affected, professionals, stakeholders and the community on the following questions in relation to review and refund of awards.

### Questions

- 40 In what circumstances are VOCAT awards refunded? Is it appropriate for the Act to require the refund of awards in certain circumstances and if so, in what circumstances?
- 41 When might victims seek review of a VOCAT award? Are there any barriers to seeking a review of an award? If so, how should these barriers be addressed?



# Timeliness of awards made by VOCAT

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## 10. Timeliness of awards made by VOCAT

### Introduction

- 10.1 This chapter considers the Victims of Crime Assistance Tribunal (VOCAT) application and evidentiary requirements, the process for decision making and time frame for decision making. These requirements and processes all impact on the timeliness of an award.
- 10.2 This chapter relates to issues raised in the first, third and eighth matters in the supplementary terms of reference which concern whether:
- the *Victims of Crime Assistance Act 1996* (Vic) (the Act) can be simplified to make it easier for applicants to understand all their potential entitlements and quickly and easily access the assistance offered by the scheme without necessarily requiring legal support
  - the tests for eligibility for assistance and the evidence required to meet those tests can be simplified to avoid unnecessary or disproportionate costs being incurred
  - any processes, procedures or requirements under the Act cause unnecessary delay to the provision of assistance to victims of crime, having regard to other models that would more effectively deliver assistance, for example an administrative or quasi administrative model.
- 10.3 Questions posed in this chapter relate to whether the current processes and procedures are clear, simple and working as intended, and to whether the processes and procedures remain appropriate.

### VOCAT application requirements

- 10.4 VOCAT applications commence by way of a written application in the prescribed form,<sup>1</sup> accompanied by documentary evidence.<sup>2</sup> (See Appendix C).
- 10.5 If the applicant has not reported the act of violence to the police, the form must be accompanied by a statutory declaration by the applicant setting out the circumstances of the act of violence and the reasons the matter was not reported.<sup>3</sup>

### The VOCAT application form

- 10.6 The form has 12 parts:
- 1) details of the applicant
  - 2) section to be completed if the claim is being made on behalf of a child or a person with disability
  - 3) the circumstances of the act of violence, including the perpetrator's name if known

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1 *Victims of Crime Assistance Act 1996* (Vic) s 26(1)(a); *Victims of Crime Assistance Rules 2010* (Vic) r 6.

2 *Victims of Crime Assistance Act 1996* (Vic) s 26(1)(b).

3 *Ibid* s 26(2); Victims of Crime Assistance Tribunal, *Application for Assistance Form* (2016) 2 and 7, see Appendix C.

- 4) details of any reporting to police, including station, police officer, rank and date, and whether criminal proceedings have commenced against the perpetrator
  - 5) the effects resulting from the act of violence, including any physical and psychological effects, as well as whether the applicant has experienced grief, stress or trauma. The form also asks whether the applicant attended hospital.
  - 6) whether the applicant would prefer to have the matter resolved 'on the papers' or if they would like a hearing before VOCAT. If the applicant wishes to have a hearing, they can ask for the proceedings to be conducted in closed court.
  - 7) whether the applicant has applied for assistance under any other schemes, including the Victims Assistance Program, Workcover, the Transport Accident Commission, as well as any benefits the applicant has received or is entitled to receive under a superannuation or insurance scheme
  - 8) the type of assistance that the applicant wishes to claim from VOCAT, including expenses incurred, expenses to assist in recovery and special financial assistance. The applicant must indicate whether they are applying as a primary, secondary or related victim, or whether they are claiming funeral expenses only.
  - 9) if a death was caused by the act of violence, the applicant must also give details of the deceased
  - 10) if the applicant is a related victim, they must list every person who they believe may be or may claim to be a related victim, and they can also apply for assistance with funeral expenses
  - 11) the applicant's authorisation for VOCAT to obtain any other evidence necessary
  - 12) an acknowledgment by the applicant that all information provided is true and correct.
- 10.7 An application for assistance and the supporting documentation can be lodged in hard copy or online via the VOCAT website.<sup>4</sup>
- 10.8 Hard-copy applications for assistance must be lodged with or posted to the VOCAT venue closest to the applicant's place of residence.<sup>5</sup> However, if there are multiple applicants in respect of one act of violence, it must be the venue closest to where the act of violence was committed.<sup>6</sup> If the Chief Magistrate nominates a venue, then the application should be lodged at that venue.<sup>7</sup>
- 10.9 A hard-copy application must lodged with the Registrar at the Melbourne Magistrate's Court if the applicant resides outside Victoria, is a related victim, or is a primary or secondary victim who is aware of the existence of a related victim.<sup>8</sup>
- 10.10 If an applicant applies online, their application will automatically be lodged with the correct venue.<sup>9</sup>
- 10.11 The VOCAT website provides information for applicants about:
- how to lodge an application
  - the different victim categories under which they can apply
  - the details required in relation to the act(s) of violence
  - the police reporting and the injury suffered
  - the required supporting documentation
  - how the VOCAT process works.<sup>10</sup>

4 Victims of Crime Assistance Tribunal, *Lodging an Application* (2016) <[www.vocat.vic.gov.au/how-apply/lodging-application](http://www.vocat.vic.gov.au/how-apply/lodging-application)>. For the online application form, see Victims of Crime Assistance Tribunal, *Application for Assistance* (2016), <<http://vocat.iapply.com.au>>.

5 *Victims of Crime Assistance Rules 2010* (Vic) r 7(1)(b)(i).

6 *Ibid* r 7(1)(b)(ii).

7 *Ibid* r 7(1)(a).

8 *Ibid* r 7(2).

9 Victims of Crime Assistance Tribunal, *Where to Apply* (2016) <[www.vocat.vic.gov.au/how-apply/where-apply](http://www.vocat.vic.gov.au/how-apply/where-apply)>.

10 Victims of Crime Assistance Tribunal, *Lodging an Application* (2016) <[www.vocat.vic.gov.au/how-apply/lodging-application](http://www.vocat.vic.gov.au/how-apply/lodging-application)>.

- 10.12 The online application page also gives details of services that can help an applicant to complete the form, including the contact number for the Victims of Crime Helpline.<sup>11</sup>
- 10.13 There is no fee for filing an application for assistance, whether it is done online or in hard copy.<sup>12</sup> In addition, a lawyer cannot charge an applicant costs in respect of an application, unless those costs are approved by VOCAT.<sup>13</sup>

### Supporting documentation and evidentiary requirements

- 10.14 Once an application is received, VOCAT writes to the applicant or their lawyer acknowledging receipt of the application and seeking further evidence, including:
- a report from the applicant’s treating doctor if physical injury is claimed
  - receipts or invoices for the expenses claimed
  - a copy of the applicant’s police statement
  - copies of any intervention orders
  - a report from the counsellor if the applicant is seeking counselling
  - information about Medicare rebates.<sup>14</sup>
- 10.15 Table 4 outlines the supporting documentation VOCAT considers should be filed in relation to each type of expense claimed, in addition to the completed statement of claim form.<sup>15</sup>
- 10.16 The effect of this requirement is that where victims wish to apply for different types of assistance they need to file a number of different supporting documents as listed in the second column of Table 4.

**Table 4: Documentation to be filed with VOCAT in support of application**

Assistance claimed	Documents to be filed in support of claim
<b>Special financial assistance</b>	Application should include evidence that the applicant has experienced or is suffering a significant adverse effect (eg medical/psychological report) (evidence may be given at a hearing).
<b>Counselling expenses</b>	Application should include: <ul style="list-style-type: none"> <li>• a completed Application for Counselling form</li> <li>• a relevant Counsellor’s Report and a Counselling and Report Fee Invoice.</li> </ul>
<b>Medical expenses</b>	Application should include a report from a medical practitioner/dentist linking the treatment provided/proposed to the injury sustained by the applicant (the report should detail the proposed treatment plan), receipts, invoices or quotes substantiating the expense claimed (may also include ambulance expenses).
<b>Safety-related expenses (primary victims only)</b>	Application should include receipts, invoices or quotes substantiating the safety-related expense(s) claimed (eg an invoice from home security company, locksmith etc)
<b>Other expenses to assist recovery</b>	Application should include receipts, invoices or quotes substantiating the other expenses claimed (eg an invoice from the home security company, locksmith etc, or a quote if the expense has not yet been incurred).

11 *Victims of Crime Assistance Tribunal, Application for Assistance, Before You Apply* (2016) <<http://vocat.iapply.com.au/#/form/537c03cfdcf1490668c3b672>>.

12 *Victims of Crime Assistance Tribunal, Lodging an Application* (2016) <[www.vocat.vic.gov.au/how-apply/lodging-application](http://www.vocat.vic.gov.au/how-apply/lodging-application)>.

13 *Victims of Crime Assistance Act 1996* (Vic) s 48(5).

14 *Victims of Crime Assistance Tribunal, Application for Assistance Form* (2016) 15, see Appendix C.

15 *Victims of Crime Assistance Tribunal, Supporting Documentation* (2016) <[www.vocat.vic.gov.au/determining-application/supporting-documentation](http://www.vocat.vic.gov.au/determining-application/supporting-documentation)>.

<b>Clothing worn at time of act of violence</b>	<p>Application should include:</p> <ul style="list-style-type: none"> <li>• invoices, receipts or quotes for the cost of replacing the clothing</li> <li>• a statutory declaration detailing the cost of the clothing lost or damaged (value of replacement clothing must be equivalent to the value of damaged clothes).</li> </ul>
<b>Loss of earnings</b>	<p>Application should include:</p> <ul style="list-style-type: none"> <li>• a completed Loss of Earnings Claim form</li> <li>• advice in writing detailing number of days/weeks absent from work, reason for period of absence, and gross loss of earnings (including how gross loss was calculated)</li> <li>• medical report/certificate linking the applicant's total or partial incapacity to work to their injury</li> <li>• documentation verifying WorkCover payments, Transport Accident Commission payments, Social Security payments, any other payments (if any) received by the applicant for their injury</li> <li>• if applicant is self-employed, tax returns for the three financial years before the act of violence occurred and the financial years for the loss of earnings claim period.</li> </ul>
<b>Funeral expenses</b>	<p>Application should include a receipt, invoice or quote from the funeral service substantiating the expense claimed.</p>
<b>Distress</b>	<p>Application should include:</p> <ul style="list-style-type: none"> <li>• evidence of the applicant's relationship to the deceased primary victim</li> <li>• evidence that the applicant has suffered grief, distress or trauma as a direct result of the deceased primary victim's death (evidence may be given at a hearing).</li> </ul>
<b>Dependency claims</b>	<p>Application should include (related victims only):</p> <ul style="list-style-type: none"> <li>• a completed Dependency Claim form</li> <li>• details of gross pre-death earnings of the deceased (including how earnings were calculated)</li> <li>• documentation verifying WorkCover payments, Transport Accident Commission payments, Social Security payments, any other payments (if any) received by the applicant/deceased's estate</li> <li>• tax returns of the applicant/deceased for the three financial years before the death of the primary victim and the financial years for the dependency claim period</li> <li>• details of the assets and liabilities of the applicant and the estate of the deceased</li> <li>• details of the financial contributions made by the deceased primary victim to the applicant for the three financial years immediately before the death of the primary victim</li> <li>• verification of the relationship between the applicant and the deceased (eg spouse, child).</li> </ul>
<b>Solicitor's costs</b>	<p>Applicant must complete the 'Amounts Payable to Solicitor' section of Statement of Claim form.</p>
<b>Solicitor's disbursements</b>	<p>Application should include receipts and invoices for solicitors disbursements claimed.</p>

- 10.17 Claims for medical expenses, counselling costs and loss of earnings must generally be supported by medical and/or psychological reports. While the Act does not explicitly require applicants to lodge a medical report, it does require an application to be accompanied by documentary evidence as indicated in the form.<sup>16</sup>
- 10.18 VOCAT's *Guide to Completing the Application for Assistance Form* states that a medical or psychological report should be filed with VOCAT if the effects of the act of violence are of a physical or psychological nature.<sup>17</sup> VOCAT also states on its website that past medical expenses need to be substantiated by medical bills and invoices, while future medical costs require reports from a doctor, dentist, surgeon or other provider.<sup>18</sup>
- 10.19 In order to make an application for counselling expenses, applicants must complete an application for counselling form,<sup>19</sup> which they submit with an application for assistance form. This form must be accompanied by a counsellor's report.<sup>20</sup>
- 10.20 VOCAT requests that all such supporting documentation be provided within four months. The applicant must notify VOCAT in writing within this time that the application is ready to proceed or the application may be struck out.<sup>21</sup>
- 10.21 The Whittlesea Community Legal Service has previously stated that four months may not be long enough for applicants to compile and lodge all supporting evidence.<sup>22</sup> In the case of medical and counselling expenses, this is often because 'it may be difficult for an applicant to get appointments with medical practitioners or psychologists/psychiatrists who can provide appropriate supporting documentation to the Tribunal'.<sup>23</sup>
- 10.22 If the applicant needs more than four months, she or he must make a written request to VOCAT outlining what material is still outstanding and how much time they require to obtain it. VOCAT can then extend the period within which all material must be filed.<sup>24</sup>
- 10.23 During preliminary consultations the Commission was informed that VOCAT frequently requests further documentation, particularly where the alleged perpetrator has not been charged or convicted, or there is little corroborating evidence. The Commission was also told that VOCAT often seeks information from Victoria Police to help determine whether a crime occurred, as well as the criminal history of the alleged offender and the victim. It also seeks information about a victim's injuries via medical records or from Victoria Police.<sup>25</sup>
- 10.24 The *Justice Legislation Further Amendment Act 2016* (Vic) amended the Act, removing the requirement for an applicant to verify their application form by way of statutory declaration. It is sufficient now for an application form to be verified by way of acknowledgment. This change makes it easier for applicants and legal practitioners to file an application electronically.

16 *Victims of Crime Assistance Act 1996* (Vic) s 26(1)(b).

17 Victims of Crime Assistance Tribunal, *Guide to Completing the Application for Assistance Form* (2016) s 5. See Appendix C.

18 Victims of Crime Assistance Tribunal, *Medical Expenses* (2016) <[www.vocat.vic.gov.au/assistance-available/financial-assistance-available/medical-expenses](http://www.vocat.vic.gov.au/assistance-available/financial-assistance-available/medical-expenses)>.

19 The Application for Counselling Form is contained in Form 4. This is available at <<https://www.vocat.vic.gov.au/application-counselling-form-4-pd-1-2014>>.

20 Victims of Crime Assistance Tribunal, *Counselling Applications* (2016) <[www.vocat.vic.gov.au/assistance-available/financial-assistance-available/counselling-expenses/counselling-applications](http://www.vocat.vic.gov.au/assistance-available/financial-assistance-available/counselling-expenses/counselling-applications)>. For further guidance on the preparation of counselling reports to support an application under the Act, see Victims of Crime Assistance Tribunal, Melbourne Magistrates' Court, *Practice Direction No 1 of 2014—Awards for Counselling Expenses*, 1 July 2014.

21 Victims of Crime Assistance Tribunal, *Supporting Documentation* (2016) <<https://www.vocat.vic.gov.au/determining-application/supporting-documentation>>.

22 Whittlesea Community Legal Service, *Victims of Crime Assistance Tribunal Capacity Building Project*, Discussion Paper (Whittlesea Community Connections, 2011) 76.

23 *Ibid.*

24 *Ibid.*

25 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 24.

## The decision-making process

- 10.25 In addition to the documentation and evidentiary requirements, VOCAT also has broad investigative powers under the Act to:
- authorise a person to make any enquiry or carry out any investigation on behalf of VOCAT that is needed to furnish it with the further information it requires
  - order the preparation and submission to VOCAT of a medical report or counselling report
  - order an applicant to lodge, within a specified period, an additional statement containing particulars of matters specified in the order or any documents specified in the order.<sup>26</sup>
- 10.26 After receiving documentation from the applicant and other relevant parties, a directions hearing may be required to provide VOCAT with guidance about matters relevant to the application. It is more common to request an applicant's lawyer to attend a directions hearing than the applicant.<sup>27</sup>
- 10.27 VOCAT may determine an application without conducting a directions hearing or a final hearing. This depends on the preference of the applicant as well as VOCAT's need for a hearing.<sup>28</sup> This is discussed further below in Chapter 11.
- 10.28 Once VOCAT has all the information it requires to make a decision, it advises the applicant whether a hearing will be held. As discussed below in Chapter 11, matters that proceed to a hearing are usually those where a victim has asked for the application to be determined by a hearing, or where VOCAT considers that the matters are complex and require the giving of evidence and oral submissions by lawyers. Around 25 per cent of VOCAT matters are determined at hearings.<sup>29</sup>
- 10.29 In practice, many straightforward applications are decided without a hearing.<sup>30</sup> However, as stated above, are usually determined at a hearing.

## The time frame for decision making

- 10.30 VOCAT must act 'expeditiously' (that is, promptly) to determine applications. Under the Act, VOCAT has a duty to act fairly, according to the substantial merits of the case and as promptly as the requirements of the Act and a proper determination of the matter permit.<sup>31</sup>
- 10.31 However, VOCAT must also have regard to matters that can sometimes affect the time it takes to finalise an application, including:
- awaiting the outcome of a criminal investigation, trial or inquest
  - the need for further enquiries to be made by VOCAT
  - the need to notify the alleged offender about the application and give him or her reasonable time to respond
  - waiting for an injury to stabilise so that an accurate prognosis can be provided to VOCAT
  - requiring additional time to identify and communicate with all related victims of a deceased primary victim to advise them of their right to apply for financial assistance.<sup>32</sup>

26

*Victims of Crime Assistance Act 1996* (Vic) s 39(1).

27

Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 24. Directions Hearings are discussed further in Chapter 11.

28

*Victims of Crime Assistance Act 1996* (Vic) s 33.

29

Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 36.

30

Ibid 24.

31

*Victims of Crime Assistance Act 1996* (Vic) s 32(1).

32

Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 24.

- 10.32 The Act specifically enables VOCAT to make awards even where there might be related civil or *Sentencing Act 1991* (Vic) matters that have not yet been finalised. Under section 32(3) of the Act, VOCAT is not prevented from hearing and determining an application only because there is a civil proceeding, or a proceeding pending under subdivision (1) of division 2 of part 4 of the *Sentencing Act*.<sup>33</sup>
- 10.33 This means that VOCAT can still decide an application, even if there is a pending civil trial, or if a court is going to decide a matter concerning compensation or restitution under the *Sentencing Act*.
- 10.34 However, under section 41 of the Act, VOCAT can adjourn consideration of an application if there is a criminal trial or a civil trial that is related to that act of violence that is likely to be decided within six months.<sup>34</sup>
- 10.35 The effect of sections 32 and 41 of the Act is that in practice, a VOCAT application will generally be adjourned until related matters in the civil and criminal courts have been decided.
- 10.36 During preliminary consultations the Commission was told that where there are criminal proceedings pending, it is almost always the practice of VOCAT to order an adjournment.<sup>35</sup> In fact, applicants are advised when making an application that VOCAT may wait until criminal charges are finalised before determining their matter.<sup>36</sup>
- 10.37 Where a hearing is requested or required, it usually occurs within six weeks of a VOCAT member deciding to conduct it or, if requested by the applicant, within six to 10 weeks of the applicant filing all supporting material.<sup>37</sup>

## Interim awards

- 10.38 As noted in Chapter 6, section 56 of the Act empowers VOCAT to make an interim award of assistance pending the final determination of an application.
- 10.39 Applicants who need urgent assistance, such as financial assistance for safety-related expenses, can seek an interim award.<sup>38</sup> This award can often be paid before VOCAT makes a final determination.
- 10.40 Interim awards form part of the total financial assistance available for expenses incurred, or likely to be incurred, up to the statutory limit of \$60,000, and must be deducted from the total amount of any assistance awarded.<sup>39</sup>

## Discussion and options for reform

- 10.41 This section discusses the effects of the application requirements, the decision-making process and the time frame for decision making. It sets out options for reform to address concerns that these requirements and processes are not meeting victims' needs and are affecting the timeliness of awards.
- 10.42 The Commission seeks the views of victims, persons affected, professionals, stakeholders and the community on whether the application requirements and decision-making process should be reformed. Possible options for reform and questions are set out below.

33 *Victims of Crime Assistance Act 1996* (Vic) s 32(3).

34 *Ibid* s 41(2).

35 See also Whittlesea Community Legal Service, *Victims of Crime Assistance Tribunal Capacity Building Project*, Discussion Paper (Whittlesea Community Connections, 2011) 73.

36 *Victims of Crime Assistance Tribunal, Guide to Completing the Application for Assistance Form* (2016) 15, see Appendix C.

37 *Victims of Crime Assistance Tribunal, Annual Report 2015–16* (2016) 24.

38 *Victims of Crime Assistance Act 1996* (Vic) s 56(1).

39 *Ibid* s 56(4).

## Are victims receiving timely assistance?

- 10.43 In June 2017, the Victorian Community Safety Trustee released an interim report on the implementation of the Victorian Government’s Community Safety Statement. In that report, delays in relation to VOCAT applications were noted:
- Currently, on average, it takes around nine months to finalise an application and some matters span more than two years. If the approach is ‘victims first’, then the current process warrants review in the interests of quick resolution for victims.<sup>40</sup>
- 10.44 Victims Support Agency research in 2011 found at least two cases of sexual assault victims waiting for around 12 months for a VOCAT award for further counselling. It is unclear whether these victims had attempted to obtain interim awards or knew they were available.<sup>41</sup>
- 10.45 New South Wales research into the effective provision of financial assistance has found that the vast majority of victims who require financial assistance for practical purposes need it within three months of the crime.<sup>42</sup> However, the majority of VOCAT applications are finalised within 12 months.<sup>43</sup>
- 10.46 VOCAT has implemented initiatives to improve timeliness, including an online application form and an electronic case management system.<sup>44</sup> The use of judicial registrars is designed to save time by reserving the use of magistrates for more complex matters. According to VOCAT’s *Annual Report 2015–16*, close to 50 per cent of all VOCAT applications are finalised within nine months.<sup>45</sup>
- 10.47 Despite these initiatives, VOCAT has observed an increase in the complexity of applications, particularly relating to family violence.<sup>46</sup> In the 2015–16 reporting period, there was a 12 per cent increase from the previous financial year in the number of matters proceeding to hearing rather than being determined ‘on the papers’.<sup>47</sup>
- 10.48 This supports VOCAT’s observation of an increase in complexity of the applications brought before it, as hearings are more likely to be required when matters are complex. A consequence of this is that the number of pending applications has also increased because of ‘challenges in keeping pace with the increased number of applications’.<sup>48</sup>
- 10.49 Interim data analysis conducted by the Commission and discussed further in Chapter 12 indicates that there may also be significant unmet demand for financial assistance under the Act by victims of crimes against the person, in addition to victims of family violence.<sup>49</sup> If more victims were to apply to VOCAT, it is highly likely that timeliness would be further affected. This is particularly true if new classes of victim are able to access the scheme, as discussed in Chapter 5 of this paper.
- 10.50 During preliminary consultations the Commission was told that increased complexity affects VOCAT’s timeliness because more information is required. The perpetrator may need to be notified and a directions hearing may be required. VOCAT may need more documentation, some of which may have to be sought through Freedom of Information requests or through other administrative or bureaucratic systems, such as hospital administration. VOCAT may also ultimately decide a hearing is necessary to determine the matter, which is more resource-intensive. Stakeholders told the Commission these

40 Community Safety Trustee (Vic), *Community Safety Trustee: First Progress Report—June 2017* (2017) 14.

41 Victims Support Agency, Department of Justice and Regulation (Vic), *Counselling for Victims of Crime* (2011) 33.

42 Betty Chan et al, ‘Support and Compensation: Lessons from Victims of Crime’ (Paper presented at the Actuaries Institute Injury Schemes Seminar, Gold Coast, 10–12 November 2013) 19.

43 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 36.

44 *Ibid* 9.

45 *Ibid* 36.

46 *Ibid* 37.

47 *Ibid*.

48 *Ibid* 9.

49 Based on the number of victim reports for crimes against the person between April 2016 and March 2017, approximately 65,000 individuals were potentially eligible for financial assistance from the Victims of Crime Assistance Tribunal. However, preliminary data analysis conducted by the Commission indicates only approximately 9 per cent of these victims may be applying for financial assistance through VOCAT. See Chapter 12 for further discussion.

circumstances are frequently encountered for victims of family violence, sexual assault and other matters that may be complex due to multiple acts of violence or where the violence is perpetrated over time.

- 10.51 Legal practitioners consulted for Whittlesea Community Legal Service's *Victims of Crime Assistance Tribunal Capacity Building Project* in 2011 said that obtaining relevant supporting documentation was one of the principal difficulties of running a VOCAT case. Difficulties in obtaining documentation from medical practitioners, psychologists, psychiatrists and counsellors were the primary reason for delays and cost increases in preparing VOCAT matters.<sup>50</sup>
- 10.52 The reliance on documentation from medical practitioners and psychologists also increases the scheme's vulnerability to a VOCAT 'industry' developing around the compensation process. In preliminary consultations the Commission was told that there was an increasing number of medical professionals and counselling services that specialise in VOCAT, sometimes to the detriment of victims who do not receive high quality services. During preliminary consultations, the Commission was also told that the reliance on lawyers can leave both victims and the VOCAT process potentially vulnerable to exploitative practices whereby lawyers could charge VOCAT for services not actually delivered.
- 10.53 For example, in some cases psychologists who specialise in victim compensation have been found to use practices that exploit crime victims and VOCAT. These include fraudulent claims for expenses for counselling services to VOCAT,<sup>51</sup> and exploitative or insensitive practices with victims.<sup>52</sup>
- 10.54 The Commission is not aware of whether interim awards are 'fast tracked', or are subject to the same payment process and time frame. However, the Commission notes concerns raised with the Victorian Royal Commission into Family Violence that even interim awards experience delays.<sup>53</sup> The Royal Commission into Family Violence was told that although family violence services operating in some magistrates' courts have adopted procedures to make interim awards for urgent expenses related to security, relocation or medical bills, the administrative processes still result in payments taking a number of weeks, limiting their usefulness.<sup>54</sup>
- 10.55 Preliminary consultations conducted by the Commission also indicated that the interim award process was not producing timely responses for many victims of family violence. Some stakeholders stated that where family violence circumstances are urgent, they no longer seek assistance through VOCAT, as such delays affect client safety and do not assist with time-sensitive matters such as security or relocation.
- 10.56 One of the objectives of the Act is to assist victims of crime to recover from the effects of violent crime. However, delays in accessing financial assistance can potentially re-traumatise victims and in some cases, further entrench economic disadvantage when victims are most vulnerable. The onerous documentation and evidentiary requirements are

50 Whittlesea Community Legal Service, *Victims of Crime Assistance Tribunal Capacity Building Project*, Discussion Paper (Whittlesea Community Connections, 2011) 40.

51 Psychologist Sezen Ildiri had her registration cancelled and was charged for fraudulently claiming expenses from the Victims of Crime Assistance Tribunal. For the decision to deregister Ms Ildiri, see *Psychology Board of Australia v Ildiri* [2011] VCAT 1036 (14 June 2011). See also Steve Butcher, 'Crime Psychologist Charged', *The Sydney Morning Herald* (online), 9 December 2008 <www.smh.com.au/national/crime-psychologist-charged-20081208-6u16.html>; Steve Butcher, 'Counsellor Used Crime Victims in Fraud', *The Sydney Morning Herald* (online), 28 May 2009 <www.smh.com.au/national/counsellor-used-crime-victims-in-fraud-20090527-bnnp.html>; Paul Tatnell, 'Psychologist Caught in Rip-off Scam', *The Herald Sun* (online), 18 June 2011 <www.heraldsun.com.au/ipad/psychologist-caught-in-rip-off-scam/news-story/2b60d4c1b3cb3467557263e6bb95206b?sv=9689e30a9b6f984bdf05e0ac152f785>.

52 For the Psychology Board of Australia's statement on the cancellation of psychologist Domenic Greco's registration in 2014, see Australian Health Practitioner Agency, 'Statement of the Psychology Board of Australia' (Media Release, 23 December 2014) <www.ahpra.gov.au/News/2014-12-23-media-release-psyba.aspx>. See also Grant McArthur, 'Trauma Psychologist Found to Have Misled Crime Victims, Tribunal Finds', *The Herald Sun* (online), 14 August 2014 <www.heraldsun.com.au/news/victoria/trauma-psychologist-found-to-have-misled-crime-victims-tribunal-finds/news-story/8075113e45ad3eb0b578c2ffc0d578fa>; Tom Minear, 'VCAT Bans Psychologist Domenic Greco for Two Years', *The Herald Sun* (online), 4 January 2015 <www.heraldsun.com.au/news/law-order/vcat-bans-psychologist-domenic-greco-for-two-years-for-exploiting-victims-of-crime/news-story/ef4d20fa652c3a2286e277d194851e1e>; Rania Spooner, 'Crime Victims' Advocate Misled Clients, Victorian Civil and Administrative Tribunal Finds', *The Age* (online), 14 August 2014 <www.theage.com.au/victoria/crime-victims-advocate-misled-clients-victorian-civil-and-administrative-tribunal-finds-20140814-10487o.html>.

53 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 4, 81.

54 Ibid.

also potential sources of re-traumatisation. For example, the review of New South Wales' compensation scheme in 2012 found that early provision of financial assistance can assist victims to begin their healing process earlier.<sup>55</sup> The reviewers were consistently told that assisting victims at the earliest point after the act of violence delivers the best outcomes.<sup>56</sup> The waiting time in New South Wales of just over two years from date of lodgement to determination was found to be making victims' distress worse.<sup>57</sup>

- 10.57 In the first consultation paper, options were considered to improve the timeliness of awards in relation to the specific needs of victims of family violence.<sup>58</sup> However, many of these are relevant to other classes of victim, as they concern ways to improve the operation of Victoria's financial assistance scheme more broadly.
- 10.58 Options to address concerns about timely assistance are set out below, along with specific questions for consideration.

### Application triaging and 'co-location'

- 10.59 As discussed in the first consultation paper, one option to improve the timeliness of assistance is to implement an administrative triage function in the VOCAT registry to assess and prioritise all VOCAT applications.<sup>59</sup>
- 10.60 This would require additional funding and a specialist coordination team, with appropriate expertise in assessing victim needs in the immediate, short and longer term. This is likely to require a more intensive case management approach, similar to the approach taken by the Koori VOCAT list, providing linkages and referrals to other specialist services, including the Victims Support Agency, Centres Against Sexual Assault (CASAs) and specialist family violence services.
- 10.61 Triageing all applications in this way might create more capacity to meet victims' immediate needs—either by way of VOCAT's interim award process or through appropriate referral to other support systems. However, such a triaging function would be more resource-intensive, as it involves case management and more specialised victim support.
- 10.62 An alternative approach might involve co-locating staff from the Victims Assistance Programs (VAP) as support coordinators within VOCAT. In addition to assisting with triaging functions, they could provide in-person support to victims of crime as well as facilitating case management and referral activities. Co-location of VAPs is currently used by Victoria Police across a number of police stations to enable earlier assistance for victims.

### Practice Direction to expedite decision making

- 10.63 Preliminary consultations indicated that VOCAT awards are almost always delayed pending finalisation of related criminal matters. Research by Whittlesea Community Legal Service in 2011 similarly found that VOCAT will delay the final hearing until the outcome of the criminal matter is known—citing this as one of the major causes of delay.<sup>60</sup>
- 10.64 To address this issue, one option is for VOCAT to develop a Practice Direction, consistent with sections 32 and 41 of the Act, which provides more guidance about expediting a VOCAT application when certain criteria are met.

55 Department of Attorney General and Justice (NSW), *Review of the Victims Compensation Fund* (PricewaterhouseCoopers Australia, 2012) 46.

56 Ibid 48.

57 Ibid 57.

58 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 122–4 [11.66]–[11.89].

59 Ibid 122 [11.66]–[11.67].

60 Whittlesea Community Legal Service, *Victims of Crime Assistance Tribunal Capacity Building Project*, Discussion Paper (Whittlesea Community Connections, 2011) 73.

## Question

- 42 Is there a need to amend section 32(3) and section 41 of the Act to clarify the need for speedy determinations? Alternatively, would an appropriate Practice Direction provide sufficient guidance?

### Specialist streams or specialist decision makers

- 10.65 Another option is to create separate VOCAT streams or lists, following a similar approach to the VOCAT Koori List.
- 10.66 Like the VOCAT Koori List, this option could adopt a case management approach appropriate to crime type, such as family violence or sexual assault, and triage urgent matters more effectively in a specialist environment. VOCAT's intention in establishing its Koori List was to ensure that the purposes and objectives of the Act could be achieved in relation to a specific cohort of VOCAT applicants. VOCAT relied on the procedural flexibility and the informality afforded to it to respond with maximum flexibility to the particular circumstances of a Koori applicant.<sup>61</sup> The Koori List does not involve applying any different legal considerations to the determination of applications for assistance. All applications are considered and determined within the legislative framework. However, its Koori List enables VOCAT to be more responsive to the circumstances of Koori victims of crime, who may otherwise have found it difficult to engage with the system.<sup>62</sup>
- 10.67 Similar specialisation for other classes of victim could bring benefits of increased collective knowledge and expertise in specific kinds of VOCAT matters. It would ensure VOCAT members dealing with the complexity of certain matters such as historical childhood sexual assault, family violence or sexual assault were familiar with the needs and experiences of victims. In the case of family violence, they would be familiar with the cycles and patterns of violence and the hurdles experienced by such victims in reporting to police. In the case of childhood sexual assault, the VOCAT member would be familiar with the long-term effects of such crimes, and the reasons a victim might not identify the abuse until later in life.
- 10.68 Specialised lists might also result in swifter final determinations and might limit delays, since VOCAT members would become familiar with the challenges posed by some categories of victim, such as applicants who submit outside the two-year time limit. The experience of the VOCAT Koori List was that specialisation increased cultural awareness and sensitivity to Koori issues.
- 10.69 The Department of Justice and Regulation previously envisaged VOCAT's capacity to adapt to the specific needs of certain victims of crime when it proposed VOCAT be extended to deliver a state-based redress scheme for victims of childhood sexual abuse in institutional settings.<sup>63</sup>
- 10.70 A complementary or alternative option is to appoint VOCAT-only magistrates, given the increased complexity in matters coming before VOCAT.<sup>64</sup> This would increase specialisation across all VOCAT matters but would not require the infrastructure of specialist lists or streams. The courts have previously highlighted the benefits of specially trained and assigned magistrates in the management of family violence matters.<sup>65</sup> In this

61 Victims of Crime Assistance Tribunal, *Koori VOCAT List Pilot, Review and Recommendations* (2010) 9.

62 Ibid 10.

63 Department of Justice and Regulation (Vic), *A Victorian Redress Scheme for Institutional Child Abuse*, Public Consultation Paper (5 August 2015) 34.

64 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 9.

65 Magistrates' Court of Victoria and Children's Court of Victoria, Submission No 978 to Royal Commission into Family Violence, *Royal Commission into Family Violence*, June 2015, 30.

context, Ian Freckelton has observed that victim compensation schemes are complex and should be recognised as specialised areas of practice.<sup>66</sup>

## Question

- 43 What benefits would be achieved for victims if initiatives such as triaging, co-location or specialist streams were introduced?

### An administrative model

- 10.71 As an alternative, consideration could be given to adopting an administrative model where commissioners or government assessors make determinations, such as in Queensland, the Northern Territory, Tasmania, Western Australia, New South Wales and the Australian Capital Territory.<sup>67</sup>
- 10.72 Part of the efficiencies generated by the administrative schemes, like that in New South Wales, arise from removing some of the administrative burden on victims of having to provide supporting documentation. The guide to victim support in New South Wales states: 'a support coordinator will assist with your claim. Victims Services will obtain police reports and court papers where available, and we can also obtain clinical notes, with your consent, from medical practitioners you have seen for your injuries.'<sup>68</sup>
- 10.73 However, in assessing any such alternatives, it is important to consider whether these schemes provide the same victim experience in terms of judicial validation and acknowledgment. These issues are discussed further in Part Three of this paper.

## Question

- 44 As an alternative approach, should an administrative model be adopted? If yes, what benefits would be achieved for victims through the adoption of an administrative model? How would this work in practice? What would be the disadvantages of an administrative model?

### Hearing VOCAT matters during other civil and criminal hearings

- 10.74 Magistrates in the Family Violence Court Division have the ability to determine VOCAT matters at the same time as dealing with other civil or criminal family violence matters.<sup>69</sup>
- 10.75 Another option could be to extend this power to all magistrates, regardless of whether it is a specialist court location. This would enable a magistrate hearing a family violence intervention order matter or a criminal matter where a victim has clearly been a victim of an act of violence to make an interim VOCAT award to support the recovery of the victim. As the Act already enables awards to be varied and refunded,<sup>70</sup> there is scope for further consideration should new information come to light or the victim's circumstances change.
- 10.76 However, such an approach would represent a shift away from the Court's use of specialisation as a way to expedite the making of awards and decrease complexity.

66 Ian Freckelton, 'Criminal Injuries Compensation for Domestic Sexual Assault: Obstructing the Oppressed' in Chris Sumner et al (eds), *Victimology* (Australian Institute of Criminology, 1996) 252.

67 See the comparative table of Australian jurisdictions at Appendix B.

68 Victims Services, Department of Attorney General and Justice (NSW), *The New Victims Support Scheme: A Detailed Guide* (2013) 11.

69 Magistrates' Court of Victoria, *Guide to Specialist Courts and Court Support Services* (2014) 28.

70 *Victims of Crime Assistance Act 1996* (Vic) pt 4.

## Question

- 45 What benefits would be achieved by enabling all magistrates to make interim VOCAT awards at the same time as hearing other matters? How would this work in practice? Would there be disadvantages?

### Evidentiary requirements for counselling and medical expenses

- 10.77 As well as contributing to delays and being an additional administrative burden for victims, there are significant costs associated with obtaining medical reports. The costs affect victims wishing to make an application for financial assistance, and VOCAT, which usually reimburses the costs of medical and psychological reports.
- 10.78 One option for reform is to broaden the types of documentary evidence that a victim can provide in support of a claim for expenses. This would enable victims to lodge reports from support services other than medical professionals or psychologists.
- 10.79 Following a recommendation from its review of victims of crime financial assistance legislation,<sup>71</sup> Queensland has removed the requirement for applicants to provide a medical certificate for an expense, loss of earnings or other component of assistance in relation to an injury.<sup>72</sup> The Queensland scheme now specifies that an application for assistance must 'be accompanied by documents supporting the application'.<sup>73</sup>
- 10.80 Additionally or alternatively, VOCAT could offer greater assistance to applicants with regard to obtaining medical or psychological reports.
- 10.81 VOCAT currently states on its website that it will only be able to access medical records on an applicant's behalf if she or he attended a public hospital.<sup>74</sup> The applicant must obtain reports from all other doctors, dentists, surgeons and other providers on their own.<sup>75</sup> In contrast, as mentioned above, the New South Wales scheme assists victims with administrative requirements.<sup>76</sup>
- 10.82 VOCAT could adopt a similar practice to New South Wales by providing assistance in obtaining reports.

## Questions

- 46 Should applicants be able to support their applications with documentary evidence other than medical and psychological reports? If so, what other documentation should applicants be able to provide?
- 47 Should more assistance be provided by VOCAT to help victims satisfy the evidentiary requirements?

71 Department of Justice and Attorney-General (Qld), *Final Report on the Review of the Victims of Crime Assistance Act 2009* (2015) 15 (Recommendation 3).

72 See *Victims of Crime Assistance and Other Legislation Amendment Act 2017* (Qld) s 42.

73 *Victims of Crime Assistance Act 2009* (Qld) s 52(b).

74 Victims of Crime Assistance Tribunal, *Medical Expenses* (2016) <[www.vocat.vic.gov.au/assistance-available/financial-assistance-available/medical-expenses](http://www.vocat.vic.gov.au/assistance-available/financial-assistance-available/medical-expenses)>.

75 *Ibid.*

76 Victims Services, Department of Attorney General and Justice (NSW), *The New Victims Support Scheme: A Detailed Guide* (2013) 11.

# VOCAT hearings and evidentiary processes

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## 11. VOCAT hearings and evidentiary processes

### Introduction

- 11.1 This chapter discusses Victims of Crime Assistance Tribunal (VOCAT) hearings and evidentiary processes including:
- directions hearings
  - notification and appearance of interested persons
  - alternative evidentiary arrangements and open court
  - therapeutic effect of VOCAT hearings
  - restricting publication of VOCAT application material
  - VOCAT determinations without a hearing.
- 11.2 This chapter relates to the first, seventh and eight matters raised in the supplementary terms of reference, which ask the Victorian Law Reform Commission (the Commission) to consider whether:
- the *Victims of Crime Assistance Act 1996* (Vic) (the Act) can be simplified to make it easier for applicants to understand all their potential entitlements and quickly and easily access the assistance offered by the scheme without necessarily requiring legal support
  - it is appropriate in certain circumstances (as is currently the case) for alleged perpetrators of a crime to be notified of an application to VOCAT or be called to give evidence
- 11.3 Questions in this chapter relate to the extent to which the current processes and procedures are clear, simple and working as intended, as well as whether the policy rationale for them remains justifiable.

### The hearing process

- 11.4 VOCAT may determine an application without conducting a hearing. This may occur where the applicant expressly wishes and consents in writing to VOCAT making a determination without a hearing, and in circumstances where VOCAT does not require a hearing.<sup>1</sup>
- 11.5 Where a hearing is requested by a victim or required by VOCAT, VOCAT must fix a time and place for the hearing and provide the applicant with reasonable notice.<sup>2</sup>

- 11.6 However, VOCAT is not a court. VOCAT hearings are less formal than court hearings<sup>3</sup> and VOCAT is not bound by the rules of evidence.<sup>4</sup> Consequently, VOCAT may inform itself in relation to the application in any manner that it thinks fit.<sup>5</sup>
- 11.7 VOCAT's procedures remain a legal process bound by the provisions of the Act.<sup>6</sup> For example, VOCAT has the power to issue a warrant for the arrest of a witness who has been served with a summons to attend VOCAT but has failed to do so.<sup>7</sup> VOCAT must also give a party to the matter a reasonable opportunity to call or give evidence, examine, cross-examine or re-examine witnesses and make submissions.<sup>8</sup>
- 11.8 The decision in *AB v Victims of Crime Assistance Tribunal*<sup>9</sup> indicates that the duty to give a party a reasonable opportunity to call evidence can be tempered by concern for the wellbeing of the applicant.
- 11.9 In that case, the alleged perpetrator, the applicant's father, had been joined as a party to the proceedings. He wished to call the applicant's mother as a witness but the mother expressed concern that her daughter might self-harm or commit suicide if the mother were to give evidence. VOCAT excused the mother from giving evidence, ruling that the risks of self-harm were too great.<sup>10</sup> The applicant's father appealed the decision to the Supreme Court. In dismissing the appeal, Justice McDonald stated:

I am satisfied that there are credible arguments in support of the Tribunal having the power to excuse a witness from giving evidence in circumstances where such evidence could result in an applicant committing an act of self-harm, including suicide.<sup>11</sup>

## Directions hearings

- 11.10 *Practice Direction No 7 of 2008—Directions Hearings* provides guidance as to when it is appropriate to conduct a directions hearing.<sup>12</sup> Directions hearings may be held at any time the Tribunal considers appropriate, including, but not limited to the following circumstances:<sup>13</sup>
- where the Tribunal has determined that a person with a legitimate and/or substantial interest (including an alleged offender) will or may be a party to the proceedings
  - counsel assisting the Tribunal has been appointed
  - access is sought to classified documents (as per Practice Direction No. 9 of 2008) in a Tribunal file or access to a file is sought by a third party
  - an application has been made for an extension of time
  - there has been a delay or other deficiency in reporting the act of violence to the police
  - pecuniary loss or a dependency award is claimed
  - the Tribunal has been provided with adverse police material
  - the application does not appear to disclose a relevant offence within the meaning of section 3(1) of the Act
  - the application is incomplete or deficient.

3 Section 38(1)(a) of the *Victims of Crime Assistance Act 1996* (Vic) provides that the Tribunal is not required to conduct itself in a formal manner.

4 *Victims of Crime Assistance Act 1996* (Vic) s 38(1)(b). See also Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 25.

5 *Victims of Crime Assistance Act 1996* (Vic) s 38(1)(b).

6 Section 20 of the *Victims of Crime Assistance Act 1996* (Vic) provides that the Tribunal has the functions, powers and duties conferred on it by the Act. See also Victims Support Agency, Department of Justice and Regulation (Vic), *Counselling for Victims of Crime* (2011) 63.

7 *Victims of Crime Assistance Act 1996* (Vic) s 37(1A).

8 *Ibid* s 38(1)(c).

9 [2015] VSC 245 (5 June 2015).

10 Victims of Crime Assistance Tribunal quoted in *AB v Victims of Crime Assistance Tribunal* [2015] VSC 245 (5 June 2015) [4].

11 *AB v Victims of Crime Assistance Tribunal* [2015] VSC 245 (5 June 2015) [43].

12 Victims of Crime Assistance Tribunal, Melbourne Magistrates' Court, *Practice Direction No 7 of 2008—Directions Hearings*, 11 December 2008, 1.

13 *Ibid* 1–2.

- 11.11 The Tribunal may hold a directions hearing on its own initiative or at the request of a practitioner.<sup>14</sup>
- 11.12 Applicants who are legally represented need not attend a directions hearing unless required to do so by the Tribunal.<sup>15</sup>
- 11.13 In appropriate circumstances, the Tribunal may make final orders at a directions hearing.<sup>16</sup>
- 11.14 The Tribunal may request the applicant or a person with a legitimate and/or substantial interest provide information at a directions hearing including, but not limited to:<sup>17</sup>
- the number of witnesses to be called
  - the estimated length of the hearing
  - the need, if any, for alternative arrangements for giving evidence, including use of the remote witness facility or video conferencing facility
  - details of documents to be exchanged or viewed
  - details of the facts in dispute between the parties
  - the need for interpreters
  - any other information which may affect the conduct of the final hearing.
- 11.15 During preliminary consultations the Commission was informed that the use of directions hearings by VOCAT members varied, including in the amount and particulars of the information requested and the purpose of the directions hearing.

### Notification and appearance of interested persons

- 11.16 Under the Act, VOCAT may give notice of the time and place for a hearing to any other person whom it considers to have a 'legitimate interest' in the matter.<sup>18</sup> This can include the alleged perpetrator.<sup>19</sup> These notification requirements of the Act are discretionary.
- 11.17 However, the Act also provides that VOCAT must not notify the alleged perpetrator or an interested third party without first giving the applicant an opportunity to be heard on whether or not they should be notified.<sup>20</sup>
- 11.18 VOCAT's process for notifying an alleged perpetrator or interested third party is set out in *Practice Direction No. 4 of 2008: Notification of Alleged Offenders and Third Parties*.<sup>21</sup> The Practice Direction provides that VOCAT must advise the applicant in writing that such notification is being considered and allow 21 days for the applicant to respond.<sup>22</sup> At the conclusion of 21 days, the tribunal member will make a decision on whether the alleged perpetrator is to be notified of the application.<sup>23</sup>
- 11.19 If the tribunal member decides to notify the alleged perpetrator, the applicant has 21 days to decide whether she or he still wishes to pursue their application.<sup>24</sup> If the application proceeds, the registrar will send notification of the application to the alleged perpetrator. The alleged perpetrator then has 14 days to advise the registrar as to whether she or he intends to participate in the hearing.<sup>25</sup>

14 Ibid 2.

15 Ibid.

16 Ibid.

17 Ibid.

18 *Victims of Crime Assistance Act 1996* (Vic) s 34(2).

19 Ibid s 34(3).

20 Ibid.

21 It should be noted that the Practice Direction uses the phrase 'legitimate or substantial interest', while the Act uses the term 'legitimate interest' in the notification provision. This is most likely because the provision of the Act dealing with persons who are entitled to appear at the Victims of Crime Assistance Tribunal (VOCAT), not just be notified, refers to those with a 'substantial interest'.

22 Victims of Crime Assistance Tribunal, Melbourne Magistrates' Court, *Practice Direction No 4 of 2008—Notification of Alleged Offenders and Third Parties*, 1 January 2009, 1.

23 Ibid 2.

24 Ibid.

25 Ibid.

- 11.20 The same process applies for third parties, other than the alleged perpetrator, whom VOCAT identifies as having a legitimate interest in the matter.<sup>26</sup>
- 11.21 Persons who consider that they have a legitimate interest in an application for assistance, including the alleged perpetrator, can also apply to VOCAT to be notified of the proceedings.<sup>27</sup> The application must be made in writing and must set out why they consider that they have a legitimate interest or should be notified of the proceedings.<sup>28</sup>
- 11.22 Unless otherwise ordered by a VOCAT member, such an application by the third party, including the perpetrator, will be forwarded to the applicant, who then has 21 days to respond to VOCAT as to whether she or he objects to the third party, or the alleged perpetrator, participating in the proceeding.<sup>29</sup>
- 11.23 If the applicant does not oppose the third-party application, or VOCAT receives no response, the third-party application will be determined by a VOCAT member in chambers.<sup>30</sup> If the applicant opposes the third-party application, the matter will be referred to a VOCAT member for listing advice and there may be a directions hearing.<sup>31</sup>
- 11.24 In addition to VOCAT's discretion to inform persons it considers to have a legitimate interest, section 35 identifies persons who are entitled to appear and be heard by VOCAT. In addition to the applicant for financial assistance, these people are:
- persons who have been accepted by VOCAT as having a 'substantial interest' in an application for assistance, including the alleged perpetrator<sup>32</sup>
  - an officer of VOCAT or a legal practitioner assisting VOCAT<sup>33</sup>
  - the state, if it considers that it has a legitimate interest in the matter.<sup>34</sup>
- 11.25 A person or body who is entitled to appear and be heard by VOCAT is considered a party to the matter.<sup>35</sup>
- 11.26 A party may appear personally or by a legal practitioner.<sup>36</sup> They may also appear by another representative with the leave of VOCAT.<sup>37</sup>

### Alternative evidentiary arrangements and open court

- 11.27 VOCAT is able to direct that alternative arrangements be made for the giving of evidence by a witness.<sup>38</sup> This may be done by VOCAT on its own initiative or on the application of a party to a proceeding.<sup>39</sup>
- 11.28 Some of the alternative arrangements are:
- closed-circuit television or other facilities that enable a witness to give evidence from a place other than the room in which VOCAT is sitting
  - screens to remove the alleged perpetrator from the witness' direct line of vision
  - permitting a person to be beside the witness to give emotional support while they are giving evidence
  - requiring counsel to be seated while examining or cross-examining the witness.<sup>40</sup>

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26 Ibid 2–3.  
 27 Ibid 3.  
 28 Ibid.  
 29 Ibid.  
 30 Ibid.  
 31 Ibid.  
 32 *Victims of Crime Assistance Act 1996* (Vic) s 35(1).  
 33 Ibid s 35(2).  
 34 Ibid s 35(3).  
 35 Ibid s 35(4).  
 36 Ibid s 36(1).  
 37 Ibid.  
 38 Ibid s 37(2).  
 39 Ibid.  
 40 Ibid s 37(3).

- 11.29 These provisions were considered by the Supreme Court of Victoria in *AB v Victims of Crime Assistance Tribunal*,<sup>41</sup> where Justice McDonald noted they reinforce the victim-centred approach of the statutory scheme.<sup>42</sup> The judge drew on them, along with VOCAT's power to conduct a hearing without giving notice to the alleged perpetrator, to conclude that in making procedural decisions VOCAT is required to give consideration to the interests of the applicant.<sup>43</sup>
- 11.30 These alternative evidentiary arrangements were used in *BFK v Victims of Crime Assistance Tribunal*,<sup>44</sup> where the applicant, BFK, and the alleged perpetrator, YVP, each gave evidence from a remote witness facility to ensure they did not meet face-to-face. The Victorian Civil and Administrative Tribunal stated that causing BFK and YVP to meet in court 'would have increased BFK's distress'.<sup>45</sup>
- 11.31 The Act requires VOCAT hearings to be open to the public.<sup>46</sup> However, VOCAT can direct that whole or part of a hearing be closed to the public.<sup>47</sup> It can also direct that only certain persons, or classes of person, may be present.<sup>48</sup>
- 11.32 A direction to close or restrict access to a hearing may be given on the application of a party or on VOCAT's own initiative.<sup>49</sup>
- 11.33 In addition, the Act requires VOCAT to close the hearing to the public if an application is made for it to be closed in the following circumstances:<sup>50</sup>
- the applicant is a primary victim and their injury resulted from a sexual offence<sup>51</sup>
  - the applicant is a primary victim and is a child
  - the applicant is a primary victim and has a cognitive impairment
  - VOCAT is satisfied that the applicant is likely to suffer distress if the hearing is open to the public
  - VOCAT is satisfied that the applicant is likely to feel intimidated if the hearing is open to the public.

### Therapeutic effect of VOCAT hearings

- 11.34 During preliminary consultations the Commission was told that one of the beneficial aspects of Victoria's approach to state-funded financial assistance for victims of crime is the use of VOCAT hearings presided over by judicial officers. Victoria is one of the few Australian jurisdictions that enables victims to elect to attend a hearing and uses judicial decision makers.<sup>52</sup>
- 11.35 This tribunal-based system gives victims a unique opportunity to engage with the justice system and be heard and acknowledged. For some victims, the hearing of an application by a judicial officer provides an acknowledgment from the justice system that there has been a crime and that they have suffered harm as a consequence.<sup>53</sup> Where an offender has not been prosecuted, victims can feel acknowledged and validated by participating in a VOCAT hearing.<sup>54</sup>

41 [2015] VSC 245 (5 June 2015).

42 Ibid [27]–[28].

43 Ibid [27].

44 [2017] VCAT (15 March 2017).

45 *BFK v Victims of Crime Assistance Tribunal* [2017] VCAT (15 March 2017) [21].

46 *Victims of Crime Assistance Act 1996* (Vic) s 42(1).

47 Ibid s 42(1)(a).

48 Ibid s 42(1)(b).

49 Ibid s 42(2).

50 Ibid s 42(3).

51 Ibid s 42(3)(a)(i). Specifically, an offence against sub-divs (8A), (8B), (8C), (8E) or (8FA) of div 1 of pt I of the *Crimes Act 1958* (Vic) or any corresponding previous enactment (sexual offences) or an offence at common law of rape or assault with intent to rape: *Victims of Crime Assistance Act 1996* (Vic) s 3(1).

52 See the comparative table of Australian jurisdictions in Appendix B.

53 Department of Justice (Vic), *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*, Discussion Paper (2009) 43.

54 Ibid.

- 11.36 During preliminary consultations the Commission was told about the powerful nature of such judicial acknowledgment, particularly in sexual offence matters where successful prosecution is rare.
- 11.37 VOCAT considers that the tribunal structure enables ‘victims of crime [to] gain acknowledgment of their experiences by a judicial officer in the criminal justice system, but in the more flexible, informal and intimate manner afforded by an administrative tribunal’.<sup>55</sup>
- 11.38 However, some victims may wish not to participate in a VOCAT hearing. While less formal than a criminal court, it is important to note that VOCAT still operates within a legal framework and some processes mirror the adversarial system, although perhaps less formally. As stated by Judith Herman, ‘if one set out intentionally to design a system for provoking symptoms of traumatic stress, it might look very much like a court of law’.<sup>56</sup> Research indicates that some victims can be distressed by having to recount details of the crime during VOCAT hearings<sup>57</sup> or traumatised by VOCAT member comments.<sup>58</sup>
- 11.39 During preliminary consultations the Commission was told that one of the reasons the VOCAT process can be re-traumatising for victims is because it is not a trauma-informed process.
- 11.40 Trauma-informed practice involves modifying aspects of service provision to ensure a basic understanding of how trauma affects the life of an individual seeking a service.<sup>59</sup> A trauma-based approach accepts victims of crime as being harmed as a result of the crime.<sup>60</sup> One of its benefits is that it avoids re-traumatisation, as the focus is on ensuring the person’s physical, psychological and emotional safety.<sup>61</sup>
- 11.41 Significantly, approaches that are not trauma-informed often mirror the power and control experienced in abusive relationships.<sup>62</sup>

## Restricting publication and use of VOCAT application material

- 11.42 The Act permits VOCAT to restrict the publication of material produced as part of an application for assistance if it is in the public interest to do so.<sup>63</sup> This includes the whole or part of the evidence given at a hearing,<sup>64</sup> the content of specified documents<sup>65</sup> and any information likely to lead to the identification of a party or another person at a hearing.<sup>66</sup>
- 11.43 Section 43(3) of the Act makes it an offence to publish any material subject to such an order by VOCAT.<sup>67</sup>
- 11.44 The Commission’s report, *The Role of Victims of Crime in the Criminal Trial Process* noted that VOCAT records may be subpoenaed and used by the defence in criminal hearings to demonstrate inconsistencies in a victim’s evidence and to challenge the credibility of a victim.<sup>68</sup> The Commission was informed that VOCAT records are regularly subpoenaed for criminal proceedings.<sup>69</sup>

55 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 14.

56 Judith Herman, ‘The Mental Health of Crime Victims: Impact of Legal Intervention’ (2003) 16(2) *Journal of Traumatic Stress* 159, 159. See also, Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Consultation Paper (2016) 18.

57 Department of Justice (Vic), *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*, Discussion Paper (2009) 18; Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Consultation Paper (2016) 38.

58 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 141 [14.9].

59 Jenna Bateman, Corinne Henderson and Dr Cathy Kezelman, *Trauma-Informed Care and Practice: Towards a Cultural Shift in Policy Reform across Mental Health and Human Services in Australia*, Position Paper and Recommendations (Mental Health Coordinating Council, 2013) 5.

60 Ibid 8.

61 Ibid 5.

62 Ibid 9.

63 *Victims of Crime Assistance Act 1996* (Vic) s 43(1).

64 Ibid s 43(1)(a).

65 Ibid s 43(1)(b).

66 Ibid s 43(1)(c).

67 The penalty is 100 penalty units or imprisonment for two years for a natural person and 500 penalty units for a body corporate: *ibid* s 43(3).

68 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report No 34 (2016) 246.

69 Ibid 247.

- 11.45 Accordingly, the Commission recommended that applications, supporting documentation and documents provided to, or prepared for, or on behalf of VOCAT in connection with an application for financial assistance under the Act should be inadmissible as evidence in any criminal legal proceedings except:<sup>70</sup>
- in criminal proceedings in which the applicant is the accused
  - in or arising out of proceedings before VOCAT
  - with the applicant's consent.
- 11.46 The Commission also recommended that a person should not be required by subpoena or any other procedure to produce any application or document that would be inadmissible following the implementation of the above recommendation. The Commission stated:
- Victims are entitled to apply for assistance from VOCAT to help them with their recovery. They should not be discouraged from doing so because of fear that an offender will seek to access or use their VOCAT records in criminal proceedings.<sup>71</sup>
- 11.47 These recommendations are yet to be implemented and therefore remain relevant considerations in the Commission's current examination of the Act and VOCAT.
- 11.48 During preliminary consultations, the Commission was also told of concerns regarding the admissibility of VOCAT documentation in family law matters. This was raised specifically in the context of family violence where there may be parallel family law matters on foot.

## VOCAT determinations without hearing

- 11.49 This section discusses VOCAT determinations without a hearing. Under section 33 of the Act, VOCAT has the power to determine an application without conducting a hearing. This is often referred to as making a determination 'on the papers'.
- 11.50 VOCAT can do this in the following circumstances:
- The applicant has stated in the application a wish for VOCAT to determine their application 'on the papers'.<sup>72</sup>
  - The applicant consents in writing to VOCAT doing so.<sup>73</sup>
  - The application relates to the making of an interim award, unless VOCAT considers that a hearing is necessary or desirable.<sup>74</sup>
- 11.51 If VOCAT does determine an application on the papers, it must notify the applicant of its decision, including details of the amount of assistance awarded, the purpose for which assistance was awarded, any conditions to which the award is subject, the persons(s) to whom assistance is payable and any other order that it makes.<sup>75</sup>
- 11.52 Applications are determined on the papers in the majority of VOCAT matters—approximately 75 per cent in 2015–2016.<sup>76</sup>
- 11.53 Preliminary consultations indicated that, in practice, decisions made on the papers generally involve a two-step process in which the applicant will first ask VOCAT to determine their application without a hearing, and if unhappy with VOCAT's determination, will subsequently request a hearing. In this sense, the process under section 33 seems to resemble an offer of settlement in the course of civil proceedings, but one that comes from the deciding authority itself.

70 Ibid (Recommendations 50 and 51).

71 Ibid.

72 *Victims of Crime Assistance Act 1996* (Vic) s 33(1)(a).

73 Ibid s 33(1)(b).

74 Ibid s 33(1)(c).

75 Ibid s 33(2).

76 *Victims of Crime Assistance Tribunal, Annual Report 2015–16* (2016) 36.

- 11.54 Determinations made on the papers can be a beneficial way for victims to have their applications determined quickly and without having to attend court. They also present a way for victims to avoid the alleged perpetrator participating in the hearing and may alleviate safety or wellbeing concerns relating to an open court hearing.
- 11.55 However, in its submission to the Royal Commission into Family Violence, Women’s Legal Service Victoria expressed concern that there may be inconsistency in outcomes for victims whose applications are decided on the papers and those whose applications are determined at a hearing.<sup>77</sup>
- 11.56 During preliminary consultations the Commission was told that the potential variability in awards is compounded, or possibly caused, by a lack of transparency in the VOCAT process itself. It is difficult to know whether the award offered during the section 33 process is consistent with that offered in similar cases.
- 11.57 Some stakeholders told the Commission that the quantum of awards made on the papers seemed to be lower than if a hearing was held. It was suggested that providing victims with the opportunity to speak freely with the magistrate during a hearing often illustrated other needs that could be factored into awards made, particularly in relation to VOCAT’s ability to make awards for other expenses in exceptional circumstances.

## Discussion and options for reform

- 11.58 This section discusses the impact of current hearing and evidentiary processes. It also sets out options for reform to address concerns for victims’ safety and wellbeing associated with hearing and evidentiary processes.
- 11.59 The Commission seeks the views of victims, persons affected, professionals, stakeholders and the community on whether these processes and procedures should be reformed. Options for reform and questions are set out below.

### Perpetrator notification and right to appear

- 11.60 As the Commission noted in the first consultation paper, the perpetrator notification provisions are a particularly significant issue for victims of family violence, raising safety concerns and the potential for re-traumatisation.<sup>78</sup>
- 11.61 However, these concerns are not unique to family violence victims—such issues extend to other vulnerable victims and witnesses or other cohorts of victims, such as victims of sexual assault. The Commission was told during preliminary consultations that a perpetrator is more likely to be notified when the applicant has not reported the incident to the police or charges have not been laid, when they have been acquitted, or when there is little evidence to support an applicant’s claim.
- 11.62 Victims of certain types of crime associated with low reporting rates, such as sexual assault,<sup>79</sup> or victims who may fear or distrust police are therefore more vulnerable to the perpetrator notification requirements. However, these are often also the victims more vulnerable to intimidation, threats to their safety or re-traumatisation through contact with an alleged perpetrator.<sup>80</sup>

77 Women’s Legal Service Victoria, Submission No 940 (No 1) to Royal Commission into Family Violence, *Royal Commission into Family Violence*, 19 June 2015, 53.

78 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 88–9 [9.38]–[9.46].

79 Centre for Innovative Justice, *Innovative Justice Responses to Sexual Offending—Pathways to Better Outcomes for Victims, Offenders and the Community* (RMIT University, 2014) 6.

80 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 90.

- 11.63 As discussed in the first consultation paper, reporting rates, prosecution rates and conviction rates are low in cases of family violence.<sup>81</sup> Furthermore, as family violence tends to occur in private, there is often little corroborating evidence beyond that of the applicant and the perpetrator.<sup>82</sup> These factors may lead to victims of family violence being more exposed to the perpetrator notification procedure, despite its potential to be highly traumatic.<sup>83</sup>
- 11.64 This may also be the case for childhood sexual assault and many other sexual offences.<sup>84</sup>
- 11.65 Preliminary consultations identified that even if perpetrator notification occurs rarely, the fact that it exists at all can be a deterrent for some victims who may elect not to pursue a VOCAT application because of the chance of the perpetrator being notified.

### Removing the perpetrator notification provision

- 11.66 As outlined in the first consultation paper, one option could be to remove the notification provision either entirely or specifically for vulnerable victims, such as victims of family violence or sexual assault.<sup>85</sup> Some stakeholders considered that this approach would better reflect the purpose of the Act—namely, to assist victims of crime recover.
- 11.67 However, during preliminary consultations views on whether removing the perpetrator notification provision would cause procedural fairness issues were mixed.
- 11.68 Some stakeholders considered it important for procedural fairness that alleged perpetrators are notified of an application being made which contains serious allegations against them and which could result in serious findings being made against them.
- 11.69 However, other stakeholders considered that the perpetrator notification provisions were contrary to the purpose of the Act. This view is consistent with the victim-centred approach of the VOCAT process, as described by Justice McDonald in *AB v Victims of Crime Assistance Tribunal*.<sup>86</sup>
- 11.70 The Commission was told by some stakeholders that the notification provisions serve little purpose, as the outcome of a VOCAT proceeding does not affect the rights of an alleged perpetrator. However, other stakeholders said that it was important for an alleged perpetrator to be afforded the opportunity to make submissions and be heard before a finding is made about an alleged offence, despite the finding not affecting their criminal record.

## Question

- 48 How do the rights of perpetrators—to be notified or appear—fit with the purpose of the Act, which is to provide assistance to victims of crime?

81 Ibid 89 [9.45]. See also Christine Forster, 'Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes' (2014) 22 *Journal of Law and Medicine* 188, 194.

82 Ibid 197.

83 Women's Legal Service Victoria, Submission No 940 (No 1) to Royal Commission into Family Violence, *Royal Commission into Family Violence*, 19 June 2015, 53.

84 Centre for Innovative Justice, *Innovative Justice Responses to Sexual Offending—Pathways to Better Outcomes for Victims, Offenders and the Community* (RMIT University, 2014) 6.

85 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 90 [9.57].

86 [2015] VSC 245 (5 June 2015) [28].

## Enhancing safety considerations in the Act

- 11.71 Another option is to amend the Act to list specific safety concerns that must be taken into account by VOCAT before a perpetrator can be notified. These safety factors could be associated with particular types of crime, or relate to specific vulnerabilities of victims. This option could be guided by an overall principle of not causing additional trauma, intimidation or distress to the applicant.
- 11.72 More explicit guidance in the Act might result in fewer notifications being made and place victim safety and wellbeing at the forefront of the decision-making process.
- 11.73 Alternatively, the Act could be amended to include a legislative presumption against perpetrator notification. For example, the Act could specify that an alleged perpetrator should not be notified of an application unless exceptional circumstances exist. Exceptional circumstances could be defined in the Act.
- 11.74 Another approach could be for the Act to provide for perpetrator notification only in circumstances where VOCAT would be unable to make a fair decision without notifying the perpetrator and seeking evidence from the perpetrator.
- 11.75 Including a legislative presumption against perpetrator notification would shift the Act's current focus from whether an alleged perpetrator has a 'legitimate interest' in an application, to whether the notification is justifiably required for VOCAT to reach a fair decision.
- 11.76 Another option is to improve the evidentiary and procedural protections for victims. This option could help limit some of the adverse impacts of the perpetrator notification and appearance provisions. This option is further discussed below at [11.83]–[11.92].

## Questions

- 49 Should the Act be amended to include a legislative presumption against perpetrator notification? If so, how should the Act be amended?
- 50 Should the notification provision be amended to recognise the safety concerns of victims more specifically? If so, what changes should be made to the Act?
- 51 Given the aim of the Act is to assist victims of crime, should the Act be amended to include a guiding principle protecting victims from undue trauma, intimidation or distress during VOCAT hearings?

## Removing the option of hearings

- 11.77 A final option, and one which would require significant changes to both the Act and the broader financial assistance scheme, would be to remove the option for tribunal hearings entirely. This is the case in New South Wales, Australian Capital Territory, Queensland and Northern Territory where hearings are no longer available.<sup>87</sup>
- 11.78 For some victims, the hearing of an application by a judicial officer provides an acknowledgment from the justice system that there has been a crime and that they have suffered harm as a consequence.<sup>88</sup> However, for some victims the hearing process can be a source of further trauma.<sup>89</sup>

87 See the comparative table of Australian jurisdictions at Appendix B.

88 Department of Justice (Vic), *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*, Discussion Paper (2009) 43.

89 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 141.

- 11.79 While this option does not reduce safety concerns associated with perpetrators being notified of an application, which is sometimes enough of a disincentive for victims to apply to VOCAT, it does reduce safety or wellbeing concerns arising from perpetrators attending hearings.
- 11.80 The benefits of tribunal models, as opposed to administrative models, are discussed further in Chapter 15 of this paper.
- 11.81 Consideration might also be given to other opportunities for acknowledging victims, beyond the use of judicial hearings, given the potential for victims to be re-traumatised by the process. This might involve restorative justice practices linked with a financial assistance system.
- 11.82 The potential for a financial assistance scheme to complement restorative justice practices is discussed further in Part Three of this paper.

### **Evidentiary and procedural protections for vulnerable witnesses**

- 11.83 As noted above, VOCAT has the power to close the court, restrict publication of material and permit alternative evidentiary procedures in order to protect vulnerable applicants.
- 11.84 The Magistrates' Court and Children's Court noted in their submission to the Royal Commission into Family Violence that the evidentiary provisions that protect sexual assault complainants and protected witnesses in criminal proceedings and intervention order matters do not explicitly extend to VOCAT hearings.<sup>90</sup>
- 11.85 For example, the courts identified that, unlike the *Criminal Procedure Act 2009 (Vic)* and the *Family Violence Protection Act 2008 (Vic)*, the Act does not specifically prohibit a victim of a sexual offence being personally cross-examined by the offender, nor explicitly require questioning to be appropriately constrained.<sup>91</sup> In addition, in contrast to the Criminal Procedure Act and the Family Violence Protection Act, the Act does not contain any explicit protections for the giving of evidence by child applicants and witnesses.
- 11.86 While the Act gives VOCAT the discretion to put in place these kinds of evidentiary protections, the fact that such protections are not explicitly articulated in the Act may lead them to be underused or used inconsistently.
- 11.87 Options to address concerns about the evidentiary and procedural protections for vulnerable witnesses are set out below, along with specific questions for consideration.

### **Replicating the procedural and evidentiary protections in other legislation**

- 11.88 One option is to replicate the procedural and evidentiary protections in place in the Criminal Procedure Act and the Family Violence Protection Act for vulnerable victims.<sup>92</sup> This would involve extending explicit protections, such as, in relation to sexual offences, prohibiting the alleged perpetrator from cross-examining the applicant and preventing inappropriate questions being asked of the applicant.

90 Magistrates' Court of Victoria and Children's Court of Victoria, Submission No 978 to Royal Commission into Family Violence, *Royal Commission into Family Violence*, June 2015, 60.

91 *Ibid.*

92 Magistrates' Court of Victoria and Children's Court of Victoria, Submission No 978 to Royal Commission into Family Violence, *Royal Commission into Family Violence*, June 2015, 60 (Recommendation 25).

- 11.89 It would also entail specific protections for child victims. For example, as in the Criminal Procedure Act, the Act could explicitly prohibit the cross-examination of a child victim of a sexual offence.<sup>93</sup> Moreover, in considering whether or not a child should give evidence, the Act could take a similar approach to the Family Violence Protection Act, and require VOCAT to have regard to the desirability of protecting children from unnecessary exposure to the court system and the harm that could occur to the child and to family relationships if a child were to give evidence.<sup>94</sup>
- 11.90 This option for reform would ensure greater consistency in the kinds of evidentiary and procedural protections that VOCAT provides for victims who are particularly vulnerable.

## Question

- 52 Should the Act be amended to include increased protections for victims during VOCAT hearings? If so, what procedural and evidentiary protections should be provided?

### Embedding safety considerations in the Act

- 11.91 The Commission recommended in *Victims of Crime in the Criminal Trial Process* that the Criminal Procedure Act be amended to include a guiding principle that measures should be taken that limit, to the fullest practical extent, the trauma, intimidation and distress suffered by victims when giving evidence.<sup>95</sup>
- 11.92 As proposed in the first consultation paper, a similar principle regarding VOCAT procedure could be incorporated into the Act.<sup>96</sup> In particular, the Act could be amended to include a guiding principle that in determining the procedure of hearings and the giving of evidence, VOCAT is to have regard to the fact that measures should be taken to limit the trauma, intimidation and distress suffered by victims when giving or hearing evidence.

### Removing the option of hearings

- 11.93 As discussed above, another option is to remove the availability of tribunal hearings entirely, as in New South Wales, the Australian Capital Territory, Queensland and the Northern Territory.<sup>97</sup>
- 11.94 The benefits of tribunal models as against administrative models are discussed further in Chapter 15 of this paper.

### Improving the therapeutic effect of VOCAT hearings

- 11.95 The Commission was told during preliminary consultations that VOCAT hearings can sometimes cause further distress to victims because hearings are not trauma-informed.
- 11.96 The Law Institute of Victoria has recently considered the importance of trauma-informed legal practice, including for the judiciary and court staff.<sup>98</sup>

93 *Criminal Procedure Act 2009* (Vic) s 123.

94 The *Family Violence Protection Act 2008* (Vic) prevents a child, other than a child who is an applicant for a family violence intervention order, from giving evidence in a proceeding under that Act unless the court grants them leave to do so. In deciding whether to grant such leave, the court must have regard to the desirability of protecting children from unnecessary exposure to the court system and the harm that could occur to the child and to family relationships if the child gives evidence: s 67.

95 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report No 34 (2016), 214 (Recommendation 41).

96 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 91 [9.67]–[9.69].

97 See the comparative table of Australian jurisdictions at Appendix B.

98 Cathy Kezelman and Pam Stavropoulos, 'Dealing with Trauma' (2016) 90(10) *Law Institute Journal* 36.

- 11.97 Furthermore, Victoria's *Family Violence Rolling Action Plan 2017–2020* recognises the need for the Magistrates' Court to move towards a more trauma-informed approach in the family violence context by 'embedding a specialist, trauma-informed response across our justice system through the expansion of the Specialist Family Violence Court model'.<sup>99</sup>
- 11.98 Ian Freckelton has reflected more broadly on the intrinsic lack of understanding and training of decision makers within financial assistance and compensation schemes, stating that 'decision makers who have never encountered DSM-IV or standard works on trauma and victim impact are put in the position of having to deal with this sensitive area'.<sup>100</sup>
- 11.99 One option is to consider how trauma-informed practice could be embedded within VOCAT and how this might improve experiences for victims. Such practice might include introduction of specialised training or specialist staff—or a combination of both. It might also involve broader structural or procedural changes, such as specialist streams or VOCAT-appointed magistrates as discussed in Chapter 10. All of these strategies could be underpinned by a trauma-informed approach.

### Restricting access to and the use of VOCAT records

- 11.100 In its report, *The Role of Victims of Crime in the Criminal Trial Process*, the Commission recommended that VOCAT applications, supporting documentation and documents provided to, or prepared for or on behalf of, VOCAT in connection with an application for financial assistance under the Act should be inadmissible as evidence in any criminal legal proceedings except:
- in criminal proceedings in which the applicant is the accused
  - in or arising out of proceedings before VOCAT
  - with the applicant's consent.<sup>101</sup>
- 11.101 The Commission's rationale, confirmed through consultations at the time, was that medical, psychological, psychiatric and counselling records are prepared for a specific purpose—determining eligibility under Act. As the Act's aim is to assist victims with their recovery after crime, the Commission concluded that it is not appropriate for such materials to then be used to discredit a victim.<sup>102</sup>
- 11.102 In addition, during preliminary consultations, the Commission was also informed of concerns about the use of VOCAT application materials during family law proceedings, particularly in cases involving family violence.
- 11.103 In the Commission's report, *The Role of Victims of Crime in the Criminal Trial Process*, the Commission recommended that documents connected with VOCAT applications should be inadmissible in criminal legal proceedings. Given further issues were raised during preliminary consultations regarding the use of VOCAT materials in other court matters, such as family law matters, consideration should be given to whether the Act should be amended to provide that VOCAT applications and supporting documentation should be inadmissible as evidence in other types of legal proceedings, such as matters relating to family law.

99 Department of Premier and Cabinet (Vic), *Family Violence Rolling Action Plan 2017–2020* (2017) 7.

100 Ian Freckelton, 'Criminal Injuries Compensation for Domestic Sexual Assault: Obstructing the Oppressed' in Chris Sumner et al (eds), *Victimology* (Australian Institute of Criminology, 1996) 251. The 'DSM-IV' refers to the Diagnostic and Statistical Manual of Mental Disorders, which is the authoritative guide to the diagnosis of mental disorders.

101 Recommendations 50 and 51: Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report No 34 (2016) 247.

102 Ibid.

## Question

- 53 Should VOCAT application materials be admissible as evidence in criminal or family law proceedings? If not, how should the Act be amended?

### Improving the transparency and consistency of VOCAT processes and decision making

- 11.104 Concerns about transparency in the VOCAT process are not new. In a submission to the then-Victorian Department of Justice's 2009 review of victim compensation, the Federation of Community Legal Centres stated that there was a need for more transparency and equity in the VOCAT process.<sup>103</sup> Similarly, research conducted by Whittlesea Community Legal Services found that the lack of written reasons for decisions made it difficult to gather evidence regarding the operation of VOCAT and therefore even more difficult to educate the legal profession about it.<sup>104</sup>
- 11.105 While all hearings conducted by VOCAT are digitally recorded, there is no such process for determinations on the papers. Written decisions are not publicly available—the only decisions available to the public relate to review decisions of the Victorian Civil and Administrative Tribunal. These reviews are rare (only 11 reviews were conducted in 2015–16).
- 11.106 This lack of transparency in the decision-making process results in a high degree of uncertainty, as the system relies on the knowledge of support workers or lawyers to advise victims on whether an award made on the papers under section 33 is appropriate, or if the decision should be reviewed.
- 11.107 However, applications are determined on the papers in the majority of VOCAT matters—approximately 75 per cent of all applications in 2015–16.<sup>105</sup> This effectively means that VOCAT is operating predominantly as an administrative system while remaining embedded within a tribunal-based system.
- 11.108 Given this way of operating in practice, when decisions are made by VOCAT 'on the papers', there is neither the transparency afforded by the usual open court process, supplemented by the publication of judicial decisions, nor a clear administrative decision-making framework as would be the case if the decision making were embedded in government service delivery.
- 11.109 Arguably, this predominantly administrative process consumes considerable judicial resources.
- 11.110 In addition to transparency concerns, some stakeholders told the Commission during preliminary consultations that they were concerned about the level of judicial discretion contained within the Act. Many stakeholders spoke about inconsistencies in practice, approach and the quantum of awards made by VOCAT members, and considered that these inconsistencies were tied to the level of discretion granted by the Act.
- 11.111 Some stakeholders said that the broad discretion in the Act could be used inappropriately. They suggested that more guidance in the Act might help to improve consistency in VOCAT's practice, even if this resulted in more prescriptive considerations, categories or

103 Federation of Community Legal Centres, Submission to Victorian Department of Justice, *Reviewing Victims of Crime Compensation: Sentencing Orders and State-Funded Awards*, February 2010, 7.

104 Whittlesea Community Legal Service, *Victims of Crime Assistance Tribunal Capacity Building Project*, Discussion Paper (Whittlesea Community Connections, 2011) 27.

105 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 36.

award amounts. These stakeholders considered that such changes would make it easier to guide victims through the VOCAT process and to manage expectations, even if there were less flexibility.

### Requiring written decisions and publication of determinations

- 11.112 One option to address concerns regarding transparency and consistency is to require appropriately de-identified written decisions to be published by VOCAT where a matter has been determined on the papers. This would provide guidance to victims, support workers and lawyers about the decision-making process, particularly in relation to areas of the Act that are more problematic, such as considerations about character and behaviour, as discussed in Chapter 8. This would also alleviate concerns that lower awards are made for matters determined on the papers compared to at a hearing.
- 11.113 However, before this option could be adopted, the resource implications of requiring publication of written decisions in the majority of cases would need to be considered.
- 11.114 Based on figures from 2015–16 (4161 applications awarded), written decisions would be required in approximately 3000 cases since around three-quarters of all decisions are made without a hearing. This could impose a significant burden on VOCAT.

### Limiting broad discretion under the Act

- 11.115 Alternatively, consideration could be given to removing some of the broad discretions available within the Act, such as the special financial assistance minimum and maximum amounts and awards to assist recovery in exceptional circumstances, discussed in Chapter 6, as well as considerations about character and behaviour, explored in Chapter 8.
- 11.116 Limiting some of the broader discretion afforded under the Act might provide more clarity about the quantum and types of award made, and the circumstances in which they might be made. Victims of similar kinds of violence, with similar injuries, would be more likely to receive similar awards.
- 11.117 However, the ability of VOCAT to provide flexible support tailored to victim needs would be decreased if less discretion was available under the Act.

### Streamlining decision making—a single decision-making process

- 11.118 Another option is to streamline all VOCAT decision making into a single, consistent decision-making process. This would mean that all victim applications would be determined the same way—either all through an administratively based system or all through a hearing-based system.
- 11.119 A review of the Australian Capital Territory scheme, for example, contended that administrative schemes increase transparency and the clarity of guidelines for eligibility.<sup>106</sup>
- 11.120 This streamlining option would remove concerns that some victims are accessing different types or quantum of award depending on how their matter is determined. However, this option would require significant changes to the current scheme.
- 11.121 Broader changes are further discussed in Part Three of this consultation paper.

## Question

54 How could transparency and consistency in VOCAT processes and decision making be improved?

# Awareness and accessibility of VOCAT

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## 12. Awareness and accessibility of VOCAT

### Introduction

- 12.1 This chapter considers what proportion of victims of crime currently access the Victims of Crime Assistance Tribunal (VOCAT). This analysis explores the number of VOCAT applications compared to the recorded number of crimes against the person in Victoria.
- 12.2 This analysis seeks to understand how aware the community might be of VOCAT, and how accessible VOCAT is to victims of crime. These are different matters to the legislative barriers that may be encountered after a victim applies to VOCAT.
- 12.3 This chapter relates to issues raised in the first matter specified in the supplementary terms of reference. It asks the Victorian Law Reform Commission (the Commission) to consider whether the *Victims of Crime Assistance Act 1996* (Vic) (the Act) can be simplified to make it easier for applicants to understand all their potential entitlements, and quickly and easily access the assistance offered by the scheme without necessarily requiring legal support.
- 12.4 It also considers the extent to which access to the scheme is supported by the broader victim support system.
- 12.5 This chapter poses a number of questions and suggests options for reform to improve victims' awareness of, and access to, the scheme.

### Victims' access to VOCAT

- 12.6 Based on statistical analysis of family violence and VOCAT data, the first consultation paper concluded that the small number of family violence-related VOCAT applications recorded for 2015–16 (388) appeared disproportionate to the number of family violence incidents recorded that same year (78,628).<sup>1</sup>
- 12.7 In order to understand how aware the broader group of victims of crimes against the person are of VOCAT and their eligibility under the Act, this section examines victim report data to assess the percentage of crimes against the person reported to police that result in applications to VOCAT.
- 12.8 Victoria's Crime Statistics Agency analyses the number of victim reports<sup>2</sup> using Victoria Police's database, LEAP. A victim report is counted when an individual, business or organisation reports that they have been a victim of one or more criminal offences and a record is made in LEAP.<sup>3</sup>

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1 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 135 [13.8]–[13.11].

2 The Commission uses the number of 'victim reports' rather than recorded offences, as it is concerned with the potential number of individual victims who may be eligible for VOCAT rather than the number of recorded crimes for that period.

3 A victim report involves only one victim but can involve multiple offences and alleged offenders. One report may involve offences that occur over a period of time but if processed by Victoria Police as one report, it will have a count of one in the data presented in this section.

- 12.9 In the year ending March 2017, 243,962 victim reports were made by individuals.<sup>4</sup> Of the total number of victim reports, 80.5 per cent had a principal offence of 'property and deception offences', while 65,179 reports (19.5 per cent) were 'crimes against the person'.<sup>5</sup> These crimes against the person include homicide, assault, sexual offences, abduction, robbery, stalking, harassment and threatening behaviour and dangerous/negligent acts endangering people. All such crimes against the person are 'acts of violence' for the purposes of VOCAT.
- 12.10 Based on the number of victim reports for crimes against the person between April 2016 and March 2017, approximately 65,000 individuals were potentially eligible for VOCAT.<sup>6</sup> However, not all victims of these crimes would satisfy all of the eligibility and mandatory consideration criteria under the Act, such as having an 'injury' as defined under the Act.
- 12.11 VOCAT's data collection activities are based on the financial year and do not directly match the Crimes Statistics Agency reporting time frame. Accordingly, the Commission has averaged the number of VOCAT applications filed for the past three financial years to calculate the average number of applications that might be received by VOCAT in any 12-month period—a figure of 5998 VOCAT applications.<sup>7</sup> This annual average can then be compared with the 65,000 victim reports relating to crimes against the person for the 12-month period used by the Crime Statistics Agency.
- 12.12 Using these figures as a guide, it would appear that at present, approximately only nine per cent of all potentially eligible victims of crimes against the person are making applications to VOCAT for financial assistance.
- 12.13 As with the previous data analysis prepared by the Commission in relation to family violence, the small number of VOCAT applications appears disproportionate to the number of victim reports for crimes against the person, and may indicate a high proportion of unmet demand.
- 12.14 This appears consistent with other research findings. For example, a 2008 study in the United States of America found that the vast majority of victims do not apply for state-based financial assistance—fewer than five per cent of victims apply.<sup>8</sup> This study found particularly low application rates among young victims, males, culturally and linguistically diverse communities and physical assault victims.<sup>9</sup> Lack of awareness of the scheme, as well as lack of assistance to complete an application, were cited as reasons for the under-utilisation of the scheme.<sup>10</sup>

## Awareness of the scheme and VOCAT

- 12.15 Awareness of compensation and state-funded financial assistance has been raised as one of the most critical barriers to the effectiveness of any victims of crime financial assistance or compensation scheme.<sup>11</sup>
- 12.16 Research conducted by Women's Legal Service Victoria has found that many victims of family violence are simply unaware of the existence of VOCAT.<sup>12</sup> Women's Legal Service Victoria has therefore recommended that any reform to the Act to improve accessibility

4 Crime Statistics Agency, *Victim Reports* (June 2017) <[www.crimestatistics.vic.gov.au/crime-statistics/latest-crime-data/victim-reports-3](http://www.crimestatistics.vic.gov.au/crime-statistics/latest-crime-data/victim-reports-3)>.

5 Ibid.

6 Not all victims of these crimes will satisfy all eligibility and mandatory consideration criteria under the Act. The Commission also has not included 149 blackmail and extortion offences in this analysis, as these do not fit within the definition of 'act of violence' under the Act. However, all other 'crimes against the person' recorded by the Crimes Statistics Agency fit within the definition of an 'act of violence' under the Act.

7 This is the average taken from the past three financial year application figures: 6221 (2015–16); 6053 (2014–15); 5722 (2013–2014).

8 Jennifer Alvidrez et al, 'Reduction of State Victim Compensation Disparities in Disadvantaged Crime Victims through Active Outreach and Assistance: A Randomized Trial' 98(5) *American Journal of Public Health* 882, 882 and 886.

9 Ibid 882.

10 Ibid.

11 Betty Chan et al, 'Support and Compensation: Lessons from Victims of Crime' (Paper presented at the Actuaries Institute Injury Schemes Seminar, Gold Coast, 10–12 November 2013) 26.

12 Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality after Family Violence—Report on the Stepping Stones Project* (Women's Legal Service Victoria, 2015) 56.

for victims of family violence must also be accompanied by awareness raising, to ensure family violence victims are aware of their entitlements under the Act.<sup>13</sup>

- 12.17 Similarly, research conducted by the Victims Support Agency in relation to a broader cohort of victims found a general lack of awareness and understanding of VOCAT and the process, even among victims who had been through the VOCAT process.<sup>14</sup> Some participants were unaware of VOCAT as a separate legal entity, referring to the process and assistance provided as being provided by 'Victims of Crime'.<sup>15</sup> Many participants in the Victims Support Agency research stated there was a lack of public awareness of VOCAT and as a consequence considered it likely that many victims would be missing out on assistance. Some described learning about VOCAT themselves only 'by chance'.<sup>16</sup>
- 12.18 Research by Whittlesea Community Legal Service in 2011 also found a lack of awareness among victims regarding financial assistance available through VOCAT.<sup>17</sup>
- 12.19 During preliminary consultations, the Commission was told that it did not seem to be a core part of any agency's role to inform victims about VOCAT or to provide written information or referrals.
- 12.20 In an analysis of Australian victim compensation schemes, Betty Chan et al conceded that only a small proportion of victims pursue support from a victim compensation scheme. One reason provided was victims' lack of awareness of the schemes.<sup>18</sup>
- 12.21 Issues relating to awareness of compensation schemes are not unique to Victoria. Similar issues were identified during the United Kingdom's examination of the Criminal Injuries Compensation Authority as part of its Independent Inquiry into Child Sexual Abuse, a similar inquiry to Australia's Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse. A 2017 report of the Independent Inquiry found that because the UK scheme is not well publicised, many victims/survivors are simply unaware of its existence.<sup>19</sup>
- 12.22 Furthermore, a 2008 study in the United States found general under-utilisation of victim compensation schemes. The study piloted active outreach to improve access to victim compensation. Active outreach through a trauma recovery service was found to increase the overall proportion of victims applying for compensation.<sup>20</sup> Of the sample group provided with active outreach and support to submit an application, only three per cent did not submit a financial assistance application.<sup>21</sup>
- 12.23 Research also indicates that a lack of awareness might not be the only barrier for victims to accessing the scheme. Some victims may be hesitant to apply to VOCAT out of fear they will be viewed as attempting to 'profit' from their victimisation:

the pressure to be a worthy and deserving victim and to not appear demanding or expectant had significant effect on some [victims'] comfort in applying for, or receiving, compensation ... while compensation may be available through [VOCAT], it is not necessarily considered accessible from the perspective of all victim/survivors. This could result in some victim/survivors being discouraged from applying ...<sup>22</sup>

13 Ibid.

14 Victims Support Agency, Department of Justice and Regulation (Vic), *Counselling for Victims of Crime* (2011) 57–8.

15 Ibid 57.

16 Ibid 58.

17 Whittlesea Community Legal Service, *Victims of Crime Assistance Tribunal Capacity Building Project*, Discussion Paper (Whittlesea Community Connections, 2011) 32.

18 Betty Chan et al, 'Support and Compensation: Lessons from Victims of Crime' (Paper presented at the Actuaries Institute Injury Schemes Seminar, Gold Coast, 10–12 November 2013) 17.

19 Independent Inquiry into Child Sexual Abuse (United Kingdom), *Criminal Compensation Issues Paper: A Summary of the Themes Raised by Respondents* (2017) 4.

20 Jennifer Alvidrez et al, 'Reduction of State Victim Compensation Disparities in Disadvantaged Crime Victims through Active Outreach and Assistance: A Randomized Trial' 98(5) *American Journal of Public Health* 882, 886.

21 Ibid.

22 Hayley Catherine Clark, *A Fair Way to Go: Criminal Justice for Victim/Survivors of Sexual Assault* (PhD Thesis, University of Melbourne, 2011) 114.

- 12.24 Other victims might be aware of the scheme, but not consider themselves eligible. For example, the Victorian Royal Commission into Family Violence found that some victims were unaware of their eligibility for assistance on the basis of family violence.<sup>23</sup> One victim provided evidence indicating that she had only discovered that she could make an application as a victim of family violence after she had applied to VOCAT as a victim of an unrelated sexual assault matter.<sup>24</sup> Service providers also submitted to the Royal Commission into Family Violence that VOCAT was underused by victims of family violence.<sup>25</sup>

## Accessibility of the scheme and VOCAT

- 12.25 The Act has been described as ‘complex and difficult for victims to understand’.<sup>26</sup> A victim’s experience of VOCAT is therefore likely to be enhanced by victim support and the availability of legal representation.<sup>27</sup>
- 12.26 VOCAT has emphasised its close links with support agencies.<sup>28</sup> However, these support mechanisms are not integrated with VOCAT and so victims have to access multiple services.

## VOCAT as part of the legal system

- 12.27 During preliminary consultations the Commission was told that victims are unlikely to navigate the VOCAT system without a lawyer. This was described as a barrier because some victims are not able to access a lawyer. The Commission was also told that sometimes lawyers will not take on VOCAT-related work because the legal costs awarded are too low given the amount of work often required.
- 12.28 Research by the Victims Support Agency found that some victims experienced difficulty securing a solicitor who would take on their VOCAT application, particularly in regional areas, while others who could find a solicitor found them difficult to deal with, non-communicative, difficult to contact, dismissive, insensitive, and only interested in money.<sup>29</sup>
- 12.29 Accessibility issues have also been linked to the legalistic nature of the VOCAT processes:
- The most common problems with the process of obtaining counselling through VOCAT can broadly be associated with the need to comply with the requirements of a legal system ... includ[ing] reluctance by some counsellors to engage with the VOCAT process, time-consuming trips to solicitors, difficulty in obtaining documentation and delays in obtaining [VOCAT-funded] counselling once it had been awarded.<sup>30</sup>
- 12.30 Some academics have suggested that VOCAT’s accessibility is limited because it is part of the justice system rather than the victim support system. Clarke notes that victims can be discouraged from accessing the justice system because they perceive it as detrimental to their wellbeing. As a result, Clarke considers that there should be ‘a greater separation of compensation schemes from the criminal justice system ... [to] provide a more encouraging and accessible service for victim/survivors’.<sup>31</sup>

23 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 4, 81.

24 Ibid.

25 Ibid.

26 Department of Justice (Vic), *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*, Discussion Paper (2009) 18.

27 Ibid.

28 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 21.

29 Victims Support Agency, Department of Justice and Regulation (Vic), *Counselling for Victims of Crime* (2011) 39.

30 Ibid 59.

31 Hayley Catherine Clark, *A Fair Way to Go: Criminal Justice for Victim/Survivors of Sexual Assault* (PhD Thesis, University of Melbourne, 2011) 119.

## The VOCAT application form and requirements

- 12.31 The Commission was also told during preliminary consultations that the documentation requested by VOCAT to support an application can be overwhelming for victims, who therefore need the help of lawyers.
- 12.32 The application requirements were detailed in Chapter 10 of this paper where it was noted that significant documentation is expected to be filed in relation to each type of expense claimed, in addition to the completed statement of claim form.<sup>32</sup>
- 12.33 It was also suggested that the VOCAT application form was not ‘victim-friendly’, and not written in plain English. Moreover, the Commission was told that the form did not recognise all victim experiences. For example, the form is tailored towards victims of a one-off act of violence; uses singular language, such as ‘what was the act of violence/offence?’; and leaves a small space for the applicant to answer. It also asks for the ‘date of the act of violence’ and has a section for the time at which the act occurred. Although the form provides an option for entering a span of dates, it also requires the applicant to insert a start and end date. The ‘reporting details’ section asks singular questions, such as the date of the report and the police officer’s name.
- 12.34 It is possible that these features of the form make it difficult for victims of certain types of crime to complete. Some victims, such as victims of historical child sexual assault or family violence, may be making an application for a series of acts that occurred over a long period of time, with no clear beginning or end, and which may have been reported multiple times to different police officers.
- 12.35 Concerns with the VOCAT application form were also raised in Victims Support Agency research. A victim of historical childhood sexual assault said the application form was not suitable for sexual assault victims, stating: ‘[the VOCAT form] needs to be very friendly. It was too black and white and it was like everyone fits into the same box, and no one fits into the same box.’<sup>33</sup>
- 12.36 The VOCAT application form can be contrasted with the form for victim impact statements produced by the Department of Justice and Regulation. While the victim impact statement form is also a legal form, being a statutory declaration submitted to the court during the sentencing phase of a criminal trial, it has been designed by the Victims Support Agency to provide more guidance, information and space for a victim to convey their story in a more sensitive and victim-friendly way.<sup>34</sup> Similar ‘victim-friendly’ information has also been used by the Office of Public Prosecutions in relation to victim and family member reports under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).<sup>35</sup>
- 12.37 During preliminary consultations the Commission was also told that there is a lack of information about VOCAT in accessible formats and in languages other than English. However, the Commission notes that a number of VOCAT’s publications have been translated into languages other than English and are available on the VOCAT website.<sup>36</sup>

32 Victims of Crime Assistance Tribunal, *Supporting Documentation* (2016) <[www.vocat.vic.gov.au/determining-application/supporting-documentation](http://www.vocat.vic.gov.au/determining-application/supporting-documentation)>.

33 Victims Support Agency, Department of Justice and Regulation (Vic), *Counselling for Victims of Crime* (2011) 33.

34 Victims Support Agency, Department of Justice and Regulation (Vic), *Guide to Victim Impact Statements* (2015) (brochure).

35 Office of Public Prosecutions (Vic), *Victim or Family Member Report Form* (2012) (brochure).

36 Victims of Crime Assistance Tribunal, *Translated Publications* (2016) <[www.vocat.vic.gov.au/publications/translated\\_publications](http://www.vocat.vic.gov.au/publications/translated_publications)>.

## Discussion and options for reform

12.38 Options to address issues associated with victims' awareness of and access to VOCAT are set out below, along with specific questions for consideration.

### Combining victim support and the financial assistance scheme

- 12.39 One option to improve crime victims' awareness of and access to the scheme is to combine the financial assistance scheme provided under the Act and through VOCAT with the existing victim support scheme administered by the Department of Justice and Regulation, including:
- the Victims of Crime Helpline
  - the Victims Assistance Program (VAP)
  - the Victims Register
  - the Prisoner Compensation Quarantine Fund
  - the Child Witness Service.<sup>37</sup>
- 12.40 The establishment of a financial assistance scheme within Victoria's existing victim support structure could follow a similar structure to that adopted in other Australian jurisdictions. This model was suggested for consideration by the Royal Commission into Family Violence.<sup>38</sup>
- 12.41 For example, Victims Services New South Wales allocates a victims support coordinator to develop a tailored plan and care package for victims. Part of this care package may include financial assistance for immediate needs and economic loss, as well as a recognition payment, which is similar to Victoria's award for special financial assistance.<sup>39</sup> Victims are advised that they do not need a lawyer, as their allocated support coordinator will assist with their claim and Victims Services can obtain police reports, court papers and medical records on a victim's behalf with their consent.<sup>40</sup>
- 12.42 Similarly, in the Australian Capital Territory, Victim Support ACT administers the financial assistance scheme as well as delivering victim case management. Clients registered for case management receive services such as assessment, court support, advocacy and therapeutic services.<sup>41</sup> Victim Support ACT processes applications for financial assistance and the Victims of Crime Commissioner, the head of Victim Support ACT, is the final decision maker.<sup>42</sup> This is a new model, introduced in July 2016. Victim Support ACT has stated that the new scheme has reduced barriers for victims by separating the process from the court system and reducing reliance on lawyers.<sup>43</sup>
- 12.43 In a combined victim support and financial assistance scheme, a single service delivers all the components of victim support, reducing reliance on referral pathways. This means victims are assessed for financial assistance automatically as a component of victim support and so are made aware of their financial assistance options. Such a model may also address some of the concerns raised above that some victims may be hesitant to apply for financial assistance because of the potential stigma associated with seeking compensation.
- 12.44 A combined model could also ensure that financial assistance would be delivered as part of victim services, bound by the principles of the *Victims' Charter Act 2006* (Vic). The Victims' Charter Act only applies to investigatory, prosecutorial or victim services agencies

37 Victims Support Agency, Department of Justice and Regulation (Vic), *Victims Support Agency* (2017) <[www.victimsofcrime.vic.gov.au/](http://www.victimsofcrime.vic.gov.au/)>.  
38 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 4, 86. See also Appendix B for combined victim support and financial assistance scheme models in other Australian jurisdictions.

39 Victims Services, Department of Attorney General and Justice (NSW), *The New Victims Support Scheme: A Detailed Guide* (2013) 3.  
40 Ibid 11.

41 Victim Support (ACT), *Annual Report 2015–16* (2016) 14.

42 Victim Support (ACT), *Frequently Asked Questions* (2016) <[www.victimsupport.act.gov.au/financial-assistance-scheme/new-financial-assistance-scheme-1-july-2016/](http://www.victimsupport.act.gov.au/financial-assistance-scheme/new-financial-assistance-scheme-1-july-2016/)>.

43 Victim Support (ACT), *Annual Report 2015–16* (2016) 29.

and therefore, VOCAT is not bound to provide clear, timely and consistent information about victims' rights and entitlements the same way victim services are.<sup>44</sup>

- 12.45 An alternative option could be to introduce a hybrid administrative and judicial system. For example, the victim support system could administer payments for expenses incurred or reasonably likely to be incurred for counselling, medical expenses, loss of earnings, funeral expenses and other reasonable expenses to assist with recovery from crime.
- 12.46 However, the provision of special financial assistance—sometimes referred to as a 'recognition payment' in other jurisdictions—could still be administered judicially.
- 12.47 This hybrid model might improve awareness and accessibility for many more victims, as their case workers would be able to automatically and directly link their case planning and service provision to entitlements for expenses incurred under the scheme. However, preserving judicial decision making for recognition payments would also enable victims to receive the recognition and acknowledgment implicit in judicial decision making. These considerations are discussed further in Chapter 15.
- 12.48 Embedding financial assistance for expenses related to recovery within the victim support system would also mirror the current system for the provision of family violence flexible support packages (FSPs). Specialist family violence services administer flexible support packages to assist victims to escape violence, and enable family violence services to access funds to provide victims with urgent and critical support tailored to their specific needs.<sup>45</sup> Flexible support packages can be made up to \$7000, with an average cost of \$3000.<sup>46</sup>
- 12.49 Case managers can seek assistance under a number of categories, including:
- freedom from abuse and violence (which can include purchasing mobile phones, alarms or installing CCTV)
  - suitable and stable housing (funding travel costs, relocation costs, whitegoods, mortgage payments, utility bills)
  - physical and mental wellbeing (funding disability aids and covering pharmaceutical costs)
  - alcohol and other drugs counselling
  - family violence counselling
  - participation in learning and education activities (funding TAFE or university including books and equipment) or participation in the workforce (purchasing clothing, uniforms or travel support)
  - financial security and independence (payment of debts or financial services)
  - legal and court costs
  - support for social engagement, connection with culture and identity (funding a travel card, car repairs, driving lessons or cultural activities).<sup>47</sup>
- 12.50 The framework for FSPs requires case managers to identify the ways in which the packages will support the long-term health and wellbeing of the victim. As FSPs are administered by community agencies via a case management approach, and agencies are not bound by legislation like VOCAT, packages can be approved in approximately 14 days.<sup>48</sup>

44 *Victims' Charter Act 2006* (Vic) s 18.

45 Department of Health and Human Services (Vic), *Program Requirements for the Delivery of Family Violence Flexible Support Packages* (2016) 1; Women's Health West, *Annual Report 2015–16* (2016) 24.

46 Department of Health and Human Services (Vic), *Program Requirements for the Delivery of Family Violence Flexible Support Packages* (2016) 1.

47 Eastern Domestic Violence Service, *Family Violence Flexible Support Packages Application Form* (2017).

48 *Ibid.*

- 12.51 Unlike the current victim support system, family violence victims do not need to access this financial assistance via a separate agency—their case worker can apply for the assistance on their behalf.

## Questions

- 55 How do victims learn about the availability of VOCAT? When, how and by whom should victims be informed of their potential eligibility under the Act?
- 56 Should the provision of state-funded financial assistance be integrated with victim support services? If so, how should financial assistance be integrated with victim support?

### Reducing reliance on lawyers

- 12.52 The supplementary terms of reference require the Commission to consider how victims can quickly and easily access the assistance offered by the scheme without necessarily requiring legal support.
- 12.53 VOCAT can be difficult for victims to access without a lawyer to help navigate the scheme.<sup>49</sup> Legal representation often enhances a victim's access to support. However, it can be difficult for some victims to access a lawyer, particularly in rural and remote areas. In addition, victims' experiences of lawyers vary, with some victims describing lawyers they have engaged to assist with VOCAT applications as non-communicative, difficult to contact, dismissive or insensitive.<sup>50</sup>
- 12.54 The need for legal representation significantly increases the costs of a financial assistance scheme. For example, in 2015–16, \$4,937,677 for legal costs was awarded, an average of \$1187 per awarded applicant.<sup>51</sup> As noted in Chapter 6, during preliminary consultations the Commission was told that the legal costs awarded can be more than the amount of the award given to the victim.
- 12.55 Combined administrative victim support and financial assistance schemes as outlined above can reduce reliance on lawyers. For example, in New South Wales, victims are advised that they do not need a lawyer, as their allocated support coordinator will assist with their claim and Victims Services can obtain police reports, court papers and medical records with a victim's consent.<sup>52</sup>
- 12.56 However, this approach, which sees a reduced reliance on lawyers, is not universally supported in New South Wales. When the New South Wales scheme was tribunal-based, around 70 per cent of applicants were legally represented. Upon introduction of the combined victim support/financial assistance scheme, this figure reduced to approximately five per cent.<sup>53</sup>
- 12.57 Community Legal Centres NSW submitted to the 2012 review of New South Wales' scheme that victims are 'best served by having legal representation in a claim for compensation' and that: 'legal practitioners are best placed to provide assistance with framing and drafting the victims compensation application and submission'.<sup>54</sup> It was submitted that legal representation is particularly crucial for complex matters such as

49 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 136 [13.17].

50 Victims Support Agency, Department of Justice and Regulation (Vic), *Counselling for Victims of Crime* (2011) 38.

51 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 59.

52 Victims Services, Department of Attorney General and Justice (NSW), *The New Victims Support Scheme: A Detailed Guide* (2013) 11.

53 Community Legal Centres NSW, Submission to New South Wales Department of Justice, *Review of the Victims Rights and Support Act*, 29 July 2016, 5.

54 Community Legal Centres NSW, *Submission to New South Wales Department of Attorney General and Justice, Review of NSW's Victims Compensation Scheme*, 30 April 2012, 41.

applications relating to domestic violence, sexual assault and child sexual assault.<sup>55</sup> It was also submitted that legal representation is vital to advise victims of their right to review or appeal a decision.<sup>56</sup>

- 12.58 Furthermore, in a recent submission to the current statutory review of the New South Wales scheme, Community Legal Centres NSW submitted that it was ‘a conflict of interest for staff from the agency that ultimately determines whether or not victims support is awarded to assist a victim in making such an application’.<sup>57</sup>
- 12.59 Similarly, research conducted by Whittlesea Community Legal Service in Victoria found that briefing experienced counsel for VOCAT matters can result in increased awards for special financial assistance.<sup>58</sup>

## Question

- 57 Is the VOCAT system easy to navigate without legal representation? If not, why? Should the system be changed to make it more accessible for victims without legal representation? If so, what changes should be made to the Act and/or VOCAT processes?

### Providing victim-friendly and accessible information

- 12.60 Another option for reform is to review the suite of forms and information for victims making an application to VOCAT to improve their accessibility. This alone could help reduce reliance on lawyers, as victims may feel more able to pursue an application on their own, or with help from their family, friends or a support worker.
- 12.61 This option would involve reviewing the current application form to make it more accessible for all victims, including victims of family violence and sexual assault, as well as other crimes that may involve multiple acts of violence perpetrated over time.
- 12.62 The application form could be reviewed to better capture the experiences of a broader range of victims. It could use more victim-centred and victim-friendly design principles, similar to those used by the Victim Support Agency and the Office of Public Prosecutions in their forms and applications for victim impact statements, or the Crimes (Mental Impairment and Unfitness to be Tried) Act form and guide for family members.
- 12.63 Forms and information could be rewritten in plain English and made available in a broader range of languages other than English.

## Question

- 58 Is there a need to make VOCAT more accessible for victims? If so, what changes should be made to the Act and/or VOCAT processes to make VOCAT more accessible for victims, including those speaking languages other than English?

55 Ibid 42.

56 Ibid 43.

57 Community Legal Centres NSW, Submission to New South Wales Department of Justice, *Review of the Victims Rights and Support Act*, 29 July 2016, 6.

58 Whittlesea Community Legal Service, *Victims of Crime Assistance Tribunal Capacity Building Project*, Discussion Paper (Whittlesea Community Connections, 2011) 60.

## PART THREE: IS THERE A NEED FOR BROADER REFORM?

# The needs of victims of crime

- 176 Introduction to Part Three
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- 177 Understanding the impacts of crime on victims
- 178 What are victim needs?
- 179 When is financial assistance most useful?

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## 13. The needs of victims of crime

### Introduction to Part Three

- 13.1 Part Three of this paper addresses broader questions in relation to the existing *Victims of Crime Assistance Act 1996* (Vic) and scheme. In particular, as required by the supplementary terms of reference, this part considers whether other models would more effectively deliver assistance to victims of crime, such as an administrative or quasi-administrative model.
- 13.2 Consistent with the *Victims' Charter Act 2006* (Vic), Chapter 13 considers that victim needs should be at the centre of any evaluation of how a state-funded financial assistance scheme should operate. Chapter 13 considers the impact of crime on victims, the needs of victims of crime following an act of violence, and the importance of financial assistance as a component of victim support. Chapter 13 therefore places victim needs at the centre of any consideration of reform.
- 13.3 Consistent with the supplementary terms of reference, Chapters 14 and 15 consider two overarching approaches to reform:
- Approach 1: Reforming the existing scheme
  - Approach 2: Is there a need for a different model?
- 13.4 Chapter 14 is based on approach 1. It considers options to improve the current model and approach through legislative and procedural reform, including possible changes to the Act's eligibility requirements and availability of awards, timelines, symbolic payments, and how the scheme complements other government services to victims of crime.
- 13.5 Chapter 15 is based on approach 2. It considers whether there are other models that would deliver assistance more effectively, for example, through an administrative or quasi-administrative model. Chapter 15 discusses matters including:
- whether financial assistance should be part of victim case management and the victim support system
  - whether a financial assistance scheme should incorporate restorative justice opportunities
  - whether judicial decision making in financial assistance matters is appropriate and sustainable
  - whether financial assistance should be a specialised field.
- 13.6 The Commission raises these options to prompt stakeholder consideration of how the existing scheme could be reformed, as well as what other models might improve outcomes for victims.

## Introduction to Chapter 13

- 13.7 This chapter relates to the one of the objectives stated in the supplementary terms of reference—that a state-funded financial assistance scheme for victims should seek to achieve outcomes for victims that minimise trauma for victims and maximise the therapeutic effect for victims.
- 13.8 In order to understand how a state-funded financial assistance scheme can minimise trauma and maximise therapeutic effect, this chapter considers:
- the impact of crime on victims
  - the needs of victims of crime following an act of violence
  - the importance of financial assistance as a component of victim support.
- 13.9 This chapter does not consider options for reform, but seeks the views of victims, persons affected, professionals, stakeholders and the community on the impacts of crime on victims, victim needs, and when and how financial assistance is most useful.

## Understanding the impacts of crime on victims

- 13.10 It is important to understand how acts of violence can affect individual victims. The ways victims may be affected influence their broader victim support and financial assistance needs.
- 13.11 Research has emphasised that the impact of crime on victims is a ‘highly individualised experience’ and does not necessarily correspond to the ‘seriousness of the crime based solely on crime type’.<sup>1</sup>
- 13.12 Elaine Wedlock and Jacki Tapley state that victims may have personal or structural vulnerabilities that influence their ability to cope with crime victimisation.<sup>2</sup> Experiences of victimisation can be influenced by a broad range of factors including age, gender, ethnicity, socio-economic status, health, crime types, relationship with the perpetrator and a victim’s past experiences of the justice system.<sup>3</sup>
- 13.13 Nonetheless, there are some common effects of crime for all victims. Although the impacts of crime may vary depending on a victim’s individual characteristics, an emotional and psychological reaction occurs in most victims.<sup>4</sup> Common psychological and emotional reactions may include feelings of guilt, fear, anger, sadness, confusion and helplessness.<sup>5</sup> Day-to-day activities can be affected by lack of sleep, anxiousness, and headaches, and can result in withdrawal from other people and activities, trouble with concentration and reduced performance at work or school.<sup>6</sup>
- 13.14 Compared with victims of financial and property crimes, victims of serious or violent offences may experience higher levels of emotional stress, as well as physical, psychological and social impacts, and for longer.<sup>7</sup>
- 13.15 Certain types of crime, or certain individual characteristics of victims, or a combination of both, may correlate with specific adverse effects. For example, as discussed in the Commission’s consultation paper *Family Violence and the Victims of Crime Assistance Act 1996* (the first consultation paper), family violence has specific effects on infant and child

1 Elaine Wedlock and Jacki Tapley, *What Works in Supporting Victims of Crime: A Rapid Evidence Assessment* (Victims’ Commissioner and University of Portsmouth, 2016) 8.

2 Ibid.

3 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Information Paper 2: Who Are Victims of Crime and What Are Their Criminal Justice Needs and Experiences? (2015) 4.

4 Ibid.

5 Victims Support Agency, Department of Justice and Regulation (Vic), *The Effects of Crime* (2017) <[www.victimsofcrime.vic.gov.au/home/the+crime/the+effects+of+crime/](http://www.victimsofcrime.vic.gov.au/home/the+crime/the+effects+of+crime/)>.

6 Ibid.

7 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Information Paper 2: Who Are Victims of Crime and What Are Their Criminal Justice Needs and Experiences? (2015) 4.

victims, including adverse effects on unborn children whose mother may be experiencing elevated levels of stress as a result of family violence.<sup>8</sup>

## What are victim needs?

- 13.16 Consistent with the *Victims' Charter Act 2006* (Vic) (the Victims Charter), victim needs should be at the centre of any consideration of how a state-funded financial assistance scheme should operate. In particular, and as per the Victims Charter, a state-funded financial assistance scheme must 'take into account, and be responsive to, the particular needs of persons adversely affected by crime'.<sup>9</sup>
- 13.17 Elaine Wedlock and Jacki Tapley have emphasised that victims' personal characteristics, experiences and social interactions 'impact on [victims'] abilities to cope with victimisation, depending on their vulnerability and resilience, which in turn influences the type of support required'.<sup>10</sup> Victim needs may also vary depending on crime type.<sup>11</sup>
- 13.18 As a consequence, victims' needs are variable<sup>12</sup> and can change over time.<sup>13</sup> In the immediate aftermath of a crime, a victim may need help in making sure a home is safe and secure, while other needs are longer-term, such as reparation by the offender.<sup>14</sup>
- 13.19 Nonetheless, access to compensation, or financial assistance, has been articulated as a basic victim need:
- all victims have a range of needs in the aftermath of a crime and during the judicial process that follows ... the need to be recognised and treated with respect and dignity; the need to be protected; the need to be supported; the need to access justice; and the need for compensation and restoration.<sup>15</sup>
- 13.20 Consequently, international instruments have recognised the rights of victims of crime to receive assistance and compensation. For example, in 1985, the United Nations General Assembly adopted the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.<sup>16</sup> This Declaration provides that 'victims should receive the necessary material, medical, psychological, and social assistance through governmental, voluntary, community-based and indigenous means'.<sup>17</sup>
- 13.21 David Miers suggests that victims require material reparation, including compensation and restitution, as well as immaterial reparation, like an apology.<sup>18</sup> This is in addition to the varied information, support and justice needs that a victim may require.<sup>19</sup>
- 13.22 Accordingly, there is no single aspect of victim support—whether financial, practical or psychological—which will meet all victims' needs. As Wedlock and Tapley have emphasised, it is important that victim services and supports are flexible:

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8 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 18 [3.16].

9 *Victims' Charter Act 2006* (Vic) s 6(2).

10 Elaine Wedlock and Jacki Tapley, *What Works in Supporting Victims of Crime: A Rapid Evidence Assessment* (Victims' Commissioner and University of Portsmouth, 2016) 10.

11 Betty Chan et al, 'Support and Compensation: Lessons from Victims of Crime' (Paper presented at the Actuaries Institute Injury Schemes Seminar, Gold Coast, 10–12 November 2013) 24.

12 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Information Paper 2: Who Are Victims of Crime and What Are Their Criminal Justice Needs and Experiences? (2015) 4.

13 Australian Institute of Family Studies, *Victim/Survivor-focused Justice Responses and Reforms to Criminal Court Practice: Implementation, Current Practice and Future Directions*, Research Report No 27 (2014) <<https://aifs.gov.au/publications/victim-survivor-focused-justice-responses-and-reforms-cri/4-mapping-justice-needs>>.

14 Annemarie ten Boom and Karlijn F Kuijpers, 'Victims' Needs as Basic Human Needs' (2012) 18(2) *International Review of Victimology*, 155, 164–5.

15 Viviane Reding, 'Putting Victims First—Better Protection and Support for Victims of Crime' (Paper presented at Victims of Crime in the EU—The Post-Lisbon Legislative Agenda, Trier, 9 June 2011) 3, 3.

16 *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, 95th plen mtg, UN Doc A/RES/40/34 (29 November 1985).

17 *Ibid* [14].

18 David Miers, 'Offender and State Compensation for Victims of Crime: Two Decades of Development and Change' (2014) 20(1) *International Review of Victimology* 145, 148.

19 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Information Paper 2: Who Are Victims of Crime and What Are Their Criminal Justice Needs and Experiences? (2015) 12–25.

Acknowledging that everyone experiences victimisation differently emphasises the need for a range of support services that offer accessible and flexible services, so that the right interventions can be offered to those who want them at a time when they need them most.<sup>20</sup>

- 13.23 In Victoria, this need for flexibility has been incorporated into the Victim Support Agency's *Standards for the Provision of Services to Victims of Crime in Victoria*: 'victims of violent crime have a range of needs which may include health and counselling, information, practical support and advocacy when interacting with police, courts and legal processes.'<sup>21</sup> The Standards emphasise the importance of information, receipt of a timely and prompt response by victim services and access to flexible support.<sup>22</sup>
- 13.24 As victims' needs are variable and changeable, it is suggested that the provision of support, including state-funded financial assistance, should be flexible. Systems that are rigid and inflexible may fail to meet the varied and changing needs of victims.

### When is financial assistance most useful?

- 13.25 Determining when, and how, state-funded financial assistance is most useful will vary depending on a victim's personal factors—age, gender, ethnicity, social-economic status and health—in addition to the type of crime of which they are a victim. For example, victims of childhood sexual assault perpetrated by a family member are likely to have different needs, and at different times, to the victim of a 'random' assault by a stranger. Both victims have experienced an act of violence but because the characteristics of their victimisation are so different, it is likely that their needs will vary over time.<sup>23</sup>
- 13.26 Experiences in Victoria and other jurisdictions indicate that some victims require urgent financial assistance as a priority. For example, victims of family violence often require urgent financial assistance to enable them to relocate or to implement home security.<sup>24</sup>
- 13.27 During preliminary consultations the Commission was told that financial assistance is most effective when it is able to be used as a 're-establishment fund' assisting a victim to begin rebuilding their life.<sup>25</sup>
- 13.28 The New South Wales review preceding the introduction of a new financial assistance scheme in 2013 identified the importance of 'providing a flexible range of supports for victims depending on their individual circumstances'.<sup>26</sup>
- 13.29 The New South Wales scheme now provides victim support according to four 'pillars' of support. Each pillar involves some form of financial assistance. However, the financial assistance available under each pillar is for a different purpose and is likely to occur at different stages in the victim's recovery journey:
- The first pillar involves financial assistance to cover the reasonable costs of counselling. This might be needed at different times.
  - The second pillar relates to urgent financial assistance to meet immediate needs, such as relocation costs, security upgrades and crime scene clean-up, that are unlikely to be needed after the initial crisis stage.

20 Elaine Wedlock and Jacki Tapley, *What Works in Supporting Victims of Crime: A Rapid Evidence Assessment* (Victims' Commissioner and University of Portsmouth, 2016) 10.

21 Victims Support Agency, Department of Justice and Regulation (Vic), *Standards for the Provision of Services to Victims of Crime in Victoria* (2011) 5.

22 Ibid 10–25.

23 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Information Paper 2: Who Are Victims of Crime and What Are Their Criminal Justice Needs and Experiences? (2015) 4.

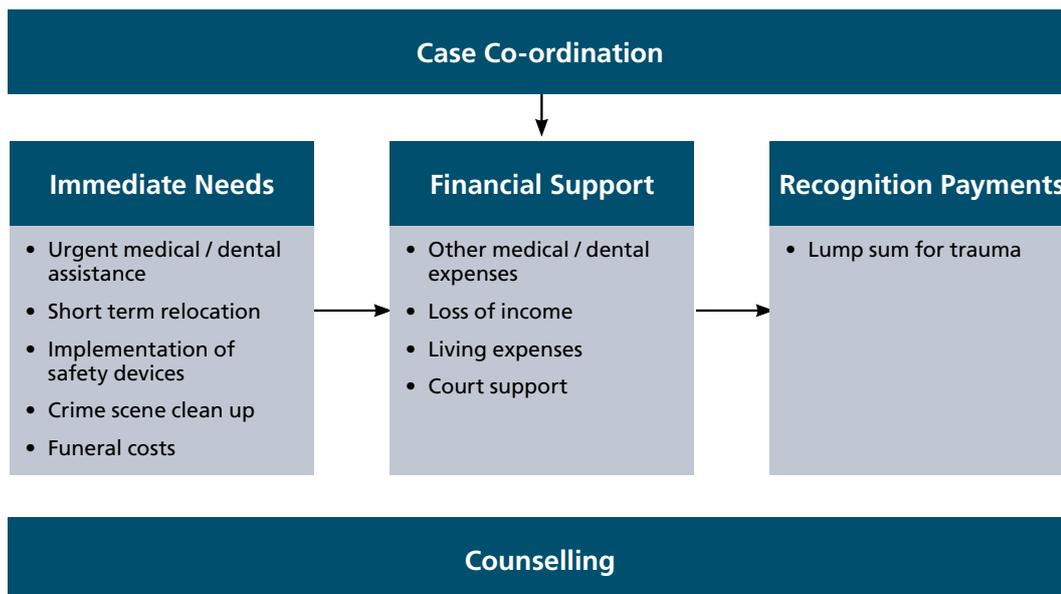
24 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 120–1 [11.55]–[11.56].

25 Ibid 156 [15.67].

26 Betty Chan et al, 'Support and Compensation: Lessons from Victims of Crime' (Paper presented at the Actuaries Institute Injury Schemes Seminar, Gold Coast, 10–12 November 2013) 25.

- The third pillar, financial support, may continue to be needed at different stages as it relates to a number of out-of-pocket expenses that may not be as time-dependent, such as loss of earnings, medical or dental expenses and justice expenses such as the costs of having to attend court.
- The final pillar, recognition payment, exists as a recognition of the violence suffered. This is similar to Victoria’s special financial assistance payments.<sup>27</sup>

13.30 The four pillars are underpinned by case co-ordination through victim support services, as represented below in Figure 3.



**Figure 3: Key Benefit Design for Victim Schemes<sup>28</sup>**

13.31 Having regard to the discussion above, the Commission seeks the views of victims, persons affected, professionals, stakeholders and the community on the impacts of crime on victims, victim needs and when financial assistance is most useful, to inform consideration of options for reform.

## Question

59 Having regard to the impacts of crime on victims, what are victims’ needs and how should they be met through a state-funded financial assistance scheme?

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Department of Attorney General and Justice (NSW), *Review of the Victims Compensation Fund* (PricewaterhouseCoopers Australia, 2012) 6.  
 Betty Chan et al, ‘Support and Compensation: Lessons from Victims of Crime’ (Paper presented at the Actuaries Institute Injury Schemes Seminar, Gold Coast, 10–12 November 2013) 25.

# Approach 1: Reforming the existing scheme

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## 14. Approach 1: Reforming the existing scheme

### Introduction

- 14.1 This chapter outlines broad options to reform the existing state-funded financial assistance scheme.
- 14.2 In doing so, it considers the purpose and objectives of the *Victims of Crime Assistance Act 1996* (Vic) (the Act) and whether they are currently being realised for victims of crime. To inform this discussion, the Victorian Law Reform Commission (the Commission) revisits legislative and procedural matters specified in matters one to eight in the supplementary terms of reference.
- 14.3 This chapter also sets out options for reform and poses questions about how to improve the current scheme through legislative and procedural reform. Other models are discussed in Chapter 15.

### The purpose and objectives of the Act

- 14.4 As stated in section 1(1), the purpose of the Act is to provide assistance to victims of crime. In support of this, section 1(2) of the Act specifies a number of objectives. These are:
- to assist victims to recover from the crime by paying them financial assistance for expenses incurred, or reasonably likely to be incurred as a direct result of the crime<sup>1</sup>
  - 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<sup>2</sup>
  - to allow victims of crime to have recourse to financial assistance where compensation for their injury cannot be obtained from the offender or other sources.<sup>3</sup>
- 14.5 However, section 1(3) states that 'awards of financial assistance (including special financial assistance) to victims of crime are not intended to reflect the level of compensation to which victims of crime may be entitled at common law or otherwise'.
- 14.6 In this context, section 1(4) of the Act also states that the scheme provided by the Act 'is intended to complement other services provided by the state to victims of crime'.

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1 *Victims of Crime Assistance Act 1996* (Vic) 1(2)(a).  
2 *Ibid* s 1(2)(b).  
3 *Ibid* s 1(2)(c).

## Assisting victims recover from crime

- 14.7 As noted above, the first stated objective of the Act is 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’.<sup>4</sup>
- 14.8 State-funded financial assistance can be an important component of support to assist victims of crime to recover. It may enable financial access to health services and encourage victims to access therapeutic services.<sup>5</sup> It can also assist with recovery by providing a route to economic freedom and independence, facilitating a move to another city or providing an opportunity to make a residence safer.<sup>6</sup> For these reasons, Ian Freckelton contends that state-funded financial assistance to victims of crime has a significant public health benefit.<sup>7</sup>
- 14.9 However, for state-funded financial assistance to assist in the recovery of victims, it must operate effectively.<sup>8</sup> As Freckelton writes: ‘It has the potential to be therapeutic if done promptly, sensitively and accompanied by a clear message that the recipient of the compensation was not at fault for having been victimised.’<sup>9</sup>
- 14.10 On the basis of the research and preliminary consultations undertaken by the Commission, it appears that the current scheme may not be assisting victims to recover from crime. Legislative and procedural barriers can make it difficult for the Act to meaningfully assist many victims of crime to recover. These barriers relating to eligibility, time limits, refusal or reduction of awards, adequacy of awards available, flexibility of awards and timeliness are discussed further below.

## Eligibility

- 14.11 As discussed in Chapter 5 of this paper, one of the greatest obstacles to the Act fulfilling its objective of assisting victims of crime to recover appears to be the eligibility criteria, which can prevent some victims from accessing the scheme or can give rise to assistance that falls short of their needs.
- 14.12 The narrowly defined categories of ‘primary victim’, ‘secondary victim’ and ‘related victim’ in the Act exclude a range of people affected by the ripple effects of violent crime, such as certain family members, people who assist primary victims and children who hear or are otherwise exposed to violence but who do not witness it. In addition, the distinction between primary, secondary and related victims has the effect of creating a hierarchy of victimhood, which may not reflect victims’ experiences or account for their needs.
- 14.13 Similarly, the definition of an ‘act of violence’ can also be a barrier for some victims, limiting or preventing them from accessing awards. This includes victims of family violence, child abuse, elder abuse and abuse of people with disability. Some of the most common forms of abuse perpetrated in these contexts are financial and psychological abuse,<sup>10</sup> which often do not constitute an ‘act of violence’ under the Act. Moreover, victims of property offences and some non-contact sexual offences are ineligible, despite the adverse psychological effect that these crimes can have on victims.<sup>11</sup>

4 Ibid s 1(2)(a).

5 Ian Freckelton, ‘Criminal Injuries Compensation: A Cost of Public Health’ (1999) 7 *Journal of Law and Medicine* 193, 203.

6 Christine Forster, ‘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) 32 *University of Western Australia Law Review* 264, 270.

7 See generally Ian Freckelton, ‘Criminal Injuries Compensation: A Cost of Public Health’ (1999) 7 *Journal of Law and Medicine* 193.

8 Ibid. See also generally Christine Forster, ‘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) 32 *University of Western Australia Law Review* 264, 264.

9 Ian Freckelton, ‘Criminal Injuries Compensation: A Cost of Public Health’ (1999) 7 *Journal of Law and Medicine* 193, 193.

10 See, eg, Australian Law Reform Commission, *Elder Abuse—A National Legal Response*, Report No 131 (2017) 42–3; Australian Institute of Health and Welfare, *Child Protection Australia 2015–16*, Child Welfare Series No 66 (2017) 22; Family and Community Development Committee, Parliament of Victoria, *Inquiry into Abuse in Disability Services: Final Report* (2016) 12–13 [1.1.4].

11 See, eg, Nicola Henry, Anastasia Powell and Asher Flynn, *Not Just ‘Revenge Pornography’: Australians’ Experiences of Image-Based Abuse*, Summary Report (RMIT University, 2017) 5, discussing distress suffered by victims of image-based sexual abuse. See also Victoria Police, Submission No 26 to Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, 12 October 2015, 31–2, for the psychological effects of property offences on victims.

- 14.14 Even where an offence constitutes an ‘act of violence’ and an applicant falls within one of the defined victim categories, they may still find it difficult to establish that they have suffered an ‘injury’ as defined under the Act. In particular, victims who suffer forms of mental harm that do not constitute a recognised mental illness or disorder may be ineligible for certain awards. Victims of family violence and sexual assault often suffer from diverse forms of harm, such as a reduced sense of self-worth or increased fear or feelings of insecurity. Some applicants, including victims of child abuse and victims of neglect, can encounter difficulties in establishing that their injury was a direct result of an act of violence.

### Time limit

- 14.15 As discussed in Chapter 7, the two-year application time limit can also be a barrier for certain victims, particularly those who may take a longer period of time to identify, disclose or report such acts of violence, such as victims of family violence<sup>12</sup> or sexual assault.<sup>13</sup>
- 14.16 Moreover, even though the Victims of Crime Assistance Tribunal (VOCAT) may grant applications for an extension, the existence of a time limit can be a disincentive for some victims, preventing them from even making an application out of time.

### Refusal and reduction of awards

- 14.17 As discussed in Chapter 8, the Act requires VOCAT to refuse to make an award of assistance if an act of violence was not reported to police within a reasonable time, or if the applicant failed to provide reasonable assistance to police or the prosecution, unless there are ‘special circumstances’.<sup>14</sup>
- 14.18 The requirement that the act of violence be reported to police within a reasonable time can affect the Act’s accessibility for certain groups of victims, such as victims of family violence, sexual assault and child abuse. These groups are less likely to report to police due to fear, shame or economic disadvantage.<sup>15</sup>
- 14.19 Moreover, the requirement to refuse an award to an applicant who has failed to provide ‘reasonable assistance’ may disproportionately affect victims of violence perpetrated by a person who is in a position of power, influence, trust or control over them, including victims of child abuse, family violence and sexual assault. This is because such victims may fear the perpetrator and/or wish or need to maintain their relationship with the perpetrator.
- 14.20 Awards can also be refused or reduced under the Act on a discretionary basis, having regard to a victim’s character, behaviour (including past criminal activity) or attitude, as well as to whether the victim provoked the act of violence, contributed to their own injury through their condition or disposition, or whether the perpetrator will benefit from the award.<sup>16</sup> This may sometimes operate to prevent victims of crime who are genuinely in need from being granted an award. In some situations, a refusal can be a result of character and behaviour considerations unrelated to the act of violence.
- 14.21 Refusal or reduction of an award due to the victim’s conduct, character or behaviour can also disadvantage particular cohorts of victims, who may have a criminal record or drug abuse problems as a result of disadvantage and trauma flowing from previous victimisation experiences.

12 Isabelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse, 2010) 9.

13 Christine Forster, ‘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) 32 *University of Western Australia Law Review* 264, 265.

14 *Victims of Crime Assistance Act 1996* (Vic) s 52.

15 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 104–5 [10.70].

16 *Victims of Crime Assistance Act 1996* (Vic) s 54.

### Adequacy of assistance available

- 14.22 Even where eligibility issues are overcome, the categories and quantum of awards available under the Act may sometimes be inadequate to meet victims' needs. This may detract from the Act's capacity to fulfil its objective of assisting victims to recover from crime.
- 14.23 As discussed in Chapter 6, the Act's treatment of 'related criminal acts' as a single act of violence can disproportionately reduce the awards of victims of family violence, child abuse, elder abuse and abuse of people with disability. For each of these forms of abuse, the abuse is frequently carried out by the same perpetrator, in the same location, and the acts of violence are often of a similar nature.<sup>17</sup> Repeated acts of violence in these contexts are frequently considered to be related. Reduction of awards on this basis may insufficiently address the cumulative harm suffered by victims of a pattern of abuse.<sup>18</sup>
- 14.24 In addition, while the Act enables victims of crime to apply for assistance for recovery expenses, this can only be done in exceptional circumstances.<sup>19</sup> If a victim suffers an injury that is not an 'unusual, special or out of the ordinary' consequence of a particular criminal act, they may not be able to claim an award for recovery expenses. This emphasis on whether a victim's reaction is 'normal' or 'exceptional', rather than on the severity of the act of violence or the harm suffered, means that awards for 'recovery expenses' may not always be awarded to those who need them the most.
- 14.25 Furthermore, the pool of assistance available for related victims and people applying for funeral expenses can unfairly reduce awards.<sup>20</sup>

### Flexibility—variations

- 14.26 Preliminary consultations conducted by the Commission indicated that the process for varying an award is not always smooth, particularly where variations are sought for additional counselling.
- 14.27 The Commission was told that the variation process is not 'victim-centred', as it relies on victims to re-engage lawyers and other professionals to access further assistance. This may be predominantly due to requirements for applicants to file additional paperwork to support a variation application.
- 14.28 The complexity of the variation process can increase delays and limit continuity in services such as counselling. This may adversely affect the extent to which the VOCAT framework assists victims to recover.
- 14.29 Moreover, as noted in the final report of the Victorian Inquiry into the Handling of Child Abuse by Religious and other Non-Government Organisations, *Betrayal of Trust*, the six-year variation window is a problem for victims who may require ongoing support for a longer time, such as victims of child sexual abuse.<sup>21</sup>

### Timeliness of awards

- 14.30 As discussed in Chapter 10, some stakeholders consider delays in the processing of VOCAT applications to be another key barrier, limiting the Act's ability to assist in victims' recovery.

17 See, eg, Christine Forster, 'Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes' (2014) 22 *Journal of Law and Medicine* 188, 199–200, in relation to family violence.

18 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 4, 78.

19 *Victims of Crime Assistance Act 1996* (Vic) ss 8(3), 10A and 13(4).

20 See, eg, Department of Justice and Attorney-General (Qld), *Final Report on the Review of the Victims of Crime Assistance Act 2009* (2015) 16.

21 Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (2013) vol 2, 558.

- 14.31 Currently, supporting documentation requirements and the use of a tribunal-based system mean that it can take a long time for some victims to receive financial assistance under the Act, particularly where their case is complex. This can affect victims' recovery by exacerbating their distress.<sup>22</sup>
- 14.32 These issues of eligibility, time limits, refusal and reduction of awards, timeliness and flexibility raise questions about the extent to which the first stated objective of the Act is being met by the current scheme.

### Symbolic payments to 'certain victims of crime' as recognition

- 14.33 The second stated objective of the Act is 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'.<sup>23</sup>
- 14.34 This section considers who is—or can be—considered 'certain victims' under the Act. It also considers whether the financial assistance available under the Act provides appropriate recognition of the significant adverse effects experienced or suffered by victims of crime.

#### 'Certain victims of crime'

- 14.35 The Act does not define 'certain victims of crime' for the purposes of the second objective in section 1 of the Act.
- 14.36 However, symbolic payments of special financial assistance are only available to primary victims who suffer a significant adverse effect as a direct result of an act of violence.<sup>24</sup> In addition, symbolic awards for distress are only available to related victims.<sup>25</sup> This narrows the meaning of 'certain victims of crime', and limits the payments made under the Act as a symbolic expression of sympathy, condolence and recognition to primary victims who suffer a significant adverse effect, and some related victims suffering distress.
- 14.37 The Victorian Civil and Administrative Tribunal (VCAT) has drawn a connection between the reference to 'certain victims of crime' in section 1 of the Act and the provisions giving rise to refusal or reduction of awards on the basis of the victim's character and conduct.<sup>26</sup> For example, in *Attard v Victims of Crime Assistance Tribunal*,<sup>27</sup> VCAT noted that it would be contrary to the objects of the Act to grant assistance to the deceased victim's partner and daughter because of the deceased victim's contributory conduct leading up to his death and his prior criminal record:
- Having regard to Mr Naboulsi's role in the events that led to his death ... (coupled with his criminal record) it would be an offence to the objectives of the Act to make an award of assistance. Certain victims of crime should be paid financial assistance as a symbolic expression by the state of the community's sympathy and condolences ... however, [the deceased victim was] himself the perpetrator of an act of violence ...<sup>28</sup>
- 14.38 This suggests that, beyond the eligibility criteria for assistance under the Act, the reference in section 1 of the Act to 'certain victims of crime' is connected to the notion of whether a victim is an appropriate recipient of assistance, or is a deserving victim.<sup>29</sup>
- 14.39 The question of whether or not the Act should in fact differentiate between 'deserving' and 'undeserving' victims is explored further below at [14.104]–[14.110].

22 Department of Attorney General and Justice (NSW), *Review of the Victims Compensation Fund* (PricewaterhouseCoopers Australia, 2012) 57.

23 *Victims of Crime Assistance Act 1996* (Vic) s 1(2)(b).

24 *Ibid* s 8A.

25 *Ibid* s 13(2)(c).

26 *Ibid* s 54.

27 [2011] VCAT 2429 (21 December 2011).

28 *Ibid* [24]–[26].

29 David Miers, 'Compensating Deserving Victims of Violent Crime: The Criminal Injuries Compensation Scheme 2012' (2014) 34(2) *Legal Studies* 242, 258.

- 14.40 Having regard to the current provision and its case law application, it appears that the Act is generally fulfilling its objective of restricting financial assistance only to ‘certain victims of crime’— victims of violent crime who do not contribute to the circumstances of victimisation, cooperate with authorities and do not have a criminal history.<sup>30</sup> This is ensured through the operation of the eligibility criteria and the mandatory and discretionary refusal of awards based on the character and behaviours of the applicant as assessed by VOCAT in accordance with sections 52 and 54 of the Act.
- 14.41 However, are these provisions also operating to exclude from assistance some victims who should properly be considered ‘certain victims of crime’?
- 14.42 As the first consultation paper discussed, family violence victims can be adversely impacted by refusal of awards under sections 52 and 54 of the Act. Family violence victims can sometimes be unwilling to cooperate with authorities due to fear of the perpetrator, shame or economic dependency.<sup>31</sup> Furthermore, the particular dynamics of family violence may lead to a view that the victim ‘provoked’ an act of violence.<sup>32</sup>
- 14.43 These barriers can be faced by other vulnerable members of the community such as victims of child sexual abuse,<sup>33</sup> victims who identify as LGBTIQ<sup>34</sup> and Aboriginal and Torres Strait Islanders.<sup>35</sup>
- 14.44 Therefore, if these victims are to be considered ‘certain victims of crime’ for the purposes of the Act, then other legislative barriers, like sections 52 and 54, do currently limit the Act’s ability to fulfil its objective of providing assistance to ‘certain victims of crime’.

#### Do the symbolic payments under the Act adequately recognise the harm suffered by victims?

- 14.45 The main symbolic payment available under the Act is special financial assistance. This is a lump-sum award that is available to primary victims who suffered a significant adverse effect as a direct result of an act of violence.<sup>36</sup>
- 14.46 However, the phrase ‘financial assistance (including special financial assistance) as a symbolic expression’ in section 1(2)(b) suggests that special financial assistance is not the only symbolic payment available under the Act.
- 14.47 Awards to related victims for distress may also be considered to be a symbolic expression of sympathy, condolence and recognition. Indeed, the second reading speech to the Act as originally enacted provides that these awards may ‘be made to acknowledge the distress caused by the death of the victim’.<sup>37</sup> Moreover, VCAT has noted that ‘the legislation does not specifically tie an award for assistance for distress to promoting recovery’.<sup>38</sup> This may suggest that such awards are more connected to the notion of recognition under the Act’s second objective than recovery under the first objective.<sup>39</sup>

30 See, eg, *Tighe v Victims of Crime Assistance Tribunal* [2014] VCAT 1386 (15 October 2014); *Attard v Victims of Crime Assistance Tribunal* [2011] VCAT 2429 (21 December 2011).

31 Christine Forster, ‘Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes’ (2014) 22 *Journal of Law and Medicine* 188, 189.

32 Elena Campbell, *Opportunities for Early Intervention: Bringing Perpetrators of Family Violence into View* (RMIT Centre for Innovative Justice, 2015), 23.

33 Recent research by the Royal Commission into Institutional Responses to Child Sexual Abuse found that for victims aged approximately 11 years at the time of alleged sexual abuse, the average time taken to make a complaint to the Catholic Church was 33 years, see Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Analysis of Claims of Child Sexual Abuse Made with Respect to Catholic Church Institutions in Australia* (2017) 14.

34 Angela Dwyer, ‘Policing Lesbian, Gay, Bisexual and Transgender Young People: a Gap in the Research Literature’ (2011) 22(3) *Current Issues in Criminal Justice* 415, 416, discussing the unwillingness to report to police among LGBTIQ victims of crime. See also Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 5, 145–6, discussing the unwillingness to involve authorities among LGBTIQ victims of family violence.

35 Victims of Crime Assistance Tribunal, *Koori VOCAT List Pilot, Review and Recommendations* (2010) 11, discussing the unwillingness to report to police among Aboriginal and Torres Strait Islander victims of crime.

36 *Victims of Crime Assistance Act 1996* (Vic) s 8A.

37 Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 1996, 1023–7 (Jan Wade, Attorney-General) 1026.

38 *Vita v Victims of Crime Assistance Tribunal* [2000] VCAT 2317 (30 November 2000). See also *Krasauskas v Victims of Crime Assistance Tribunal* (No. 2) [2008] VCAT 1284 [7].

39 However, note that awards to related victims for distress preceded the objectives in the Act, which were introduced by the *Victims of Crime Assistance (Amendment) Act 2000* (Vic).

- 14.48 Accordingly, in reviewing whether the Act is fulfilling its second stated objective, this section considers the adequacy both of payments of special financial assistance to primary victims and distress payments to related victims.

### Is the special financial assistance available appropriate?

- 14.49 The payment of special financial assistance to certain primary victims of crime can be an important way to express the community's sympathy and condolences. As Freckelton writes, 'a tangible manifestation of the state's concern about the harm done to victims of crime also has the potential to facilitate the reintegration into the community of people damaged by the impact of criminally caused trauma'.<sup>40</sup>
- 14.50 However, the special financial assistance available under the Act may not always adequately recognise the harm experienced by some victims of crime.
- 14.51 In particular, the amounts of special financial assistance that victims can be awarded under the Act are lower than in other Australian jurisdictions. In preliminary consultations the Commission was told that the amounts of special financial assistance, especially in relation to Categories C and D, are so low that the costs awarded to an applicant's legal representatives are sometimes higher than the special financial assistance awarded to the applicant. This can detract from the symbolic value of such payments.
- 14.52 Another concern is that the categories of special financial assistance under the Act do not take into account the cumulative effect of persistent and protracted violence, such as family violence.<sup>41</sup> This is because the relevant categories are based on the severity of a single offence, rather than the overall impact of long-term abuse.<sup>42</sup>
- 14.53 Moreover, the 'uplift' provisions may not adequately recognise the vulnerability of certain victims, including child victims, elderly victims, victims with disability and victims of an act of violence perpetrated by someone in a position of power, trust or influence over them.
- 14.54 Without recognition of the impacts of persistent violence and the vulnerability of certain victims, the Act may be limited in its ability to express the community's sympathy and condolences for the harms suffered by certain victims of crime.

### Are the awards for distress for related victims appropriate?

- 14.55 Distress payments can be a useful way to acknowledge the harm suffered by related victims without them having to prove injury or connect the payment to their recovery prospects.<sup>43</sup>
- 14.56 However, it is possible that the symbolic value of awards for distress to related victims is limited by the fact that there is a cap on the assistance available to a pool of related victims.
- 14.57 The total maximum cumulative amount that may be awarded to all the related victims of any one primary victim is \$100,000.<sup>44</sup> This means that the quantum of award to an individual related victim may be significantly reduced if there are multiple related victims eligible in respect of the same act of violence.
- 14.58 Moreover, the total maximum cumulative amount available to a pool of related victims can be reduced by an award made for funeral expenses, even if it was made to someone who was not a related victim.<sup>45</sup> In preliminary consultations the Commission was told that

40 Ian Freckelton, 'Criminal Injuries Compensation: A Cost of Public Health' (1999) 7 *Journal of Law and Medicine* 193, 193.

41 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 4, 78.

42 Women's Legal Service Victoria, Submission No 940 (No 1) to Royal Commission into Family Violence, *Royal Commission into Family Violence*, 19 June 2015, 53.

43 Whittlesea Community Legal Service, *Victims of Crime Assistance Tribunal Best Practice Manual* (Whittlesea Community Connections, 2011) 39–40.

44 *Victims of Crime Assistance Act 1996* (Vic) s 12(1).

45 *Ibid.*

this can operate to significantly decrease the awards received by related victims, due to the rising cost of funeral expenses. Although the pool of assistance can sometimes be exceeded, this can only occur in 'exceptional circumstances'.<sup>46</sup>

- 14.59 Issues with respect to special financial assistance and awards for distress raise questions about the Act's ability to symbolically recognise the harm suffered by victims of crime.

### Recourse to financial assistance where compensation unavailable from other sources

- 14.60 The third stated objective of the Act is to allow victims to have recourse to financial assistance where compensation for the injury cannot be obtained from the offender or other sources.<sup>47</sup>
- 14.61 As discussed in Chapter 2, there are other ways that victims in Victoria can seek compensation or financial assistance following an act of violence. The Act is intended to provide assistance for victims of crime where compensation for their injury cannot be obtained from the offender or other sources.<sup>48</sup>
- 14.62 In support of this objective, the Act therefore expressly provides that where compensation is also obtained from the perpetrator, the person must refund the award.<sup>49</sup> However, where compensation is obtained from another source, VOCAT has a discretion whether or not to require refund of the award.<sup>50</sup>
- 14.63 In further support of this objective, the Act also states '...the making of an award of assistance does not affect the right of a person to recover from any other person, by civil proceedings, or otherwise, any damages, compensation, assistance or payments of any kind'.<sup>51</sup>
- 14.64 The Act also enables a victim to '...assign to the State their right to recover from any other person, by civil proceedings, damages or compensation in respect of the injury or death to which the award relates'.<sup>52</sup>
- 14.65 Money recovered by the state in the exercise of a right assigned to it in accordance with section 51(1) of the Act must be dealt with as follows:
- an amount equal to the expended amount, or the total money recovered if it is less than the expended amount, must be paid into the Consolidated Fund; and
  - the balance, if any, must be paid to the assignor.<sup>53</sup>
- 14.66 The effect of this is that, where money is recovered by the state, the victim only receives the balance after the costs incurred by the state in recovering the monies are paid into the Consolidated Fund.
- 14.67 This 'offender recovery' provision in the Act does not go as far as the provisions in the former *Criminal Injuries Compensation Act 1983* (Vic) which enabled the tribunal established under that Act to order an offender to refund compensation paid on application of the Director of Public Prosecutions.<sup>54</sup>
- 14.68 Victoria's approach under the Act also differs from the approach of other Australian jurisdictions, such as New South Wales, where the Commissioner of Victims' Rights can make a provisional order for restitution against a convicted offender without a victim

46 Ibid s 12(2).

47 Ibid s 1(2)(c). It is noted that awards of financial assistance are not intended to reflect the level of compensation victims may be entitled to at common law: *ibid* s 1(3).

48 Ibid s 1(2)(c).

49 Ibid s 62(1).

50 Ibid s 62(2).

51 Ibid s 61.

52 Ibid s 51(1).

53 Ibid s 51(2).

54 *Criminal Injuries Compensation Act 1983* (Vic) s 27. The effect of this former provision can also be seen in the Transitional Provisions of the current Act, see *Victims of Crime Assistance Act 1996* (Vic) Sch 1 s 8.

assigning their rights.<sup>55</sup> In New South Wales, an order for restitution made against an offender may be enforced by the Commissioner as if it were an order made in civil proceedings against the offender.<sup>56</sup> This is also separate, and in addition to, the offender levy that applies in New South Wales.

- 14.69 Underlying Victoria's approach under the Act is the notion that 'the offender or other state-funded compensation schemes are primarily responsible for compensation of victims'.<sup>57</sup> Indeed, this notion is reflected in the second reading speech to the Act as first enacted, which notes 'wherever practicable convicted offenders [should] make good the harms caused by their crimes by paying compensation for pain and suffering to the victim as assessed by the courts'.<sup>58</sup>
- 14.70 However, in practice VOCAT has often been the only source of compensation for many victims, rather than being a supplement to other forms of compensation.<sup>59</sup> Yet the Act presumes that compensation or financial assistance is available to victims from the offender or other sources.
- 14.71 This may be problematic for some victims of crime for whom it may be impractical or unsafe to pursue other avenues of compensation. This is a particular issue for victims of family violence who may have safety concerns in relation to pursuing compensation from the offender, even where the offender has the financial means to fulfil such obligations. These concerns can also affect victims of sexual assault and victims of child abuse.
- 14.72 In addition, the effectiveness of VOCAT as an alternative way of accessing financial assistance if other options are unavailable is limited by the time limit of two years. This time limit provides a very small window of opportunity for victims to pursue alternative options before turning to VOCAT.

### Is VOCAT an effective alternative option?

- 14.73 Based on the research and preliminary consultation undertaken by the Commission, a range of structural, legislative, procedural and perceived barriers appear to be limiting VOCAT for many victims as an effective alternative option for financial assistance.
- 14.74 There is a lack of awareness among victims regarding financial assistance available through VOCAT.<sup>60</sup> Moreover, some victims may be hesitant to apply to VOCAT out of concern they will be viewed as attempting to 'profit' from their victimisation.<sup>61</sup>
- 14.75 There are also accessibility issues relating to the complexity of the Act, as well as the legalistic nature of the VOCAT process. These complexities mean that victims often need to engage a lawyer in order to navigate the VOCAT process.
- 14.76 In addition, applicants' reliance on legal practitioners is increased by VOCAT's broad discretions, such as in relation to the quantum of special financial assistance,<sup>62</sup> awards to assist recovery in exceptional circumstances<sup>63</sup> and character and behaviour considerations.<sup>64</sup> These discretionary powers, combined with a lack of reported decisions, can result in a lack of transparency. This can cause a high degree of uncertainty as to the outcome of an application and increase applicants' need to engage a lawyer.

55 *Victims Rights and Support Act 2013 (NSW) s 59.*

56 *Ibid s 72.*

57 Department of Justice (Vic), *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*, Discussion Paper (2009) 22.

58 Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 1996, 1024 (Jan Wade, Attorney-General).

59 Department of Justice (Vic), *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*, Discussion Paper (2009) 22.

60 Victims Support Agency, Department of Justice and Regulation (Vic), *Counselling for Victims of Crime* (2011) 57–8. See also Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality after Family Violence—Report on the Stepping Stones Project* (Women's Legal Service Victoria, September 2015) 56; Whittlesea Community Legal Service, *Victims of Crime Assistance Tribunal Capacity Building Project*, Discussion Paper (Whittlesea Community Connections, 2011) 32.

61 Hayley Catherine Clark, *A Fair Way to Go: Criminal Justice for Victim/Survivors of Sexual Assault* (PhD Thesis, University of Melbourne, 2011) 114.

62 The Victims of Crime Assistance Tribunal can determine an award of special financial assistance within the minimum and maximum amounts prescribed for each category: *Victims of Crime Assistance Act s 8A(5).*

63 *Ibid ss 8(3), s 10A and 13(4).*

64 *Ibid s 54.*

- 14.77 The accessibility of VOCAT is also limited by the complexity of the application form and the documentation required. There may be significant costs associated with obtaining the medical and psychological reports required in relation to applications for certain expenses.
- 14.78 VOCAT may also not be the most effective forum for certain victims of crime due to a lack of understanding and training of decision makers in relation to issues such as family violence.<sup>65</sup>
- 14.79 The effectiveness of VOCAT as an alternative option for victims of crime to pursue financial assistance may be limited by delays in the making of awards. These delays can detract from VOCAT's capacity to provide an effective alternative option for victims of crime to access financial assistance.

### Complementing other government services to victims of crime

- 14.80 As expressly noted in the Act, the intention of the Act is to 'complement other services provided by government to victims of crime'.<sup>66</sup>
- 14.81 However, whether the Act and VOCAT complement other government services raises questions about the extent to which victims are required to seek information, support and assistance from different services and agencies which may not be linked effectively.
- 14.82 Moreover, the fact that VOCAT is situated in the legal system, rather than the victim support system, can lead to victims having to navigate a process that is complex and not trauma-informed in order to access financial assistance.

### Links with other government services for victims of crime

- 14.83 Government services for victims of crime aim to be 'victim-centred'.<sup>67</sup> However, accessing or navigating victim support in Victoria is often not straightforward. In particular, victim services are often fragmented and difficult to navigate for those without the time and resources.
- 14.84 As discussed at [2.145], VOCAT sits separately from other victim support services, in the legal system rather than government funded victim services.
- 14.85 The first consultation paper discussed the limited referral pathways between VOCAT and other government services for victims of family violence.<sup>68</sup> For other victims of crime, pathways between government-administered victims' services and VOCAT may be more effective. For example, research demonstrates that the most frequent referral source to VOCAT is through the Victims Assistance Program (VAP) and Centres Against Sexual Assault (CASA) services.<sup>69</sup> Moreover, the VAP also provides help to victims to lodge a VOCAT application<sup>70</sup> and offers support during VOCAT hearings.<sup>71</sup> However, as discussed in Chapter 12, it would appear that only a small percentage of victims are currently accessing VOCAT support.
- 14.86 This may be because victims need to seek VOCAT support separately to other victim support and often need to engage a lawyer. This can break the continuity of support provided by a case manager as part of other government services and is another separate service a victim has to navigate.

65 Ian Freckelton, 'Criminal Injuries Compensation for Domestic Sexual Assault: Obstructing the Oppressed' in Chris Sumner et al (eds), *Victimology* (Australian Institute of Criminology, 1996) 251. For discussion of this in the first consultation paper, see Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 144 [14.35].

66 *Victims of Crime Assistance Act 1996* (Vic) s 1(4).

67 Department of Premier and Cabinet (Vic), *Victim-centred Justice* (2016) <[www.vic.gov.au/familyviolence/our-10-year-plan/transforming-our-approach/victim-survivors-are-safe-and-supported/victim-centred-justice.html](http://www.vic.gov.au/familyviolence/our-10-year-plan/transforming-our-approach/victim-survivors-are-safe-and-supported/victim-centred-justice.html)>.

68 Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 4, 81.

69 Victims Support Agency, Department of Justice and Regulation (Vic) *Counselling for Victims of Crime* (2011) 53.

70 See, eg, Merri Health, *Victims Assistance Program*, <[www.merrihealth.org.au/services/mental-health/victims-assistance-program/](http://www.merrihealth.org.au/services/mental-health/victims-assistance-program/)>.

71 See, eg, Centacare Ballarat, *Victims Assistance Program*, <[www.centacareballarat.org.au/services/victims-assistance/victims-assistance-program/](http://www.centacareballarat.org.au/services/victims-assistance/victims-assistance-program/)>.

- 14.87 The fragmented nature of the system can cause victims frustration.<sup>72</sup> Moreover, accessing support through different forums can result in victims having to repeat their story over and over again,<sup>73</sup> which can be re-traumatising for some victims of crime.
- 14.88 It is possible that VOCAT's location in the legal system is contributing to a fragmented and complicated victim support system, limiting the scheme's ability to meet the third objective of the Act—to complement other government services.

## Question

60 Is the Act achieving its purpose and objectives? If not, in what respects?

## Discussion and options for reform

- 14.89 This section of the paper sets out options for reform. It considers options to improve the current model and approach through legislative and procedural reform, including possible changes to the Act's eligibility requirements and availability of awards, to enable the scheme to better meet the purpose and objectives of the current Act.
- 14.90 This section discusses changes that could be made to the existing scheme, namely the Act and VOCAT, to:
- shift the Act's focus from recovery to support
  - better recognise the appropriate people as victims
  - clarify the purpose and objectives of:
    - financial assistance for expenses incurred or likely to be incurred
    - special financial assistance or recognition payments
  - require offenders to contribute to state-funded financial assistance.
- 14.91 The Commission raises all of these options to prompt stakeholder consideration of the ways in which the existing scheme could be reformed to address the issues identified in this paper, and to better achieve the outcomes identified in the supplementary terms of reference. Some proposals could be implemented on their own, while others might be complementary or reliant on other proposals.
- 14.92 The Commission seeks the views of victims, persons affected, professionals, stakeholders and the community on options to improve the current model and approach through legislative and procedural reform. Possible options for reform and questions are set out below.

## Amend the Act to focus on support

- 14.93 The Act states that it aims 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'.<sup>74</sup> Accordingly, most of the awards for assistance available under the Act are focused on expenses that promote victim recovery.

72 Victims Support Agency, Department of Justice and Regulation (Vic) *Counselling for Victims of Crime* (2011) 35.  
73 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 43.  
74 *Victims of Crime Assistance Act 1996* (Vic) s 1(2)(a).

- 14.94 However, as discussed in Chapter 6, the Act's emphasis on recovery is problematic.<sup>75</sup> Some victims may never overcome the injuries that they suffer as a result of an act of violence. Yet, such victims may still require financial assistance for counselling or medical expenses in order to have support, reduce pain, help ensure stability or promote their quality of life.
- 14.95 The notion that all victims can recover from the effects of crime, and the provision of state-funded financial assistance is only for the purpose of recovery, may not accord with some victims' lived experiences of crime. It may also perpetuate the view that there is something wrong with victims who suffer a permanent disability or ongoing mental disorder or illness as a result of an act of violence.
- 14.96 Accordingly, it may be more appropriate for the Act to aim to provide support to victims rather than to focus on recovery.
- 14.97 The New South Wales victim assistance legislation frames the object of its victim support scheme around the notion of 'support' rather than 'recovery'. The stated object of Part 4 of the *Victims Rights and Support Act 2013* (NSW) is to 'establish a scheme for the provision of support to victims of violence'.<sup>76</sup> This formulation is more inclusive, as it aims to offer assistance to victims of violent crime, whether or not they are able to 'recover'.

## Question

- 61 Should the focus of the Act be on supporting victims of crime rather than on assisting their recovery? If so, what changes should be made to the Act?

### Recognising the appropriate people as victims

- 14.98 As discussed earlier in this paper, it seems that not all victims are treated equally under the Act. While there may be sound policy objectives for this differential treatment under some circumstances, the operation of the Act can also fail to recognise and acknowledge other victims.
- 14.99 These circumstances were outlined in detail in Chapters 6 and 8 in relation to the categories and quantum of awards, and the mandatory considerations required under the Act for an award to be made.
- 14.100 One option for reform is to amend both the eligibility requirements and relevant considerations of the decision maker under the Act so that appropriate people can be recognised as victims under the Act.
- 14.101 For example, this could mean victims of crime are not deemed ineligible for assistance because of character or behaviour considerations unrelated to the circumstances of their victimisation. Past criminal activities, use of drugs and alcohol and other lifestyle factors might be irrelevant considerations when making a determination.
- 14.102 Another option could be to recognise the changing nature and evolving understanding of 'violence' by establishing a scheme that incorporates and accepts broader notions of 'victimisation' including forms of violence not previously identified or acknowledged by the Act such as family violence, forms of psychological and financial abuse and non-contact sexual offences.

<sup>75</sup> For example, the term 'reasonable' in relation to counselling expenses has been interpreted by VCAT to mean counselling that assists the victim to recover: *CS v Victims of Crime Assistance Tribunal* [2006] VCAT 1061 (9 June 2006) [51]–[63].

<sup>76</sup> *Victims Rights and Support Act 2013* (NSW) s 17.

- 14.103 The scheme could also recognise a wider range of victims and victimisation experiences—including children who hear, witness or are otherwise exposed to violence; people who assist in the aftermath of an act of violence; family members who are injured by becoming aware of the act of violence; and family members who do not constitute ‘close family members’ under the ‘related victims’ category.

## Question

- 62 Does the Act recognise appropriate people as victims? If not, what changes should be made to the Act to better recognise appropriate people as victims? Are there circumstances where some victims should not be recognised by the scheme? If so, in what circumstances?

### Amend the Act to remove the focus on ‘certain victims of crime’

- 14.104 The idea that only certain victims of crime are entitled to financial assistance as symbolic expression of the community’s sympathy, condolence and recognition appears to be underpinned by a philosophy that some victims are ‘innocent’ or ‘deserving’, while others are not.<sup>77</sup>
- 14.105 It has been suggested that the notion of ‘deserving’ victims complements the criminal justice system by encouraging crime reporting<sup>78</sup> and rewarding victims for compliant behaviour.<sup>79</sup>
- 14.106 However, as Miers writes, the distinction between ‘deserving’ and ‘undeserving victims’, or indeed ‘victims’ and ‘offenders’, is:
- factually problematic because the reality of criminal victimization is that many victims have also been offenders and that in particular incidents it may be a matter of chance as to which of two protagonists the criminal justice process subsequently labels the ‘victim’.<sup>80</sup>
- 14.107 It is possible that denying financial assistance to victims because of criminal history or substance abuse issues may in fact perpetuate offending behaviour, rather than discourage it. This is because without financial assistance to access counselling and other required services, victims may continue to use drugs or alcohol, increasing their likelihood of engaging in criminal activity.<sup>81</sup> This may further entrench the cycle of victimisation and offending.
- 14.108 In addition, awarding financial assistance to certain ‘deserving’ victims of crime only may further entrench other forms of disadvantage due to there being a correlation between higher offending rates and lower socio-economic status.<sup>82</sup>

77 See generally David Miers, ‘Compensating Deserving Victims of Violent Crime: The Criminal Injuries Compensation Scheme 2012’ (2014) 34(2) *Legal Studies* 242.

78 Matthew Hall, *Victims and Policy Making: A Comparative Perspective* (Willan Publishing, 2010) 170. See also Ian Freckleton, *Criminal Injuries Compensation Law: Law, Practice and Policy* (LBC Information Services 2001) 54–62.

79 See, eg, Geneviève Parent, ‘When Crime Pays: The Politics of Crime, Law, and Victim Compensation in Quebec’ (Paper presented at the Canadian Political Science Association Conference, Toronto 1–3 June 2006) 14, arguing that the notion of a ‘deserving victim’ aims to support the criminal justice system rather than to protect the citizen.

80 David Miers, ‘State Compensation for Victims of Violent Crime’ in Inge Vanfraechem, Antony Pemberton and Felix Mukwiza Ndahina (eds), *Justice for Victims: Perspectives on Rights, Transition and Reconciliation* (Routledge, 2014) 105, 116.

81 The Community Legal Centres NSW noted that drug and alcohol use can increase the likelihood of offending behaviour: Community Legal Centres NSW, Submission to New South Wales Department of Attorney General and Justice, *Review of NSW’s Victims Compensation Scheme*, 30 April 2012, 47.

82 Paul Sutherland and Melanie Millstead, *Patterns of Recorded Offending Behaviour amongst Young Victorian Offenders*, In Brief No 6 (Crime Statistics Agency, 2016) 6.

- 14.109 Victoria and Queensland<sup>83</sup> are the only Australian jurisdictions to make reference to ‘certain victims of crime’ in the purpose and objects section of their victims’ assistance legislation. Other jurisdictions do, however, limit the scope of their legislation by making reference to victims of ‘violent acts’<sup>84</sup> or ‘acts of violence’,<sup>85</sup> rather than victims of crime generally. Moreover, the Queensland Act explicitly states that payments of assistance as a symbolic expression are limited to ‘primary victims’ and ‘related victims’.<sup>86</sup>
- 14.110 Victoria could adopt a similar approach by removing the reference to ‘certain victims of crime’ from section 1(2)(b) and instead limiting the scope of its second stated objective in other ways, such as through reference to the eligibility criteria in the Act for financial assistance generally, or specifically for symbolic payments.

## Question

- 63 Is it appropriate under the Act that only ‘certain victims of crime’ are entitled to financial assistance as a symbolic expression of the community’s sympathy, condolence and recognition? If so, how should this be expressed in the Act?

### Reconceiving financial assistance and special financial assistance

- 14.111 In Victoria, lump-sum payments are available for certain victims under the special financial assistance provisions.<sup>87</sup> Special financial assistance is a lump-sum award that is made 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’.<sup>88</sup>
- 14.112 The current legislative articulation of special financial assistance retains the terminology of assistance, despite its practical application as a recognition payment. This is in contrast to the articulation of lump-sum payments in other jurisdictions which are distinguished from categories of award for assistance or expenses.
- 14.113 Both the New South Wales and Australian Capital Territory schemes provide for ‘recognition payments’.<sup>89</sup> Such lump-sum payments provide explicit acknowledgment by the state of the harm suffered by victims. In this way, such recognition payments are more consistent with the previous provision of awards for ‘pain and suffering’ under Victoria’s legislation prior to the introduction of the current Act.
- 14.114 In considering options for reform, one option is to amend the Act to distinguish between financial assistance (for expenses) and lump-sum payments which recognise the harm caused by a crime and are a symbolic gesture on behalf of the community and the state. This option could be complemented by amending the special financial assistance categories to better take into account the cumulative harm of a series of related criminal acts, and increasing the amount of special financial assistance so that ‘recognition’ payments more adequately recognise the harms caused.

83 See *Victims of Crime Assistance Act 1996* (Vic) s 1(2)(b); *Victims of Crime Assistance Act 2009* (Qld) s 3(1)(c).

84 *Victims of Crime Assistance Act 2006* (NT) s 3(a).

85 *Victims of Crime Assistance Act 2009* (Qld) s 3(1)(c); *Victims Rights and Support Act 2013* (NSW) s 17.

86 *Victims of Crime Assistance Act 2009* (Qld) s 3(2)(b) and (c).

87 *Victims of Crime Assistance Act 1996* (Vic) s 8A.

88 *Ibid* s 1(2)(b).

89 *Victims of Crime (Financial Assistance) Act 2016* (ACT) ss 19(c), 28-30; *Victims Rights and Support Act 2013* (NSW) ss 26(d) and div 5.

- 14.115 If payments for financial assistance and recognition were to be distinguished, financial assistance for reasonable expenses could be integrated with the existing victim support system, while special financial assistance payments could be replaced with 'recognition payments'. Recognition payments could remain part of a judicial system, through VOCAT. Alternatively, they could be incorporated within a quasi-judicial system whereby decisions or hearings are conducted by a decision maker independent of government, such as a victims' commissioner. Further discussion of decision makers is outlined below.

## Question

- 64 Would 'special financial assistance' be better classified as a 'recognition payment' like in the New South Wales and Australian Capital Territory schemes?

### Requiring offenders to contribute

#### Victim levy

- 14.116 The Consolidated Fund of the State of Victoria (consolidated revenue) pays for VOCAT's operating costs as well as the costs of awards made under the Act.<sup>90</sup>
- 14.117 Although VOCAT is intended to be a financial assistance option of last resort, in practice, it is often the most practical route for a victim of crime to pursue. This is because most offenders will not have the means to pay a compensation or restitution order made under the Sentencing Act or to pay compensation as the consequence of a civil claim.
- 14.118 In recognising that state-funded financial assistance is likely to be the most practical option for many victims, other jurisdictions have established ways to fund their victim compensation scheme from sources other than consolidated revenue.
- 14.119 For example, a number of jurisdictions have implemented victims' levies to supplement the funding of their financial assistance schemes.
- 14.120 New South Wales imposes a Victims Support Levy of \$74 for summary offences and \$166 for indictable offences on convicted offenders.<sup>91</sup> The levy contributes to the Victims Support Fund and is imposed automatically under the *Victims Rights and Support Act 2013* (NSW), rather than a penalty imposed by a court.<sup>92</sup>
- 14.121 The Australian Capital Territory imposes a \$50 victims' services levy to provide a source of revenue to improve services for victims of crime on an adult who is convicted of an offence and ordered by a court to pay a fine.<sup>93</sup> The victims' services levy is in addition to, and does not form part of, the fine.<sup>94</sup>
- 14.122 In South Australia, the *Victims of Crime (Fund and Levy) Regulations 2003* (SA) impose a levy of up to \$160 for a summary offence and \$260 for an indictable offence.<sup>95</sup>
- 14.123 There are equivalent international examples of victims' levies. Alberta (Canada) has a Victims of Crime Fund established by statute. The fund collects money from a range of sources, including victim fine surcharges.<sup>96</sup> Ontario (Canada) also has a Victims' Justice Fund collected from court-imposed fines.<sup>97</sup>

90 *Victims of Crime Assistance Act 1996* (Vic) s 69.

91 Department of Attorney General and Justice (NSW), *Court Levies: Local Court of NSW Information Sheet* (2014) 1.

92 *Ibid.*

93 *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 82–3.

94 *Ibid* s 82(3).

95 *Victims of Crime (Fund and Levy) Regulations 2003* (SA) sch 1 cl 1.

96 Thompson Reuters Foundation, *Compensation Schemes: Comparative Report on National State Compensation Schemes* (2015) 18.

97 *Ibid* 20.

- 14.124 The Victims Support Levy in NSW contributed \$9.52 million in 2015–16 towards the Victims Support Fund.<sup>98</sup> If applied in the Victorian context, \$9.52 million is close to 20 per cent of the \$46.3 million awarded by VOCAT during the 2015–16 financial year.<sup>99</sup>
- 14.125 To improve the operation and long-term sustainability of the financial assistance scheme, one option is to introduce a legislatively prescribed victim levy as in New South Wales, South Australia and the Australian Capital Territory. As well as providing an additional source of funding, there is evidence to suggest that victims prefer to receive compensation from offenders than the state.<sup>100</sup> While this option would not see individual perpetrators compensate victims, it would reassure victims that convicted offenders are repairing harm to victims of crime in some way.

### Offender recovery

- 14.126 As discussed earlier in this chapter, the Act also enables a victim to ‘assign to the State their right to recover from any other person, by civil proceedings, damages or compensation in respect of the injury or death to which the award relates.’<sup>101</sup> This provision relies on a victim electing to assign their right to the state, rather than the state being able to pursue offenders automatically to contribute to the costs of an award of assistance made under the Act.
- 14.127 During preliminary consultations the Commission was not advised of the practical operation of this provision. This may be because the provision relies on a victim electing to assign their right to the state and this may not be practical for many victims, particularly as victims are unlikely to be aware of this right. Furthermore, and as discussed in detail in Chapter 2, in many cases, offenders do not have the means to pay or victims may be unwilling for proceedings to be initiated against an offender for safety reasons.
- 14.128 The Commission notes academic concerns about ‘offender recovery’ mechanisms in relevant Australian jurisdictions’ financial assistance legislation due to victim safety and wellbeing concerns, particularly with respect to victims of family violence.<sup>102</sup> In addition, the practical difficulties of recovery monies have been noted in jurisdictions where offender recovery is pursued, difficulties which include:<sup>103</sup>
- that the majority of offenders are generally from lower socio-economic backgrounds and do not have accumulated assets
  - that many offenders are unemployed for significant periods of time or may be incarcerated and thus have limited ability to pay
  - that many offenders are difficult to locate to enforce debts.
- 14.129 Barrett Meyering notes that mechanisms for offender compensation and reparation generally sit parallel to statutory victim compensation schemes and ‘the two should not be confused with one another’.<sup>104</sup> Nonetheless, Barrett Meyering also notes that most Australian states and territories’ relevant victim compensation or financial assistance schemes have provision for making recovery orders against offenders.<sup>105</sup>

98 Department of Justice (NSW), *Victims Services Data Profiles: Restitution*, Information Sheet (2016) 1.

99 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 33.

100 David Miers, ‘Offender and State Compensation for Victims of Crime: Two Decades of Development and Change (2014) 20(1) *International Review of Victimology* 145, 148.

101 *Victims of Crime Assistance Act 1996* (Vic) s 51(1).

102 Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse, 2010) 10.

103 Department of Justice (NSW), *Victims Services Data Profiles: Restitution*, Information Sheet (2016), 2.

104 Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse, 2010) 10.

105 *Ibid.* See also, for example, *Victims Rights and Support Act 2013* (NSW) s 59 and *Victims of Crime (Financial Assistance) Act 2016* (ACT) Pt 6, *Victims of Crime Assistance Act 2009* (Qld) Pt 16.

- 14.130 In New South Wales, for example, the Commissioner of Victims Rights can make a provisional order for restitution against a convicted offender,<sup>106</sup> which may be enforced as if it were an order made in civil proceedings.<sup>107</sup> This is also separate, and in addition to, the offender levy that applies in New South Wales. New South Wales' Victims Services states that the purpose of such offender recovery provisions '...is to place responsibility on offenders to contribute to assisting victims in recovering from the act of violence'.<sup>108</sup>
- 14.131 Barrett Meyering states that 'while the concept of perpetrator accountability is attractive in theory, the impact of making recovery orders on victims' experiences of the compensation process needs to be carefully weighed.'<sup>109</sup> Furthermore, Barrett Meyering notes the safety concerns, particularly for family violence victims, where recovery orders might be made.<sup>110</sup> In recognition of these safety concerns, the Australian Capital Territory's Victims of Crime Commissioner must not take, or continue, recovery action without taking into account the objective risks to the safety of any person, and the subjective concerns of an assisted person, about the Commissioner's contact with an offender or recovery action generally.<sup>111</sup>
- 14.132 Beyond safety considerations, the efficiency of such recovery processes needs to be carefully considered. For example, in New South Wales, 2454 provisional orders for \$20.06 million were issued in 2015–16, out of which only 48 were paid in full.<sup>112</sup> To enforce such orders, Victims Services must work with the State Debt Recovery Office.<sup>113</sup>
- 14.133 Nonetheless, \$4.37 million was recovered during the 2015–16 financial year from such restitution processes which, in addition to victim levies, provided almost \$15 million to the New South Wales financial assistance scheme in 2015–16.<sup>114</sup>
- 14.134 Many of the safety concerns regarding offender recovery mechanisms may not apply in Victoria, as the Act requires a victim to elect to assign their right to the state under section 51 of the Act. Victims who did not want the offender pursued because of safety or wellbeing concerns would be unlikely to elect to assign their rights to the state. However, the Commission is unaware of whether victims do elect to assign these rights to the state, and if so, the operational implications of such assignment.
- 14.135 Given the supplementary terms of reference require the Commission to consider that the state-funded financial assistance scheme must be efficient and sustainable for the state, consideration needs to be given to the practical operation of such offender recovery mechanisms, and the appropriateness of such provisions as part of a state-funded financial assistance scheme.
- 14.136 Accordingly, the Commission seeks the views of victims, persons affected, professionals, stakeholders and the community on the current operation of section 51 of the Act, and the appropriateness of 'offender recovery' as a component of a state-funded financial assistance scheme.

106 *Victims Rights and Support Act 2013 (NSW)* s 59.

107 *Ibid* s 72.

108 Department of Justice (NSW), *Victims Services Data Profiles: Restitution*, Information Sheet (2016), 2.

109 Isobelle Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview*, Stakeholder Paper No 8 (Australian Domestic and Family Violence Clearinghouse, 2010) 10.

110 *Ibid* 12.

111 *Victims of Crime (Financial Assistance) Act 2016 (ACT)* s 72.

112 Department of Justice (NSW), *Victims Services Data Profiles: Restitution*, Information Sheet (2016), 2.

113 *Ibid* 2.

114 *Ibid* 1.

## Questions

- 65 What is the practical operation of section 51 of the Act which enables a victim to assign their rights to the state to recover from the offender? Should a state-funded financial assistance scheme retain 'offender recovery' provisions as a parallel process to other reparation mechanisms?
- 66 Should Victoria's state-funded financial assistance scheme be amended to include a victims' levy payable by offenders? If so, how and on whom should the levy be imposed?



# Approach 2:

## Is there a need for a different model?

202 Introduction

202 Is the current scheme meeting the outcomes specified in the  
supplementary terms of reference?

208 Discussion and options for reform

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## 15. Approach 2: Is there a need for a different model?

### Introduction

- 15.1 Chapter 14 discussed possible improvements to the operation of the *Victims of Crime Assistance Act 1996* (Vic) (the Act) and the Victims of Crime Assistance Tribunal (VOCAT), while retaining the current model.
- 15.2 However, the supplementary terms of reference also require the Victorian Law Reform Commission (the Commission) to consider whether other models would deliver assistance more effectively, such as an administrative or quasi-administrative model.
- 15.3 The supplementary terms of reference ask the Commission to bear in mind that a state-funded financial assistance scheme for victims should seek to achieve outcomes for victims that:
- are fair, equitable and timely
  - are consistent and predictable
  - minimise trauma and maximise the therapeutic effect for victims.
- 15.4 The supplementary terms of reference also require that a financial assistance scheme be efficient and sustainable for the state.
- 15.5 This chapter discusses options for reform in the context of whether alternative models, or components of alternative models, could more effectively deliver assistance to victims of crime and meet the outcomes outlined above.

### Is the current scheme meeting the outcomes specified in the supplementary terms of reference?

- 15.6 This part discusses the extent to which the current scheme may meet the outcomes specified in the supplementary terms of reference, namely that a state-funded assistance scheme should seek to achieve outcomes for victims that:
- are fair, equitable and timely
  - are consistent and predictable
  - minimise trauma for victims and maximise the therapeutic effect for victims.
- 15.7 The supplementary terms of reference also state that a financial assistance scheme must be efficient and sustainable for the state.

## Fair, equitable and timely

### Fair and equitable

- 15.8 Current eligibility requirements mean that some victims' experience of crime may not be adequately recognised under the Act. Some victims may be excluded, although they may be appropriate recipients, because of the narrow victim categories used in the Act, or because of the narrow definitions of 'act of violence' and 'injury'.<sup>1</sup> In some cases, the broader harms of violence suffered by victims of crime may not be recognised or may be difficult to prove.<sup>2</sup> Moreover, the categories and quantum of awards, and the ways in which these are determined, may result in outcomes that do not sufficiently recognise the harms suffered by certain victims.<sup>3</sup>
- 15.9 Further barriers may be faced by victims when making an application, even where the eligibility criteria are met:
- First, the strict time limits for making an application under the Act may not recognise that the effects of crime can contribute to delayed applications.<sup>4</sup>
  - Secondly, even where a victim is eligible and meets the application time limit, VOCAT can refuse to make an award of assistance. This might be in circumstances where the victim did not report the matter to police within reasonable time, or failed to provide reasonable assistance to police or prosecution. VOCAT may also determine that a victim's character or behaviour deems them an inappropriate recipient of assistance, even where these considerations do not relate to the circumstances of the victimisation.<sup>5</sup>
- 15.10 However, it is also important to consider VOCAT's role in ensuring that the current scheme is fair and equitable to all persons. VOCAT is required to balance the rights of victims with the rights of alleged perpetrators to be notified about an application, and to appear before VOCAT if necessary.
- 15.11 VOCAT may give notice of the time and place for a hearing to any other person whom it considers to have a 'legitimate interest' in the matter.<sup>6</sup> This can include the alleged perpetrator.<sup>7</sup> At the same time, the Act also provides that VOCAT must not notify the alleged perpetrator or an interested third party without first giving the applicant an opportunity to be heard on whether or not they should be notified.<sup>8</sup>
- 15.12 The result of these provisions is that, in practice, VOCAT must balance the rights of alleged perpetrators to be heard with the safety and wellbeing of victims should an alleged perpetrator become aware of the application or wish to attend a hearing.
- 15.13 This can be a particularly challenging task when allegations made by a victim are countered by contradictory evidence, such as in *BFK v Victims of Crime Assistance Tribunal*,<sup>9</sup> where the victim, BFK, made allegations of sexual assault against her ex-boyfriend, YVP, who denied the assault.

1 An 'act of violence' is defined under the Act as a 'criminal act' or 'a series of related criminal acts' that occurred in Victoria and that 'directly resulted in injury or death to one or more persons': *Victims of Crime Assistance Act 1996* (Vic) s 3(1).

2 The definitions and categories of 'primary victim', 'secondary victim' and 'related victim' in the Act exclude some categories of victims, such as some family members or people who assist in the aftermath of an act of violence. For categories of victims, see *Victims of Crime Assistance Act 1996* (Vic) ss 7, 9, 11.

3 For example, the special financial assistance categories in the Act may not sufficiently take into account the cumulative harm of individual acts of violence as a result of experiencing persistent and protracted violence. See, eg, Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol 4, 78.

4 The Victims of Crime Assistance Tribunal (VOCAT) must strike out applications made outside the two-year time limit unless 'it considers that, in the particular circumstances, the application ought not to be struck out': *Victims of Crime Assistance Act 1996* (Vic) s 29(2).

5 Even if VOCAT determines that a victim is eligible for an award, VOCAT must nevertheless refuse to make an award of assistance in some circumstances: *Victims of Crime Assistance Act 1996* (Vic) ss 52, 54.

6 *Victims of Crime Assistance Act 1996* (Vic) s 34(2).

7 *Ibid.*

8 *Ibid* s 34(3).

9 [2017] VCAT (15 March 2017).

- 15.14 In this case, it was noted by VCAT that 'VOCAT gave YVP the opportunity to put his view in this proceeding ... he responded by way of written statement denying the allegation, referring to their consensual sexual relationship'.<sup>10</sup>
- 15.15 At the same time, YVP also submitted that he wished to have no further part in the VOCAT proceeding. In this context, it is interesting to note that, on the victim's request, VOCAT issued a witness summons to YVP who attended the VOCAT hearing and gave evidence, including being cross-examined by BFK's and VOCAT's lawyers.<sup>11</sup>
- 15.16 This case demonstrates the extent to which VOCAT's obligation to ensure procedural fairness and natural justice for the alleged perpetrator is balanced against the victim's right to assistance under the Act, and a fair assessment of all available evidence, particularly where evidence has not been able to be tested in a criminal court.<sup>12</sup>
- 15.17 Some stakeholders consulted by the Commission confirmed the important role of VOCAT in ensuring procedural fairness for alleged perpetrators. It was considered by some stakeholders that the current scheme adequately ensures that persons are notified of an application being made which contains serious allegations against them, and which could result in serious findings being made against them. This was viewed as an essential component of a fair and equitable financial assistance scheme, appropriately overseen by judicial officers experienced in managing the competing interests of these two parties.
- 15.18 However, other stakeholders told the Commission that the balancing of victim and perpetrator rights under the Act was contrary to the purpose of the Act—to assist victims of crime. In this context, some stakeholders said that the balancing of these interests by VOCAT in fact resulted in a scheme that was ultimately not fair or equitable for victims of crime. Instead, these stakeholders saw this as an example of the rights of alleged perpetrators being placed before the rights of victims to be assisted under the Act, and for their safety and wellbeing to be prioritised.

## Timely

- 15.19 In order to consider the current scheme's ability to deliver fair, equitable and timely outcomes, it is important to consider the timeliness of award decisions.
- 15.20 VOCAT has stated that it currently faces 'challenges in keeping pace with the increased number of applications'.<sup>13</sup> This has resulted in the number of pending applications increasing by 11 per cent between the 2014–15 and 2015–16 reporting period.<sup>14</sup>
- 15.21 In June 2017, the Victorian Community Safety Trustee criticised VOCAT's wait times: 'if the approach is "victims first", then the current process warrants review in the interests of quick resolution for victims.'<sup>15</sup> Previous research has found some sexual assault victims have waited close to a year to access VOCAT-funded counselling awards.<sup>16</sup>
- 15.22 During preliminary consultations the Commission was told that some VOCAT applications by family violence victims can take 18 months to two years to be determined. The Commission was also told that some victims did not receive a final determination until four years after their initial application.
- 15.23 New South Wales research has found that the vast majority of victims who need financial assistance for practical purposes require it within three months of the crime.<sup>17</sup> However, the average processing time for VOCAT applications is between nine and 12 months.<sup>18</sup>

10 Ibid [102].

11 Ibid [105]–[106].

12 Police advised BFK that there was insufficient evidence to pursue the alleged assault: ibid [81].

13 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 9.

14 Ibid.

15 Community Safety Trustee (Vic), *Community Safety Trustee: First Progress Report—June 2017* (2017) 14.

16 Victims Support Agency, Department of Justice and Regulation (Vic), *Counselling for Victims of Crime* (2011) 33.

17 Betty Chan et al, 'Support and Compensation: Lessons from Victims of Crime' (Paper presented at the Actuaries Institute Injury Schemes Seminar, Gold Coast, 10–12 November 2013) 19.

18 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 9.

- 15.24 Based on the preliminary consultations and research undertaken by the Commission, a significant cause of these delays may be the current VOCAT application process and the need for victims to provide supporting documentation. In addition, the complexity of the Act and the matters VOCAT must consider often necessitate a significant reliance on submissions from lawyers and the gathering of external evidence. During preliminary consultations the Commission was told that without legal assistance, this administrative burden falls to victims. Together, these factors may contribute to the delay in victims receiving appropriate financial assistance.
- 15.25 These issues of eligibility, award type and quantum, character and behaviour considerations, the balancing of victim and alleged perpetrator rights, as well as matters of delay, raise the question of whether the current scheme meets the objectives of a fair, equitable and timely scheme.

### Consistent and predictable

- 15.26 During preliminary consultations, concerns were raised about the transparency, consistency and predictability of VOCAT determinations, specifically determinations made ‘on the papers’—approximately 75 per cent of all VOCAT matters.<sup>19</sup>
- 15.27 A 2009 review found that VOCAT members can take different approaches in areas such as:<sup>20</sup>
- documentation required to support an application
  - a victim’s prior criminal history or delay in reporting to police
  - whether the VOCAT determination should await finalisation of related criminal matters
  - the quantum and type of assistance granted, particularly in ‘exceptional circumstances’.
- 15.28 Combined with a lack of access to written decisions, this could result in a lack of transparency and uncertainty and raises some concerns about the current scheme’s consistency and predictability for victims of crime.

### Minimise trauma for victims and maximise the therapeutic effect for victims

- 15.29 When the Act was introduced in 1996, the Attorney-General articulated a broad intent to ‘maximise the potential for a victim’s recovery from the psychological and physical effects of a violent offence’.<sup>21</sup>
- 15.30 However, preliminary consultations and research indicate that the current scheme does not always minimise trauma and maximise therapeutic effect.
- 15.31 The delays in securing awards can affect victims’ recovery time and make distress worse.<sup>22</sup> The administrative burden caused by the documentation and evidence requirements has the potential to cause further trauma. The current process for varying an award—often to access counselling—does not enable flexible service delivery nor continuity of services.
- 15.32 Some stakeholders have queried the therapeutic nature of the scheme given it does not assist victims with longer-term injuries, even if they continue to incur expenses directly related to the act of violence. This issue has also been noted by the Victorian Inquiry into the Handling of Child Abuse by Religious and other Non-Government Organisations.<sup>23</sup>

19 Ibid 36.  
 20 Department of Justice (Vic), *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*, Discussion Paper (2009) 46.  
 21 Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 1996, 1023–7 (Jan Wade, Attorney-General).  
 22 Department of Attorney General and Justice (NSW), *Review of the Victims Compensation Fund* (PricewaterhouseCoopers Australia, 2012) 57.  
 23 Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (2013) vol 2, 558.

- 15.33 It is also suggested that some scheme considerations, such as the mandatory character and behaviour considerations, may re-traumatise victims and lead to some victims feeling shame, or that they are 'undeserving' of compensation. During preliminary consultations, the Commission was told that some lawyers 'shield' their clients from section 52 and 54 questions so as not to re-traumatise them.
- 15.34 For some victims of crime, the potential for a judicial officer to hear their matter in a court-like environment may be a validating experience. It can provide an acknowledgment from the justice system that there has been a crime and that they have suffered harm as a consequence.<sup>24</sup> In fact, for some victims, the importance of being heard and validated may outweigh any monetary award: 'most victims want to hear someone say, on behalf of the State of Victoria, that we are sorry that this happened to you.'<sup>25</sup>
- 15.35 Some victims' experience of VOCAT hearings is positive, describing Tribunal members as caring, patient and understanding.<sup>26</sup> Where an offender had not been prosecuted, victims tended to feel acknowledged and validated by the VOCAT hearing.<sup>27</sup> During preliminary consultations, the Commission was told this can be particularly powerful in sexual offence matters, where successful prosecution is rare.
- 15.36 However, research by the Victims Support Agency has found that this is not the case for all victims:
- Comments about the VOCAT hearing were mixed. While many participants made positive comments about Tribunal Members and felt acknowledged and validated by the hearing, particularly where no offender was prosecuted, some participants felt distressed by having to recount details of the crime they experienced.<sup>28</sup>
- 15.37 Some victims may be distressed by having to give evidence about the crime during VOCAT hearings:<sup>29</sup>
- Having the matter heard by a tribunal member, who listens to a victim's story and acknowledges their experience, can be a therapeutic experience...However, attending a hearing and giving evidence about the criminal act may further distress others.<sup>30</sup>
- 15.38 Although VOCAT is less formal than a court hearing, it is still adversarial in nature. As noted by Chan et al, the 'adversarial nature of the compensation process for many victim schemes can detract from the well-being of the victim and from the rehabilitative objectives of the scheme'.<sup>31</sup>
- 15.39 Some stakeholders were concerned that the scheme was not trauma-informed. The perpetrator notification provisions were highlighted as an example of how the current legal framework fails to account for trauma experienced by victims of family violence, sexual assault or abuse.
- 15.40 Trauma-informed practice involves modifying aspects of service provision to ensure they reflect a basic understanding of how trauma affects the life of an individual seeking a service.<sup>32</sup> A trauma-based approach accepts that victims of crime have been harmed as a result of the crime.<sup>33</sup> One of its benefits is that it avoids re-traumatisation, as the focus is on ensuring physical, psychological and emotional safety.<sup>34</sup>

24 Department of Justice (Vic), *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*, Discussion Paper (2009) 43.

25 Victims of Crime Assistance Tribunal, *Koori VOCAT List Pilot, Review and Recommendations* (2010) 31.

26 Victims Support Agency, Department of Justice and Regulation (Vic), *Counselling for Victims of Crime* (2011) 37.

27 Ibid.

28 Ibid 59.

29 Ibid 38.

30 Department of Justice (Vic), *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*, Discussion Paper, 18.

31 Betty Chan et al, 'Support and Compensation: Lessons from Victims of Crime' (Paper presented at the Actuaries Institute Injury Schemes Seminar, Gold Coast, 10–12 November 2013) 19.

32 Jenna Bateman, Corinne Henderson and Dr Cathy Kezelman, *Trauma-Informed Care and Practice: Towards a Cultural Shift in Policy Reform across Mental Health and Human Services in Australia*, Position Paper and Recommendations (Mental Health Coordinating Council, 2013) 5.

33 Ibid 8.

34 Ibid 5.

- 15.41 The Law Institute of Victoria has considered the importance of trauma-informed legal practice, including for the judiciary and court staff.<sup>35</sup> Similarly, Victoria's *Family Violence Rolling Action Plan 2017–2020* has recently recognised the need for the Magistrates' Court to move towards a more trauma-informed approach to family violence.<sup>36</sup>
- 15.42 In 2014, RMIT's Centre for Innovative Justice recommended in its report *Innovative Justice Responses to Sexual Offending—Pathways to Better Outcomes for Victims, Offenders and the Community*, that all Australian jurisdictions should review their crimes compensation tribunals and procedures to ensure that they incorporate appropriate therapeutic practices to improve the experience of victims, and to make them more accessible to more victims.<sup>37</sup>
- 15.43 Ian Freckelton has reflected more broadly on the intrinsic lack of understanding and training of decision makers within financial assistance and compensation schemes, stating: 'decision makers who have never encountered DSM-IV or standard works on trauma and victim impact are put in the position of having to deal with this sensitive area'.<sup>38</sup> Freckelton supports a specialist approach to victim compensation.
- 15.44 These issues of delay, lack of long-term support for victims, character and behaviour considerations, and the limited ability of the current scheme to be trauma-informed, raise concerns that some current processes can impact on a victim's recovery and worsen distress, rather than minimising trauma and maximising therapeutic effect for victims.

### Efficient and sustainable for the state

- 15.45 Victoria's victim and witness support system is fragmented. Some victim support services, and components of financial assistance and counselling, are provided through the victim support system, while others are available through VOCAT. Financial assistance and counselling are also available through the human services system and delivered by specialist family violence or sexual assault services.
- 15.46 In practice, many of the supports provided by victim support services can overlap with the assistance available through VOCAT, such as interim awards for security measures or expenses incurred for counselling.
- 15.47 Accordingly, the question arises as to whether there may be efficiency gains in reducing duplication and overlap of services.
- 15.48 This was the conclusion reached by Chan et al, who found the victim support and financial assistance schemes in New South Wales to be fragmented before the schemes were merged in 2013:
- the spectrum of support and rehabilitation available to victims is broad. However, this support is often fragmented across a range of different service providers and understanding the different support pathways available can be challenging for individuals reaching out for help. The frustration of being passed between service providers, finding information on the eligibility for particular services and completing forms can be overwhelming and detrimental to the welfare of the individual.<sup>39</sup>
- 15.49 Some inherent aspects of the current scheme's design may be creating inefficiencies and limiting the sustainability of the scheme longer term. During preliminary consultations, the Commission was told that there are often significant costs and delays associated with obtaining medical reports. These also affect the operating costs of VOCAT, as VOCAT usually reimburses the costs of medical and psychological reports.

35 Cathy Kezelman and Pam Stavropoulos, 'Dealing with Trauma' (2016) 90(10) *Law Institute Journal* 36.

36 Department of Premier and Cabinet (Vic), *Family Violence Rolling Action Plan 2017–2020* (2017) 7.

37 Centre for Innovative Justice, *Innovative Justice Responses to Sexual Offending—Pathways to Better Outcomes for Victims, Offenders and the Community* (RMIT University, 2014) 94.

38 Ian Freckelton, 'Criminal Injuries Compensation for Domestic Sexual Assault: Obstructing the Oppressed' in Chris Sumner et al (eds), *Victimology* (Australian Institute of Criminology, 1996) 251. The 'DSM-IV' refers to the Diagnostic and Statistical Manual of Mental Disorders, which is the authoritative guide to the diagnosis of mental disorders.

39 Betty Chan et al, 'Support and Compensation: Lessons from Victims of Crime' (Paper presented at the Actuaries Institute Injury Schemes Seminar, Gold Coast, 10–12 November 2013) 19.

- 15.50 The reliance on obtaining external documentation leads to a significant reliance on third-party professionals such as medical practitioners and psychologists. There is a risk that this can increase the scheme's vulnerability to fraudulent claims and victims' vulnerability to exploitation as well as impact on the timeliness of application decisions.
- 15.51 These documentation and evidentiary requirements are exacerbated by variation processes which, as the Commission was told during preliminary consultations, often rely on victims having to re-engage lawyers and other professionals to access the further assistance they may need to recover, such as additional counselling sessions.
- 15.52 While VOCAT has implemented significant reforms to enable non-complex decisions to be made by judicial registrars,<sup>40</sup> the Chief Magistrate has stated: 'despite the significant contribution made by Judicial Registrars to the work of the Tribunal, the Tribunal is facing challenges in keeping pace with the increased number of applications'.<sup>41</sup>
- 15.53 From a funding perspective, it is possible the scheme could be supplemented by other revenue streams to help ensure its longer-term sustainability. The Consolidated Fund of the State of Victoria<sup>42</sup> pays for VOCAT's operating costs as well as the cost of VOCAT awards.<sup>43</sup> This is in contrast with other schemes which are funded through a combination of revenue streams which usually involve the imposition of victim levies and some offender recovery mechanisms. A number of Australian jurisdictions have implemented victim levies to supplement the funding of their victim compensation schemes. (See Chapter 14.)
- 15.54 Issues concerning fragmentation and duplication across the victim support system and inefficiencies in practice raise some concerns about the efficiency and sustainability of the current scheme. There may also be opportunities to better support the sustainable operation of the scheme longer term through new funding streams, such as victim levies.

## Questions

- 67 Is the current scheme meeting the outcomes for victims specified in the supplementary terms of reference, namely does it achieve outcomes for victims that:
- (a) are fair, equitable and timely
  - (b) are consistent and predictable
  - (c) minimise trauma for victims and maximise the therapeutic effect for victims?
- 68 Is the current scheme efficient and sustainable for the state?

## Discussion and options for reform

- 15.55 This section of the consultation paper sets out options for reform.
- 15.56 It considers whether alternative models, or components of alternative models, would better meet the outcomes specified in the supplementary terms of reference.

40 In 2015–16, judicial registrars made 21.9 per cent of final awards. See Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 28.

41 Ibid 9.

42 The consolidated fund comprises all revenue raised by and granted to the state.

43 *Victims of Crime Assistance Act 1996* (Vic) s 69; Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 63.

- 15.57 It discusses alternative models including:
- whether financial assistance should be part of victim case management and the victim support system
  - whether a financial assistance scheme should incorporate restorative justice opportunities
  - whether judicial decision making in financial assistance matters is appropriate and sustainable
  - whether financial assistance should be a specialised field.
- 15.58 The Commission raises these options to prompt stakeholder consideration of the ways in which different models could improve outcomes for victims. Some proposals could be implemented on their own, while others might be complementary or reliant on other proposals.
- 15.59 While these options are considered to be alternative models, since they represent a departure from the current scheme's operation, some components might also be complementary reform options that could be considered alongside options to improve the current scheme in Chapter 14.
- 15.60 The Commission seeks the views of victims, persons affected, professionals, stakeholders and the community on whether other models could more effectively deliver assistance to victims of crime.

## Question

- 69 Are there other models that would deliver assistance more effectively? If so, which?

### Financial assistance as part of case management and the victim support system

- 15.61 Establishing closer links between financial assistance and victim support could improve accessibility, awareness and timely provision of support for victims. A number of jurisdictions have moved away from a court or tribunal-based system to the provision of financial assistance as part of broader victim support and/or case management.
- 15.62 Such schemes often have the potential to offer more holistic support which recognises that financial needs are part of a broader range of victims' support and information needs.
- 15.63 This approach could be effective in in Victoria. Victims Support Agency research relating to victims' experience of VOCAT found that VOCAT-funded counselling was more effective when delivered in conjunction with case management provided through the Victims Assistance Program (VAP) or Centres Against Sexual Assault (CASAs). In circumstances where victims accessed counselling only via VOCAT, without case management support, overall satisfaction with counselling was reduced.<sup>44</sup> It was suggested that this was because the VAP or CASA case manager was able to connect victims with a more suitable counsellor—either within the agency itself or privately.<sup>45</sup>

- 15.64 Moreover, victims linked in with the broader victim support system generally required less counselling than those who accessed VOCAT-funded counselling without case management support:
- ... early intervention through the [Victim Assistance Program] results in the need for less mental health treatment later. It also suggests that counselling, when received in tandem and as part of a package of other assistance such as practical support, is more effective than counselling on its own.<sup>46</sup>
- 15.65 Victims Support Agency research also indicates that many victims want one single point of contact and feel frustrated by the separation of victim support and financial assistance: '[victims] expressed the need for a single [telephone] number and a system where applicants do not need to explain their situation more than once, in order to avoid re-traumatisation.'<sup>47</sup>
- 15.66 This limitation of the current system has been highlighted by VOCAT itself: 'Some victims require assistance in several ways. The Tribunal is keenly aware that, in order to obtain such assistance ... victims are required to tell their story to each new service they encounter. It can be understandably traumatic to repeat this information over and over.'<sup>48</sup>
- 15.67 Research conducted by Elaine Wedlock and Jacki Tapley has emphasised that 'one of the fundamental problems regarding crime victims is that there is no one agency taking responsibility for them, instead the journey of the victim involves varying degrees of contact from a range of agencies at differing stages in the process'.<sup>49</sup>
- 15.68 This has led the Victims Support Agency to conclude that future reforms of the VOCAT scheme should consider 'an approach that facilitates access to counselling through the broader community based service system' as this 'would appear to not only have better outcomes for victims, but would also have the potential to significantly reduce the cost incurred by the state in paying for psychological and psychiatric report fees through VOCAT'.<sup>50</sup>
- 15.69 One option for reform therefore involves the adoption of an administrative model whereby financial assistance and case co-ordination run side by side, as in New South Wales and the Australian Capital Territory. This could see an increased reliance on specialist victim support case managers to assess victim needs, including financial assistance needs, while reducing reliance on lawyers.
- 15.70 An alternative option could be a hybrid administrative and judicial system. The victim support system could administer payments for expenses for counselling, medical expenses, loss of earnings, funeral expenses and other reasonable expenses to assist with recovery. This could be part of victim support case management currently provided by community-based Victim Assistance Programs (VAPs) funded by the Department of Justice and Regulation. Decision making could be similar to the case management framework underpinning current VAP work and the administration of family violence flexible support packages.
- 15.71 The provision of special financial assistance—referred to as a 'recognition payment' in some other jurisdictions—could remain a judicial decision. This payment could continue to be a 'symbolic expression by the State of the community's sympathy' as currently provided for under the current Act.<sup>51</sup>

46 Ibid 45.

47 Ibid 35.

48 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 43.

49 Elaine Wedlock and Jacki Tapley, *What Works in Supporting Victims of Crime: A Rapid Evidence Assessment* (Victims' Commissioner and University of Portsmouth 2016) 25.

50 Victims Support Agency, Department of Justice and Regulation (Vic), *Counselling for Victims of Crime* (2011) 63–4.

51 *Victims of Crime Assistance Act 1996* (Vic) s 1(2)(b).

## Questions

- 70 Is state-funded financial assistance to victims of crime better provided as part of victim support case management? If so, why, and how should this operate?
- 71 Alternatively, should some components of Victoria's state-funded financial assistance scheme for victims of crime be provided as part of victim support case management and others by a judicial or other independent decision maker? If so, what components and how should this operate?

### Financial assistance as a restorative justice opportunity

- 15.72 The supplementary terms of reference ask the Commission to consider how a state-funded financial assistance scheme could maximise therapeutic effects for victims.
- 15.73 In the then-Department of Justice's 2009 review of victim compensation, consideration was given to incorporating restorative justice practices within the victim compensation scheme. It was suggested that complementary restorative justice processes could run parallel with the victims' compensation process to address non-financial matters such as the emotional harm caused by a crime and the issuing of an apology by a perpetrator.<sup>52</sup>
- 15.74 The Commission has previously discussed options for inclusion of restorative justice practices within the VOCAT process. In the Commission's consultation paper in relation to the role of the victims in the criminal trial process, the Commission suggested:
- restorative justice could be incorporated into VOCAT processes. VOCAT is already guided by the objects of the [the Act], which include helping victims recover through the provision of financial assistance ... In addition, VOCAT aims to provide victims with a forum in which they can have a voice. This function could be enhanced by giving victims the option of attending a victim-offender mediation, in the same room, or separate rooms or via video-link. This would not only allow victims to have a voice, it would require the offender to hear the victim.<sup>53</sup>
- 15.75 However, submissions received on this point were mixed. Some stakeholders were supportive of restorative justice being incorporated into VOCAT proceedings. Victoria Legal Aid (VLA), however, cautioned against it being automatically a part of the VOCAT process, indicating most victims want financial assistance dealt with quickly, with as little contact as possible with an offender. VLA concluded that further exploration of options to build restorative principles into the VOCAT process would need to carefully balance a victim's and an accused's rights, given the process would need to manage the risk of harm that can flow from victims having even indirect contact with offenders or from delaying access to compensation.
- 15.76 Alternatively, and as suggested by RMIT's Centre for Innovative Justice, further consideration could be given to the development of an appropriate referral pathway from VOCAT to restorative justice conferences, rather than restorative justice practices being incorporated into the VOCAT process itself.<sup>54</sup>
- 15.77 There may be merit in considering whether restorative justice practices should be incorporated into a victims' financial assistance scheme and whether this could maximise the therapeutic effect for some victims of crime.

52 Department of Justice (Vic), *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*, Discussion Paper (2009) 48.

53 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Consultation Paper (2016) 145.

54 Centre for Innovative Justice, *Innovative Justice Responses to Sexual Offending—Pathways to Better Outcomes for Victims, Offenders and the Community* (RMIT University, 2014) 94.

## Question

- 72 Should restorative justice principles be further considered as a voluntary component of a state-funded financial assistance scheme? Alternatively, should a victims' financial assistance scheme provide a more direct pathway to restorative justice practices constituted elsewhere in the justice system?

### A new decision maker?

- 15.78 As outlined above, a number of Australian jurisdictions have now moved away from court or tribunal-based decision making towards administrative schemes. With the exception of South Australia, all other states and territories in Australia now have purely administrative schemes.<sup>55</sup>
- 15.79 While administrative schemes operate slightly differently in each jurisdiction, they have a number of similarities:
- Applications for assistance are made to victim support agencies with government assessors or specially appointed commissioners as the final decision makers.
  - Financial assistance is part of broader service provision and case management support.
  - Victims generally do not need to participate in formal hearings.
  - Applicants do not require legal assistance to progress their application.<sup>56</sup>
- 15.80 An Australian Capital Territory review in 2013 suggested that administrative schemes provide increased transparency and 'clarity of guidelines for eligibility'.<sup>57</sup> Other suggested benefits of administrative systems include:
- simplified processes that are more timely
  - less costly processes as lawyers are not required
  - victims not exposed to a potentially traumatic court-like hearing.<sup>58</sup>
- 15.81 However, Victorian research has found victim satisfaction with the current tribunal-based system:
- While administratively the compensation process focuses on the decision of allocation of funds, these participants' comments indicate that the hearings provided more meaning than the (often nominal) monetary award itself. The comments show that the [VOCAT] proceedings were associated by some participants with feelings of validation and vindication.<sup>59</sup>
- 15.82 Similarly, Victims Support Agency research found that some victims who had experienced the VOCAT hearing process found it to be a validating forum for recognition and acknowledgment of the harm caused by crime.<sup>60</sup> The informal nature of the VOCAT hearing was also highlighted as a positive aspect by some victims.<sup>61</sup>

55 South Australia is administrative at first instance, but the applicant may apply to the District Court where there is no agreement with the Crown Solicitor. See the comparative table of Australian jurisdictions in Appendix B.

56 A number of these similarities were noted in Justice and Community Safety Directorate (ACT), *The ACT Victims of Crime Financial Assistance Scheme, Issues Paper* (2013) 7.

57 Ibid.

58 Department of Justice (Vic), *Reviewing Victims of Crime Compensation: Sentencing Orders and State-funded Awards*, Discussion Paper (2009) 43.

59 Hayley Catherine Clark, *A Fair Way to Go: Criminal Justice for Victim/Survivors of Sexual Assault* (PhD Thesis, University of Melbourne, 2011) 117.

60 Victims Support Agency, Department of Justice and Regulation (Vic), *Counselling for Victims of Crime* (2011) 36.

61 Ibid 37.

- 15.83 As previously considered in Chapters 10, 11 and 12, one option might involve establishing a new administratively based scheme to transfer decision making to non-judicial officers. An alternative option could be to introduce a 'hybrid' administrative and judicial system, as discussed above.
- 15.84 A further consideration is whether decision making would be better vested in a decision maker independent of government and the courts, such as a victims commissioner or compensation commissioner. In New South Wales, this is the Commissioner of Victims' Rights.<sup>62</sup> In the Australian Capital Territory, it is the Victims of Crime Commissioner<sup>63</sup> and in Tasmania, decisions are made by Criminal Injuries Compensation Commissioners appointed by the minister.<sup>64</sup>

## Questions

- 73 What are the benefits and disadvantages of retaining judicial decision making for the provision of state-funded financial assistance for victims of crime? Are there alternative decision-making models that should be considered? If so, which?
- 74 Should hearings remain an available option, either at the request of the victim or the decision-maker?

### Victim financial assistance as a specialist field of expertise

- 15.85 During preliminary consultations, the Commission was told that one of the reasons the VOCAT process can be re-traumatising for victims is because it is not a trauma-informed process. It was also noted that magistrates presiding over VOCAT matters are not specialist VOCAT magistrates, nor experts in victim needs.
- 15.86 In this context, the Commission was also told about concerns regarding the potential for re-traumatisation, and a possible lack of victim sensitivity on the part of some VOCAT magistrates, particularly where there were:
- questions about not reporting the crime or not providing assistance to police and prosecution
  - questions about a victim's behaviour or past conduct, including unrelated criminal activity
  - inappropriate and irrelevant lines of questioning, including questions about what special financial assistance funds might be spent on, or why the victim had not left an abusive relationship earlier.<sup>65</sup>
- 15.87 One option for reform is to establish victims of crime compensation or state-funded financial assistance as a specialist area of work underpinned by a trauma-informed approach. Only decision makers with specialist training and expertise in victim needs and trauma-informed practice could preside over victim compensation decisions or hearings.

62 *Victims Rights and Support Act 2013* (NSW) s 8.

63 *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 86.

64 *Victims of Crime Assistance Act 1976* (TAS) s 2A.

65 Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 142.

- 15.88 Ian Freckelton has observed that victim compensation schemes are complex and should be recognised as specialised areas of practice.<sup>66</sup> The courts have previously highlighted the benefits of specially trained and assigned magistrates in the management of family violence matters.<sup>67</sup>
- 15.89 State-funded financial assistance as a specialisation could be achieved through:
- appointing VOCAT-only magistrates as a way of acknowledging and managing the increased complexity in matters coming before VOCAT<sup>68</sup> and creating a more specialised environment, like that created in the Family Violence Court Division
  - increasing specialisation within the VOCAT structure itself, through creation of specialist streams, such as family violence and sexual assault, as well as embedding victim support teams within the registry
  - appointing specialist decision makers, independent of government and the courts, like the Commissioner of Victims' Rights in New South Wales,<sup>69</sup> the Victims of Crime Commissioner in the Australian Capital Territory<sup>70</sup> or the Criminal Injuries Compensation Commissioners appointed by the minister in Tasmania<sup>71</sup>
  - requiring a minimum level of specialised victim, financial assistance and trauma-informed training and education for any decision maker in the scheme.

## Question

- 75 Should state-funded financial assistance to victims of crime be undertaken by other specialised decision-makers, so as to improve knowledge and awareness of victim needs and to enable a trauma-informed approach? If so, how should this operate?

66 Ian Freckelton, 'Criminal Injuries Compensation for Domestic Sexual Assault: Obstructing the Oppressed' in Chris Sumner et al (eds), *Victimology* (Australian Institute of Criminology, 1996) 252.

67 Magistrates' Court of Victoria and Children's Court of Victoria, Submission No 978 to Royal Commission into Family Violence, *Royal Commission into Family Violence*, June 2015, 30.

68 Victims of Crime Assistance Tribunal, *Annual Report 2015–16* (2016) 9.

69 *Victims Rights and Support Act 2013* (NSW) s 8; *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 11(a).

70 *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 86.

71 *Victims of Crime Assistance Act 1976* (TAS) s 2A.

# Conclusion

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## 16. Conclusion

- 16.1 This supplementary consultation paper discusses a range of issues to assist the Victorian Law Reform Commission (the Commission) in understanding the operation and effectiveness of the *Victims of Crime Assistance Act 1996* (the Act) and the Victims of Crime Assistance Tribunal (VOCAT) for all victims of crime, and whether there are other models that would more effectively deliver assistance. This consultation paper therefore sets out a number of questions and options for reform.
- 16.2 This paper does not represent concluded views on the matters raised by the supplementary terms of reference. Those conclusions will be stated in the Commission's report addressing both the first terms of reference and the supplementary terms of reference to be delivered to the Attorney-General by 27 July 2018.
- 16.3 The Commission welcomes submissions from all parts of the community. It particularly invites submissions from victims, persons affected, professionals, stakeholders and the community who have had direct experience of VOCAT processes and/or whose work interacts with VOCAT.
- 16.4 You can provide input into the Commission's review by responding to the specific questions posed throughout the paper. These questions are also included at the beginning of this paper. You may choose to answer some, but not all questions. Alternatively, you may wish to provide a response that does not address individual questions posed throughout the paper, but nonetheless relates to the issues outlined in the terms of reference.
- 16.5 To allow the Commission time to consider your views before deciding on final recommendations, **submissions are due by 31 October 2017.**
- 16.6 Your responses to these questions will assist the Commission determine whether Victoria's model of state-funded financial assistance for victims of crime, through the Act and VOCAT, is the most appropriate model.

# Appendices

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# Appendix A: Summary of key issues— Family Violence and the Victims of Crime Assistance Act 1996 (first consultation paper)

## Introduction

- 1 On 22 December 2016, the Attorney General, the Hon. Martin Pakula MP, asked the Victorian Law Reform Commission (the Commission) to review and report on the provision of state-funded financial assistance to victims of family violence under the *Victims of Crime Assistance Act 1996* (Vic) (the Act). The terms of reference ask the Commission to consider five specific matters raised by the Victorian Royal Commission into Family Violence (the Royal Commission). These are outlined below. In this consultation paper, the Victorian Royal Commission will be referred to as the Royal Commission, unless the context otherwise requires.
- 2 The Act established the Victims of Crime Assistance Tribunal (VOCAT) which determines applications for financial assistance. The operation of the Act and VOCAT are the main focus of this consultation paper.
- 3 Key issues raised by this reference are outlined below. Detailed discussion of these key issues is in Parts Two and Three of this consultation paper. Part One provides background and contextual information only, and does not raise specific consultation questions.

## Eligibility for assistance

- 4 The terms of reference ask the Commission to consider the eligibility test and whether this should be expanded to include victims of family violence where a pattern of non-criminal behaviour results in physical or psychological injury. This is discussed in detail in Chapter 6.\*
- 5 A person is eligible for financial assistance under the Act if they are the ‘primary’, ‘secondary’ or ‘related’ victim of an ‘act of violence’ that directly results in their suffering injury, death or a significant adverse effect.
- 6 Different categories of victims are eligible for different kinds of assistance. However, in all cases there must have been an ‘act of violence’. Under the Act, an act of violence is defined as a ‘criminal act’ or ‘a series of related criminal acts’ that occurred in Victoria and that ‘directly resulted in injury or death to one or more persons’. Criminal acts include assault, injury, threats, sexual offences, stalking, child stealing, kidnapping, conspiracy and attempts of these offences. The act of violence must directly result in injury, that is, actual physical bodily harm, mental illness or disorder (or exacerbation of) and pregnancy. ‘Injury’ does not include injury arising from property loss or damage.
- 7 Additional financial assistance can also be claimed if a victim has suffered a ‘significant adverse effect’, defined as any grief, distress, trauma or injury as a direct result of the act of violence. This is described as ‘special financial assistance’ in the Act.

\* In this Appendix, chapter numbers refer to the first consultation paper, *Family Violence and the Victims of Crime Assistance Act 1996: Consultation Paper*, not this supplementary consultation paper.

## Issues

- 8 The main issues facing victims of family violence with respect to the eligibility criteria are the definition of 'act of violence', the definition of 'injury', causation and the victim categories.
- 9 The act of violence requirement means that victims of family violence are only able to access financial assistance if they have experienced physical or sexual violence, a threat of injury, or stalking. Victims of non-criminal forms of family violence, such as economic, emotional and psychological abuse are excluded, as are victims of family violence that is criminal in nature but not an offence against the person. The definition of act of violence is much narrower than the definition of family violence in the *Family Violence Protection Act 2008* (Vic).
- 10 Another potential barrier for victims of family violence is the definition of injury. If a victim of family violence has not suffered physical injury or does not suffer from a mental disorder or illness, they may be ineligible for assistance. There are cases where victims of family violence, who have experienced significant mental harm, have had their applications refused because they do not suffer from a recognised mental illness or disorder.
- 11 Victims of family violence can also encounter difficulties in establishing that their injury was a direct result of the act of violence, particularly if there may be other contributing factors.
- 12 In addition, the distinction between primary, secondary and related victims can be problematic for child victims of family violence. Children who experience family violence can suffer severe psychological and developmental trauma and consequences. This is equally the case for child victims who are the direct subject of the violence and those who hear, witness or are otherwise exposed to it. However, under the Act, this second group of child victims are not recognised as primary victims. This not only has the potential to fail to acknowledge and recognise their experience of family violence but it also affects the categories and quantum of awards that they receive.
- 13 To address the above issues, the Commission will consider whether family violence could be defined in the Act and whether the Act could be amended to expand the range of injuries covered by it. Alternatively, or additionally, the Commission will consider whether the Act could be amended to include a broader range of injuries for victims of family violence or to remove the requirement for proof of injury for victims of family violence.

## Assistance available

- 14 The terms of reference ask the Commission to consider, within the total financial assistance available, the categories and quantum of awards with regard to the cumulative impact of family violence behaviour on victims. This is discussed in detail in Chapter 7.
- 15 The Act limits the amount of assistance that can be awarded to a particular victim. The maximum award for primary victims is \$60,000 plus \$10,000 of special financial assistance. The maximum award for secondary victims and any one related victim is \$50,000. There are different categories of award available to primary, secondary or related victims.
- 16 There are three main categories of award that primary victims can access—expenses actually incurred or reasonably likely to be incurred; in exceptional circumstances, an amount for other expenses actually incurred or reasonably likely to be incurred to assist in recovery; and special financial assistance.

- 17 Special financial assistance is a lump sum awarded as a symbolic expression by the state of the community's sympathy and recognition of harms suffered. Special financial assistance is classified into four categories, A, B, C and D, based on the severity of the act of violence, with Category A covering the most serious offences and Category D the least.
- 18 Related criminal acts can be treated as a single act of violence, which can limit awards available to some victims of crime.

## Issues

- 19 The main issues facing victims of family violence, including child victims, with respect to the financial assistance available are the related criminal acts provision and the categories of special financial assistance.
- 20 The related criminal acts provision can disproportionately reduce the awards for victims of family violence, including child victims, because family violence often involves repeated acts of abuse by the same offender, which is a factor relevant to whether acts are considered related.
- 21 Concerns have also been raised that the special financial assistance categories do not sufficiently take into account the cumulative harm of individual acts of violence because the relevant categories are based on the severity of a single offence, rather than the overall impact of a pattern of abuse.
- 22 To address the above issues, the Commission will consider whether the related criminal acts provision and the special financial assistance categories could be amended. This could involve adding further criteria when assessing related acts, excluding family violence from the operation of the related criminal acts provision entirely, or amending the Act so that only acts of violence committed at the same time are considered related.
- 23 The Commission will also consider how the Act could be amended to take into account the cumulative harm of family violence, including to children, by amending the special financial assistance categories to enable a higher award for a series of acts of family violence. Another option is to incorporate a 'pattern of family violence' into one of the higher categories. The Commission will also consider adopting separate categories for family violence or removing the categories of special financial assistance entirely, enabling VOCAT to consider family violence and other factors to determine awards up to the maximum amount.

## Form and timing of applications

- 24 The Royal Commission specifically identified the time limit for making an application as a potential barrier for victims of family violence. This is discussed in detail in Chapter 8.
- 25 An application for assistance to VOCAT must be made in writing in the prescribed form within two years of the act of violence occurring. VOCAT is obliged to strike out applications made outside this two-year time limit, unless they consider it appropriate not to strike the application out.

## Issues

- 26 Concerns were raised that the VOCAT application form is tailored towards victims of a one-off act of violence making it difficult for victims of family violence to complete. The application time limit was also raised as a significant barrier.
- 27 It can take victims of family violence a long time to disclose their experiences of family violence. The reasons for this are varied and complex. The fact that it may take a victim of family violence longer to lodge an application for assistance means that the time limit of two years can have a disproportionate impact on their eligibility.

- 28 To address these matters, the Commission will consider how the application form could be made more accessible for victims of family violence by using language that is not confined to singular acts of violence. The Commission will also consider how the Act could be amended to remove difficulties in relation to the time limitation, such as increasing the time limit for applications relating to family violence or making family violence an explicit factor that VOCAT must consider when making a decision about whether or not to strike out a late application. A further option is to remove the time limit for victims of family violence.

## VOCAT hearings

- 29 The terms of reference require the Commission to consider the requirement to notify a perpetrator, especially where the matter has not been reported to police, or no charges have been laid, or the prosecution is discontinued or the person is acquitted. This is discussed in detail in Chapter 9.
- 30 Under the Act, VOCAT may give notice of a hearing to any other person whom it considers to have a legitimate interest in the matter, including an alleged perpetrator who may also elect to appear at a hearing. Some procedural protections already exist for victims in these circumstances under the Act. VOCAT has issued a Practice Direction on the procedure to be followed in these circumstances.
- 31 VOCAT may also determine an application without a hearing.

## Issues

- 32 The main issue raised concerns notification of alleged perpetrators, due to the safety risks that commonly arise in applications involving family violence.
- 33 Alleged perpetrators are sometimes notified and may participate in proceedings. This can be a deterrent for victims of family violence to apply to VOCAT.
- 34 Given these issues, the Commission will consider whether the Act could be amended to remove the notification provision, either entirely or specifically for vulnerable victims, such as family violence victims. However, this consideration also raises concerns about procedural fairness.
- 35 Another option is to amend the Act to explicitly list the safety concerns associated with family violence as a factor VOCAT must have regard to when considering whether to notify an alleged perpetrator, as well as strengthening existing evidentiary and procedural protections.

## Making an award

- 36 The terms of reference require the Commission to review the matters giving rise to refusal of an application for financial assistance except in special circumstances. These matters are outlined in sections 52, 53 and 54 of the Act. This is discussed in detail in Chapter 10.
- 37 Under section 52 of the Act VOCAT must refuse to make an award if an act of violence was not reported to police within a reasonable time or the applicant failed to provide reasonable assistance to police or prosecution, unless special circumstances exist.
- 38 Section 54 of the Act also requires VOCAT to consider a number of other specified matters including the character, behaviour (including past criminal activity) and attitude of the applicant before, during and after the act of violence. This includes any provocation or 'condition or disposition' of the applicant that may have contributed to the injury. These are sometimes referred to as 'contributory conduct' or 'provocation' clauses. VOCAT must also consider whether a perpetrator will benefit from the award.

## Issues

- 39 The main issues raised relate to the requirements to report to police, to assist police and prosecution, the contributory conduct and provocation clauses, and the perpetrator benefit provisions. Many of these provisions have complex case law interpretation of the Act.
- 40 In determining whether an act of violence was reported to police within a reasonable time, case law indicates differing interpretations of what is considered a reasonable time for reporting and also differing interpretations of what might result in special circumstances mitigating a delay in reporting. This can lead to uncertainty in cases of family violence where a delay in reporting to police is often a characteristic.
- 41 In relation to whether a victim provided reasonable assistance to police or prosecution, there are no prescribed positive actions a victim must undertake. However, guidance in the VOCAT application form indicates victims must report the matter to police, make a formal report and sworn statement. Due to the nature and dynamics of family violence, these requirements can be problematic for victims of family violence.
- 42 Special circumstances can mitigate a failure to provide reasonable assistance to police and prosecution. However, special circumstances require something out of the ordinary and some case law decisions have emphasised family violence is a common circumstance.
- 43 In addition to the above issues, contributory conduct clauses have been criticised as victim blaming in family violence cases and the Act provides no guidance about what might be considered as resulting in a benefit to the perpetrator.
- 44 These issues together raise concerns that the Act fails to recognise the dynamics and characteristics of family violence. To address this, the Commission will consider how the Act could be amended to recognise family violence for the purposes of sections 52, 53 and 54.
- 45 Suggestions include an overarching provision which enables, or requires, VOCAT to consider the nature and dynamics of family violence when making a determination, exempting victims of family violence from some of the considerations under these provisions, or amending specific provisions to more explicitly reference family violence.

## VOCAT procedures and time frames

- 46 The terms of reference require the Commission to consider procedural matters to expedite the making of an award. This is discussed in detail in Chapter 11.
- 47 VOCAT must act 'expeditiously' (that is, promptly) to determine applications. Close to 50 per cent of all VOCAT applications are finalised within nine months.
- 48 After receiving relevant documentation, VOCAT may determine an application with or without conducting a directions hearing or a final hearing, depending on the preference of the applicant, as well as the Tribunal's need for a hearing. In practice, many straightforward applications are decided without the need for a hearing. More complex cases are usually determined at a hearing.

## Issues

- 49 The main issue raised in relation to time frames relates to the fact that although VOCAT must act promptly, it must also have regard to matters that can sometimes affect the time it takes to finalise an application, including awaiting the outcome of a criminal investigation, trial or inquest. The Tribunal has also observed an increase in the complexity of applications, particularly relating to family violence which impacts timeliness.

- 50 Delays in determining VOCAT applications relating to family violence can have profound impacts on victims. Financial hardship can be a significant consequence of family violence and the economic impacts of family violence can impede a victim's ability to leave an abusive relationship and obtain safety.
- 51 In considering procedural matters to expedite the making of an award, the Commission will consider options such as case triaging, development of a Practice Direction to clarify some more complex provisions of the Act, a separate family violence stream and VOCAT specialisation for magistrates.
- 52 The Commission will also consider the benefits of administrative models where commissioners or government assessors make determinations, as well as the connection between VOCAT and other support agencies. Consideration is also given to how interim awards could better reflect the administrative and case management processes used in making other awards of assistance, such as family violence flexible support packages which are administered by government-funded community organisations.

### **Review, variation and refund of awards**

- 53 Although limited data and information is available with respect to review and refund of awards, variation has been raised as a concern for family violence victims. Review, variation and refund of awards is discussed in Chapter 12.
- 54 VOCAT has broad discretion to vary awards, although variations must be consistent with the Act. For example, an award must still assist a victim's recovery from the act of violence.
- 55 In 2015–16, VOCAT varied 986 awards for expenses already incurred and 588 for expenses not yet incurred.

### **Issues**

- 56 The main issues raised concern variation of awards. Family violence victims frequently require variations, particularly in relation to additional counselling. The variation process is not always easy and can be complicated by the need to repeatedly engage a lawyer.
- 57 At the same time, variation allows VOCAT to assist victims as their needs and circumstances change.
- 58 The Commission will consider the usefulness of award variations in addressing the specific needs of family violence victims and what, if any, barriers may have been experienced by victims during the variation process.

### **VOCAT awareness and accessibility**

- 59 Concerns have been raised that there are relatively few VOCAT applications compared to the number of reported incidents of family violence in Victoria. This raises issues of awareness and accessibility of VOCAT. This is discussed in detail in Chapter 13.
- 60 Although there is limited data available which provides a comprehensive picture of the number of family violence victims who use VOCAT, the Royal Commission found that some victims were unaware of their eligibility under the Act.
- 61 The Act has also been described as complex and difficult for victims to understand. A victim's experience of VOCAT is therefore likely to be enhanced by victim support and the availability of legal representation.

- 62 Although VOCAT has close links with support agencies, these support mechanisms are not integrated with VOCAT. Some Australian states and territories have combined victim support and compensation/financial assistance schemes which aim to connect information, support and financial assistance.

### Issues

- 63 The Commission raises issues of awareness and accessibility to determine whether other changes or reform might be required to support possible legislative change.
- 64 The Commission will consider how aspects of the current system work together, including VOCAT, lawyers, victim support and family violence services, and how better integration might improve knowledge about and accessibility of the service for victims of family violence.

## VOCAT—beyond financial assistance

- 65 Financial assistance and compensation go beyond monetary benefits—they can make a statement to the community about the unacceptability of family violence and the process itself can help recognise a victim’s experience.
- 66 However, at the time of the introduction of the Act, in 1996, there was little community acknowledgment of family violence or its harms. As such, family violence is not explicitly recognised under the Act.
- 67 These issues are discussed in detail in Chapter 14.

### Issues

- 68 The main issues raised relate to the potentially therapeutic aspects of VOCAT and the Act’s lack of recognition of family violence.
- 69 Victoria is one of the few Australian jurisdictions that uses judicial decision makers. For some victims, this provides an acknowledgment from the justice system that there has been a crime and that they have suffered harm. However, research has found that this is not the experience of all victims of crime. The Commission has been advised that one of the reasons the VOCAT process can be retraumatising for victims is because it is not a trauma-informed process.
- 70 In addition, the Act’s failure to recognise family violence—or to conceive of family violence itself as an act of violence—remains one of the fundamental challenges of ensuring the Act appropriately responds to harms caused by family violence.
- 71 To address these issues, the Commission will consider how trauma-informed practice could underpin any possible changes to the Act or VOCAT procedures. Consideration could also be given to how VOCAT could be more integrated with the support system, particularly given the models in other jurisdictions that combine compensation and victim support.
- 72 The Commission will also consider how broader recognition of family violence could be incorporated in the Act, such as a general provision acknowledging the dynamics of family violence and re-envisioning the Act as applicable in circumstances involving some forms of family violence. This would need to closely mirror any potential changes to eligibility under the Act.

## Fulfilment of the purpose and objectives of the Act

- 73 The purpose of the Act is to provide assistance to victims of crime. The Act also has a number of further objectives, discussed in detail in Chapter 14.
- 74 The first stated objective of the Act is 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’. The Commission considers that a number of provisions of the Act make it difficult for the Act to assist family violence victims to recover from crime. These include the eligibility criteria, the quantum generally awarded in family violence matters, application time limits, perpetrator notification provisions, requirements to report to and assist police, as well as VOCAT delays.
- 75 The second stated objective of the Act is 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’. The Commission considers that although victims of family violence are sometimes determined to be ‘certain victims’ under the Act, the special financial assistance categories may not sufficiently take into account the cumulative harm of individual acts of violence because the categories are based on the severity of a single offence, rather than the overall impact of a pattern of abuse.

### Issues

- 76 Overall, the Commission will consider a range of structural, legislative, procedural and perceived barriers currently limiting VOCAT’s ability to assist victims of family violence to recover, thereby impacting the Act’s fulfilment of its purpose and objectives.
- 77 To enable the Act to better fulfil its purpose and objectives, the Commission will also consider how the Act can provide for:
- recognition of a broader definition of family violence—beyond the notion of a single act of violence and potentially incorporating non-violent forms of abuse
  - recognition of the cumulative harm of individual acts of violence as a result of experiencing persistent and protracted violence in a family violence context
  - acknowledgment of the difficulties faced by family violence victims in reporting to police, assisting prosecution and applying for assistance, without applying prescriptive time frames
  - prioritisation of a victim’s safety and wellbeing and a trauma-informed approach
  - more timely access to financial assistance at the point of crisis and better integration with existing supports
  - more flexibility and adaptability as circumstances change, without further burdening victims with having to continue to access lawyers in order to obtain support such as counselling.

## Appendix B: Victim compensation schemes in Australia—Comparative table<sup>1</sup>

	<b>Victoria</b>	<b>ACT</b>	<b>NSW</b>	
<b>Legislation</b>	<i>Victims of Crime Assistance Act 1996</i> (Vic)	<i>Victims of Crime (Financial Assistance) Act 2016</i> (ACT)	<i>Victims Rights and Support Act 2013</i> (NSW)	
<b>Eligibility</b>	Primary victims, secondary victims and related victims.	Primary victims, related victims and homicide witnesses.	Primary victims, secondary victims and family victims.	
<b>Proof/evidence of offence</b>	No charge or conviction required—question of fact decided on the balance of probabilities.	No charge or conviction required—must be satisfied on the balance of probabilities about any matter relevant to application including whether an offence occurred.	No charge or conviction required—documentary evidence must support that act of violence occurred on the balance of probabilities.	
<b>Types of crimes covered</b>	‘Act of violence’. Violent offences resulting in injury or death. Includes assault, sexual offences, stalking, child stealing and kidnapping.	‘Act of violence’. Offences resulting in injury or death. Includes offences against the person, sexual offences, robbery and female genital mutilation. Also includes specific ‘family violence offences’, such as property offences and breach of family violence order.	‘Act of violence’. Violent offences resulting in injury or death. Specifically extends to domestic violence.	
<b>Is there a requirement for ‘injury’?</b>	Yes—‘injury’ means actual physical bodily harm, mental illness or disorder and pregnancy. Can be ‘significant adverse effect’ for primary victims claiming special financial assistance.	Yes—‘injury’ means physical injury, mental illness and mental disorder. But recognises further injuries for family violence and sexual offences, including unplanned pregnancy, violation, reduced sense of self-worth, increased fear / insecurity.	Yes—‘injury’ means actual bodily harm, grievous bodily harm and psychological or psychiatric harm.	

<sup>1</sup> This table provides a summary of victims’ compensation and financial assistance schemes operating in each Australian state and territory as at August 2017. This table is not intended as a comprehensive reference. For a comparison of family violence-specific provisions in these schemes, see Appendix B in Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017).

	NT	QLD	SA	Tasmania	WA
	<i>Victims of Crime Assistance Act 2006</i> (NT)	<i>Victims of Crime Assistance Act 2009</i> (Qld)	<i>Victims of Crime Act 2001</i> (SA)	<i>Victims of Crime Assistance Act 1976</i> (Tas)	<i>Criminal Injuries Compensation Act 2003</i> (WA)
	Primary victims, secondary victims, family victims and related victims.	Primary victims, parent secondary victims, witness secondary victims and related victims.	Immediate victims, parent/ spouse/ domestic partner/ child of victims of homicide and dependent of immediate victims who die.	Primary victims, secondary victims, related victims.	Victims of an offence and close relatives of a person who dies as a result of an offence.
	No charge or conviction required.	No charge or conviction required—must be satisfied on the balance of probabilities that the person is eligible for the assistance.	Offence must be proved beyond reasonable doubt. But there are certain circumstances where there has been no conviction, in which the Attorney-General has the discretion to make an <i>ex gratia</i> payment.	No charge or conviction required—must be satisfied on the balance of probabilities that the death or injury was the result of criminal conduct.	Offences for which a person has been convicted ('proved offences'). But the Act also applies to 'alleged offences' in certain circumstances.
	'Violent Act'. Criminal acts that result in injury to a person.	'Act of violence'. Means crimes against the person and domestic violence, including non-criminal forms of abuse that results in death or injury.	Offences involving the use of violence, threat of violence or creates a reasonable apprehension of imminent harm, sexual offences and offences that cause death or physical injury.	Violent offences, including sexual offences, abduction, kidnapping and stalking.	Crimes, misdemeanours and simple offences that are 'proved' (ie the offender has been convicted) or, in certain circumstances, that are 'alleged'.
	Yes—'injury' means physical illness or injury, recognisable psychological or psychiatric disorder and pregnancy. But there is no requirement of injury for certain sexual offences ('compensable violent acts').	Yes—'injury' means bodily injury, mental illness/ disorder, intellectual impairment, pregnancy and disease. But recognises further injuries for domestic violence and sexual offences including violation, reduced self-worth, increased fear/ insecurity, adverse impact.	Yes—for an immediate victim must be physical or mental injury, including pregnancy, mental shock and nervous shock. Grief is required for close family members and financial loss for dependents.	Yes—'injury' means impairment of bodily or mental health and pregnancy.	Either 'injury' (including bodily harm, mental or nervous shock and pregnancy) or financial 'loss'.

	<b>Victoria</b>	<b>ACT</b>	<b>NSW</b>	
<b>Legislation</b>	<i>Victims of Crime Assistance Act 1996</i> (Vic)	<i>Victims of Crime (Financial Assistance) Act 2016</i> (ACT)	<i>Victims Rights and Support Act 2013</i> (NSW)	
<b>Are specific classes of victims recognised under the Act?</b>	Yes—child victims (under 18), elderly victims, victims with an impairment, victims of an act of violence perpetrated by someone in a power, influence or trust over them, victims of a series of related criminal acts, victims of a series of acts involving indecent assault or sexual penetration, victims of act of violence involving deprivation of liberty, victims who suffer serious injury/ very serious physical injury/ very serious disease.	Yes—victims of domestic violence, victims of sexual assault, child victims (under 18), elderly victims (over 65), victims with impaired physical, psychological or intellectual capacity, pregnant victims, victims of an offence perpetrated by someone in a position of power, influence or trust over them, victims of a series of offences, victims of an offence involving an offensive weapon and victims who suffer a very serious injury that is likely to be permanent.	Yes—victims of domestic violence, victims of sexual assault and victims of child sexual abuse.	
<b>Categories of awards for primary victims</b>	Counselling, medical expenses, loss of earnings, loss/damage to clothing worn at the time, safety-related expenses and, in exceptional circumstances, expenses to assist in recovery. Can also be awarded ‘special financial assistance’, which is a lump sum that varies according to the type of offence. Expressly excludes property loss/ damage.	Financial assistance for immediate needs and economic loss. Can also be awarded a ‘recognition payment’, which is a lump sum that varies according to the type of offence.	Counselling, financial assistance for immediate needs in order to secure victim’s safety/ health/ well-being, and financial assistance for economic loss. Can also be awarded a ‘recognition payment’, which is a lump sum that varies according to the type of offence. Expressly excludes property loss/ damage.	
<b>Quantum of awards for primary victims—maximum amount</b>	\$60,000 plus \$10,000 ‘special financial assistance’. Includes a maximum of \$20,000 for loss of earnings.	Total maximum of \$50,000. Includes a maximum of \$10,000 for immediate needs, \$30,000 for loss of earnings and a ‘recognition payment’ of up to \$26,250. But for a primary victim of a ‘domestic violence offence’ only, the total maximum award is \$10,000. These amounts are subject to indexation.	A maximum of \$5,000 for immediate needs, \$5,500 for counselling services, \$30,000 for economic loss, and a ‘recognition payment’ of up to \$10,000.	

	NT	QLD	SA	Tasmania	WA
	<i>Victims of Crime Assistance Act 2006</i> (NT)	<i>Victims of Crime Assistance Act 2009</i> (Qld)	<i>Victims of Crime Act 2001</i> (SA)	<i>Victims of Crime Assistance Act 1976</i> (Tas)	<i>Criminal Injuries Compensation Act 2003</i> (WA)
	Yes—victims of domestic violence, victims of sexual assault, victims of child abuse and victims of a pattern of abuse.	Yes—victims of domestic violence, victims of sexual assault, child victims (under 16), elderly victims (over 60), victims with impaired capacity, victims of an act of violence perpetrated by someone in a power, influence or trust over them, victims of a series of related acts of violence, victims of act of violence involving deprivation of liberty and victims who suffer serious injury/ very serious injury/ very serious disease.	No.	Yes—victims of more than one offence.	No.
	Financial assistance for financial loss and counselling. Can also be awarded a lump sum for certain 'compensable injuries' and 'compensable violent acts'.	Counselling, medical expenses, incidental travel expenses, report expenses as part of application, loss of earnings, damage to clothing worn at the time, and expenses to assist in recovery in exceptional circumstances. Can also be awarded 'special assistance', which is a lump sum that varies according to the type of offence. Expressly excludes property damage.	'Compensation for the injury arising from the offence.' Includes financial and non-financial loss.	Expenses incurred as a result of the injury, medical, dental, psychological and counselling services required in the future, loss of wages or salary, pain and suffering. Expressly excludes property loss/ damage.	Compensation for the injury and any loss suffered.
	\$40,000, including a maximum of \$40,000 for a single 'compensable injury' or a single 'compensable violent act'.	\$75,000 plus \$500 for legal costs. This includes a maximum of \$20,000 for loss of earnings and 'special assistance' of up to \$10,000.	\$100,000, including a maximum of \$100,000 for non-financial loss. Amounts prescribed in the Act are subject to indexation.	\$30,000 for a primary victim of a single offence and \$50,000 for a primary victim of multiple offences.	\$75,000 for offences committed after the commencement of the Act.

	<b>Victoria</b>	<b>ACT</b>	<b>NSW</b>	
<b>Legislation</b>	<i>Victims of Crime Assistance Act 1996</i> (Vic)	<i>Victims of Crime (Financial Assistance) Act 2016</i> (ACT)	<i>Victims Rights and Support Act 2013</i> (NSW)	
<b>Are related criminal acts treated as a single criminal act?</b>	Yes, unless in the circumstances they ought not to be. But a higher maximum award of 'special financial assistance' is available for a series of related criminal acts in certain circumstances.	Yes, if they are likely to form a single ongoing offence or if assistance would be disproportionate if treated separately. Notice must be given to the applicant. But a series of offences is a 'circumstance of aggravation', which can result in a higher 'recognition payment'.	Yes, unless in the circumstances they ought not to be. But a higher 'recognition payment' is available for a series of related criminal acts in certain circumstances.	
<b>Time limit</b>	2 years after the act of violence. But time limit can be extended in certain circumstances, having regard to factors such as whether the offender in position of power, influence or trust.	3 years after the act of violence or the day the child victim turns 18. But time limit can be extended in certain circumstances, having regard to factors such as whether the alleged offender was in a position of power, trust or authority.	2 years after the act of violence or the day the child victim turns 18. But time limit is 10 years for victims of domestic violence, child abuse or sexual assault.  No time limit for a child victim of a sexual offence. Time limit can also be extended if primary victim subsequently dies as a direct result of the act of violence.	
<b>Can a failure to report to police lead to a refusal of an application?</b>	Yes—failure to report to police in a reasonable time results in mandatory refusal, unless special circumstances exist.	Yes—failure to report to police can lead to a refusal of application. But 'special reporting class victims' can report to other professionals, including doctors, counsellors and government agencies instead. Special reporting class victims include child victims, victims of sexual offences and victims of an offender who was in a position of trust, influence or power.	Yes—must consider whether reported to police within reasonable time. May have regard to the nature of the relationship between the victim and perpetrator. Can also consider whether the act of violence was reported to a health or other relevant agency.	

	<b>NT</b>	<b>QLD</b>	<b>SA</b>	<b>Tasmania</b>	<b>WA</b>
	<i>Victims of Crime Assistance Act 2006</i> (NT)	<i>Victims of Crime Assistance Act 2009</i> (Qld)	<i>Victims of Crime Act 2001</i> (SA)	<i>Victims of Crime Assistance Act 1976</i> (Tas)	<i>Criminal Injuries Compensation Act 2003</i> (WA)
	Yes. But if the related acts occur in the context of domestic violence, the victim is eligible for a lump sum for 'domestic violence injuries'.	Yes both related criminal acts and related acts of domestic violence are treated as a single offence. Must give notice to the applicant and he or she has an opportunity to object. But in certain circumstances a higher maximum award of 'special assistance' is available for a series of related criminal acts.	Yes.	Yes. But a higher maximum award is available for a victim of more than one offence.	Yes.
	2 years after the violent act or the day the death or injury occurs. But time limit can be extended in certain circumstances, having regard to factors such as whether the alleged offender was in a position of power, trust or authority or where the injury or death occurred as a result of sexual assault, domestic violence or child abuse.	3 years after the act of violence, the day the child victim turns 18 or the day the primary victim dies.	3 years after the offence or, if the application relates to a death, 12 months from the death. May extend the time limit for 'any proper reason'.	3 years after the offence or the day the child victim turns 18. May extend the time limit if 'special circumstances' justify the extension.	3 years after the date of the offence. But an extension of time may be granted 'if it is just to do so'.
	Yes—failure to report to police within a reasonable time can lead to a refusal of application, unless the circumstances prevented the report from being made.	Yes—failure to report to police can lead to a refusal of application, unless there is a reasonable excuse. But 'special primary victims' can report to a counsellor, psychologist, doctor or domestic violence service instead. 'Special primary victims' include child victims, victims of sexual offences, victims of an offender who was in a position of trust, influence or power and victims of domestic violence.	Yes—failure to report to police within a reasonable time and 'without good reason' can lead to a refusal of application.	No specific provision. But failure to report to police may constitute a failure to assist police (see below).	No specific provision. But failure to report to police may constitute a failure to assist police (see below).

	<b>Victoria</b>	<b>ACT</b>	<b>NSW</b>	
<b>Legislation</b>	<i>Victims of Crime Assistance Act 1996</i> (Vic)	<i>Victims of Crime (Financial Assistance) Act 2016</i> (ACT)	<i>Victims Rights and Support Act 2013</i> (NSW)	
<b>Can a failure to assist/ co-operate with Police lead to a refusal of an application?</b>	Yes—failure to assist police results in mandatory refusal, unless special circumstances exist.	Yes—mandatory refusal if applicant has unreasonably failed to give assistance to police.	Yes—in determining whether or not to grant the application/ the amount of the award, Commissioner must have regard to failure to assist police.	
<b>Can an applicant’s contributory conduct lead to refusal of an application?</b>	Yes—in determining whether or not to make an award, must consider whether the applicant ‘provoked’ the act of violence, any condition/ disposition of the applicant that contributed to injury/ death or whether the perpetrator will benefit from the award. Mandatory refusal if the application is made in collusion with the alleged offender.	Yes—award must be reduced if applicant contributed to the injury, participated in or assisted in the act of violence, encouraged someone else to assist in the act of violence or failed to mitigate extent of the injury.	Yes—must consider whether victim contributed/ encouraged/ assisted the act of violence, any behaviour (including past criminal behaviour) if it directly or indirectly contributed to the applicant’s injury/ death or whether victim failed to mitigate injury (ie by not seeking medical treatment). But can consider dynamics of sexual assault/ domestic violence in relation to mitigation of injury.	
<b>Can an applicant’s character/ behaviour lead to refusal of an application where it did not contribute (either directly or indirectly) to the act of violence or injury/ death?</b>	Yes—in determining whether or not to make an award, must consider the applicant’s character, behaviour (including past criminal behaviour) or attitude of the applicant ‘at any time’.	No.	No.	
<b>Perpetrator notification</b>	Yes—discretionary.	Yes—discretionary.	Perpetrator only notified if a provisional restitution order is made.	

	<b>NT</b>	<b>QLD</b>	<b>SA</b>	<b>Tasmania</b>	<b>WA</b>
	<i>Victims of Crime Assistance Act 2006</i> (NT)	<i>Victims of Crime Assistance Act 2009</i> (Qld)	<i>Victims of Crime Act 2001</i> (SA)	<i>Victims of Crime Assistance Act 1976</i> (Tas)	<i>Criminal Injuries Compensation Act 2003</i> (WA)
	Yes—mandatory refusal if applicant failed without reasonable excuse to assist the police in a material way in the investigation or prosecution of the offender.	Yes—mandatory refusal if applicant has not given reasonable assistance to police and that failure prevented the arrest or prosecution of the offender. However, domestic violence is a factor to which the decision maker must have regard in deciding whether the victim had a reasonable excuse not to assist police.	Yes—mandatory refusal if applicant refused or failed to provide information, give evidence or to co-operate in the investigation or prosecution of the offence without reasonable excuse.	Yes—mandatory refusal if the applicant failed to reasonably assist in the identification, apprehension or prosecution of alleged offender.	Yes—mandatory refusal if the applicant failed to reasonably assist in the identification, apprehension or prosecution of alleged offender.
	Yes—award must be refused if the applicant made the application in collusion with the offender or the injury/ death occurred during the commission of an indictable offence by the applicant.	Yes—award must be refused if the applicant conspired with the perpetrator or if the main reason for the act of violence was the primary victim’s involvement in criminal activity (including previous involvement in criminal activity).	Yes—award must be refused if the claimant was engaged in conduct constituting an indictable offence and that conduct materially contributed to the claimant’s risk of injury, unless failure to compensate would be unjust in the circumstances. In determining the award, the court must also have regard to any conduct on the part of the claimant that directly or indirectly contributed to the offence or injury.	Yes—in determining whether to refuse/ reduce an award, must have regard to any behaviour, condition, attitude or disposition of the victim that appears to have directly or indirectly contributed to the injury/ death.	Yes—award for mental shock must be refused if the victim was committing a separate offence at the time or if there is a relationship or connection between the victim and the offender and the award is likely to benefit the offender. Can also refuse/ reduce award if the behaviour, condition, attitude or disposition of the victim directly or indirectly contributed to the injury/ death.
	No.	No.	No.	No.	No.
	Yes—discretionary.	Perpetrator only notified if the State subsequently intends to recover from him or her.	Yes—mandatory unless the offender’s identity or whereabouts is unknown.	Perpetrator only notified if a provisional order made that directs the offender to pay the Crown the compensation awarded.	Yes—discretionary.

	<b>Victoria</b>	<b>ACT</b>	<b>NSW</b>	
<b>Legislation</b>	<i>Victims of Crime Assistance Act 1996</i> (Vic)	<i>Victims of Crime (Financial Assistance) Act 2016</i> (ACT)	<i>Victims Rights and Support Act 2013</i> (NSW)	
<b>Judicial or administrative?</b> <sup>2</sup>	Judicial—Magistrates sitting as members of the Victims of Crime Assistance Tribunal.	Administrative—Victims of Crime Commissioner (head of Victim Support ACT).	Administrative—Commissioner for Victims Rights (head of Victims Services, NSW Justice Department).	
<b>Hearings</b>	Hearings if applicant elects or Tribunal requires.	No hearings.	No hearings.	
<b>Is there a victim levy?</b>	No.	Yes.	Yes.	

2 Note that the comparative table contained in Appendix B in the first consultation paper, *Family Violence and the Victims of Crime Assistance Act 1996* (2017), also used the term 'quasi-judicial' (defined in the glossary of this supplementary consultation paper) to describe administrative schemes with hearings. Due to the focus on judicial and administrative models as required by the supplementary terms of reference, the Commission has sought to distinguish these two approaches by only using the terms 'judicial' and 'administrative' in this table.

	<b>NT</b>	<b>QLD</b>	<b>SA</b>	<b>Tasmania</b>	<b>WA</b>
	<i>Victims of Crime Assistance Act 2006</i> (NT)	<i>Victims of Crime Assistance Act 2009</i> (Qld)	<i>Victims of Crime Act 2001</i> (SA)	<i>Victims of Crime Assistance Act 1976</i> (Tas)	<i>Criminal Injuries Compensation Act 2003</i> (WA)
	Administrative—assessors appointed by the Minister.	Administrative—government assessor chosen by the scheme manager.	First administrative, then judicial—claimant must first apply to Crown Solicitor. If no agreement is reached within 3 months, claimant may apply to District Court.	Administrative— independent Criminal Injuries Compensation Commissioners.	Administrative— assessors appointed by the Governor for a 5 year term.
	No hearings.	No hearings.	Hearings only when applicant applies to the District Court.	Hearings if applicant elects or Commissioner requires.	Hearings if the assessor requires.
	Yes.	No.	Yes.	Yes.	No.

# Appendix C: VOCAT Application for Assistance Form

Victims of Crime Assistance Rules 2010  
Form 1 Rule 6



Victims of Crime  
Assistance Tribunal

## APPLICATION FOR ASSISTANCE

### 1. DETAILS OF PERSON WANTING ASSISTANCE

Surname  Given Names   
Address   
Postcode   
Telephone (H)  (W)   
(M)   
Occupation  Date of Birth   
Sex Male  Female   
Email

#### Are you of Aboriginal or Torres Strait Islander origin?

Persons of both Aboriginal and Torres Strait Islander origin should mark both "Yes" boxes

No  Yes, Aboriginal  Yes, Torres Strait Islander

*A person of Aboriginal or Torres Strait Islander origin means a person who is descended from an Aboriginal or Torres Strait Islander, and is accepted as an Aboriginal or Torres Strait Islander by an Aboriginal or Torres Strait Island community.*

*This information will enable the Tribunal to provide you with information to assist your application*

Have you previously made an application for assistance/criminal compensation? Yes  No

Have you previously made an application in respect of this act of violence? Yes  No

#### Please nominate which category applies to you

1. Primary Victim
2. Secondary Victim
3. Related Victim
4. Application for payment of Funeral Expenses only

**Please note:  
You can only apply in  
one category**

### 2. COMPLETE THIS SECTION IF YOU ARE MAKING THIS CLAIM ON BEHALF OF A CHILD OR PERSON UNDER DISABILITY

Your Full Name   
Address   
Postcode  Telephone  Date of Birth   
Email   
Relationship to Applicant (e.g. I am their parent, guardian)

### 3. CIRCUMSTANCES OF THE ACT OF VIOLENCE

What was the act of violence/offence?   
At what address did the act of violence occur?   
Date of act of violence  Or between  and  Time  am/pm  
Who committed the act of violence (full name if known)?

Sex of alleged offender Male  Female  Date of Birth or approximate age

Was the alleged offender a family member or domestic partner of the victim?\* Yes  No

If Yes, how are you related to the offender? I am their:   
(e.g. wife, son, father, step-sister, former domestic partner)

(\* This information is for data collection purposes only)

If more than two years have lapsed since the act of violence please outline your reasons for not filing an application within this time *please attach additional material if required.*

#### 4. REPORTING DETAILS

Has the act of violence been reported to the Police? Yes  No

If yes, please provide the details:

Name  Registered No

Rank  Police Station

Date of Report

If no, you must provide a statutory declaration setting out the circumstances of the act of violence and provide the reason for the failure to report the matter to police.

Statutory Declaration attached? *please attach* Yes  No

Have criminal proceedings commenced? Yes  No  Unknown

If known, provide details known to you (i.e. date and location of hearing)

Are there intervention orders relating to this matter? Yes  No  Case number (if known)

If the incident occurred in the workplace, was it reported to your employer? Yes  No

Has the act of violence been reported elsewhere? Yes  No

If yes, please provide the details:

#### 5. WHAT EFFECTS HAVE RESULTED FROM THE ACT OF VIOLENCE?

Physical \* Yes  No

Psychological \* Yes  No

Grief, Stress or Trauma Yes  No

Provide details

Did you attend a hospital Yes  No

If yes, what hospital?

**6. DETERMINATION OF YOUR APPLICATION**

Would you prefer to:  Attend a hearing at the Tribunal? OR  
 Have your application determined in your absence?

Do you request that:  Proceedings be conducted in a closed Court?  
 Publication of your application be restricted?

Do you require an interpreter Yes  No  Language

If the Tribunal makes an award would you like it deposited directly into your bank account?

No  *(if no selected a cheque will be sent to your postal address, please ensure this is current at all times)*

Yes  Account name  BSB number  Account number

Name of Bank/Financial Institution

**7. HAVE YOU APPLIED FOR ASSISTANCE UNDER ANY OTHER SCHEMES?**

Yes  No **If "Yes", complete this section**

Have you received assistance under the Victims Assistance Program  No

Yes  Please provide details

	Still Pending	Finalised	Amount Received	Ref/Claim No
<input type="checkbox"/> Workcover	<input type="checkbox"/>	<input type="checkbox"/>	<input type="text"/>	<input type="text"/>
<input type="checkbox"/> Transport Accident Commission	<input type="checkbox"/>	<input type="checkbox"/>	<input type="text"/>	<input type="text"/>
<input type="checkbox"/> Insurance (eg. Health, income etc)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="text"/>	<input type="text"/>
<input type="checkbox"/> Other (please specify)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="text"/>	<input type="text"/>
	<input type="checkbox"/>	<input type="checkbox"/>	<input type="text"/>	<input type="text"/>
	<input type="checkbox"/>	<input type="checkbox"/>	<input type="text"/>	<input type="text"/>

Please provide details of the claim under any of these schemes

 Please supply and attach details of any relevant insurance cover (life or health) or superannuation benefit entitlements held and any payments claimed, received or to be received -

By the applicant  provide details

By the deceased  provide details

#### 8. TYPE OF ASSISTANCE SOUGHT

- (a) Primary Victim**
- Special Financial Assistance (lump sum payment for significant adverse effects suffered)
  - Counselling
  - Medical Expenses
  - Safety-Related Expenses
  - Loss of Earning
  - Loss/Damage to clothing
  - Other

- 
- (b) Secondary Victim**
- Counselling
  - Medical Expenses
  - Loss of Earnings \*
  - Other \*

- 
- (c) Related Victim**
- Distress
  - Funeral Expenses
  - Counselling
  - Medical Expenses
  - Other \*

- 
- (d) Application for payment of funeral expenses only**
- 

\* Evidence of exceptional circumstances may be required.

### 9. IF DEATH WAS CAUSED BY THE ACT OF VIOLENCE

Full Name of Deceased	<input type="text"/>		
Last Known Address	<input type="text"/>		
		Postcode	<input type="text"/>
Date of Birth	<input type="text"/>	Your relationship to the deceased, I am their: (e.g. wife, son, father, step-sister, partner)	<input type="text"/>
Date and Place of Death	<input type="text"/>		

**NOTE: YOU MUST ALSO COMPLETE THE RELATED VICTIMS PART OF THIS FORM BELOW**

### 10. THIS SECTION IS TO BE COMPLETED BY RELATED VICTIM APPLICANTS

As a related victim applicant (see definition of Related Victim) you are required to list:

- (a) every other person whom you believe may be a **related victim**; and
- (b) every other person whom you believe may alleged that he/she is a **related victim**; and
- (c) Any person whom you believe may apply because they have incurred funeral expenses as a result of the death of the primary victim.

 *Attach a separate sheet if required.*

Name of potential victim	<input type="text"/>
Age of potential victim if under 18 years of age *	<input type="text"/>
Guardian (if applicable)	<input type="text"/>
Address of potential victim	<input type="text"/>
What was the relationship of potential victim to the deceased. He/she is their:	<input type="text"/>

Name of potential victim	<input type="text"/>
Age of potential victim if under 18 years of age *	<input type="text"/>
Guardian (if applicable)	<input type="text"/>
Address of potential victim	<input type="text"/>
What was the relationship of potential victim to the deceased. He/she is their:	<input type="text"/>

Name of potential victim	<input type="text"/>
Age of potential victim if under 18 years of age *	<input type="text"/>
Guardian (if applicable)	<input type="text"/>
Address of potential victim	<input type="text"/>
What was the relationship of potential victim to the deceased. He/she is their:	<input type="text"/>

*\* If the potential victim is under 18 years of age, provide the name and address of parent, guardian or administrator.*

## 11. AUTHORISATION OF THE APPLICANT

I (*name*),  authorise the Victims of Crime Assistance Tribunal to obtain any additional evidence or documentation that the Tribunal considers necessary to enable it to determine my application.

Signature of applicant

## 12. ACKNOWLEDGMENT OF THE APPLICANT

I understand and acknowledge that:

- To the best of my knowledge, all information provided in this application is true and correct and that no details relevant to the application have been left out
- It is an offence under section 67 of the *Victims of Crime Assistance Act 1996* to knowingly give false or misleading information to the Victims of Crime Assistance Tribunal.

By ticking this checkbox I confirm that I have read and understood all the statements above

Full name of person (applicant) completing this application

Signature of applicant

Date

**Statutory Declaration**  
*(to be used if incident not reported to police)*

I   
of

in the State of Victoria do solemnly and sincerely declare:

And I make this solemn declaration, conscientiously believing the same to be true, and by virtue of the provisions of an Act of the Parliament of Victoria rendering persons making a false declaration punishable for wilful and corrupt perjury.

Declared at )  
In the State of Victoria this )  
day of 20 ) x \_\_\_\_\_

Before me: x \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

*(Signature, name, address and qualification of witness)*

## VICTIMS OF CRIME ASSISTANCE TRIBUNAL

### Guide to completing the Application for Assistance form

The Victims of Crime Assistance Tribunal (the Tribunal) can provide awards of assistance to recognise and assist victims in their recovery from violent crime.

This guide has been developed to help you complete your application to the Tribunal

**Important information about the Tribunal can be found on our website:  
[www.vocat.vic.gov.au](http://www.vocat.vic.gov.au)**

#### ELIGIBILITY

You are eligible to apply for assistance if you are the victim of a violent crime that happened in Victoria and resulted in death or injury. An injury can be:

- physical harm
- mental illness or disorder from the event, or an increase in mental illness or disorder from the event
- pregnancy

The Tribunal does not compensate loss of or damage to your property, other than loss of or damage to clothing you were wearing at the time of the violent crime and safety related expenses where appropriate.

#### HOW DO I APPLY?

If you think you may be eligible for assistance, complete the attached application form.

Sections of this guide match the sections in the application form.

You must complete all sections of the application form. If your application form is incomplete, the Tribunal will send it back to you causing delay in the Tribunal dealing with your application.

For more help in completing the form, contact the Tribunal at your local Magistrates' Court. The contact details are on our website: [www.vocat.vic.gov.au](http://www.vocat.vic.gov.au) under *Contact Us; Tribunal location and contact information*.

#### Section 1. DETAILS OF PERSON WANTING ASSISTANCE

The Tribunal asks you to say if you are Aboriginal or a Torres Strait Islander because it has different arrangements to assist Aboriginal and Torres Strait Islander applicants.

You can apply to the Tribunal for assistance if you are a primary victim, a secondary victim or a related victim. If you are not a victim but paid for the funeral of a person who died from a violent crime, you can apply for payment of reasonable funeral expenses.

##### 1. Primary Victim

You are a primary victim if you were injured as a result of:

- a violent crime; or
- trying to prevent a violent crime; or
- trying to assist a victim of a violent crime.

A person who dies from a violent crime is also a primary victim

##### 2. Secondary Victim

You are a secondary victim if you:

- were present at the scene of a violent crime and you were injured by witnessing the crime; or
- are the parent or guardian of a child under the age 18 years and you were injured when you became aware that your child was the victim of a violent crime.

### 3. Related Victim

You are a related victim if you:

- are a close family member of a person who died from a violent crime; or
- had an intimate personal relationship with a person who died from a violent crime; or
- were a dependent of a person who died from a violent crime.

### 4. Application for payment of funeral expenses

You can apply for assistance for funeral expenses if you paid for the funeral of a person who died from a violent crime even if you are **not** a related victim.

**An applicant may only apply in one capacity.**

## Section 2. CLAIMS ON BEHALF OF A CHILD OR PERSON UNDER DISABILITY

You need to complete Section 2 if you are filling out the application form on behalf of another person.

You should complete this section if you are:

- the parent or guardian of a child under 18 or another appropriate person; or
- the guardian or administrator of a represented person, appointed under the *Guardianship and Administration Act 1986*; or
- an appropriate person to assist a person who is entitled to make an application but needs assistance doing so.

If you need to clarify whether you can complete this form on behalf of another person, you may contact your local Magistrates' Court.

## Section 3. CIRCUMSTANCES OF THE ACT OF VIOLENCE

You can only apply for assistance if the violent crime is punishable by imprisonment and it occurred in Victoria.

Examples of relevant crimes include: sexual offences such as indecent assault or rape

- murder/manslaughter
- assaults, including assaults in the home
- threats to kill or injure
- stalking
- kidnapping
- child stealing

Attempts to commit these crimes are also included.

An application must be made within 2 years after the occurrence of the act of violence or, in the case of an application by a related victim or a person who has incurred funeral expenses, within 2 years after the death of the primary victim. If more than two years has passed the Tribunal may still consider your application.

In determining whether to accept an application made out of time, the Tribunal will have regard to:

- the applicant's age at the time of the criminal act;
- whether the applicant is intellectually disabled or mentally ill;

- whether the person who is alleged to have committed the act was in a position of trust, influence or power in relation to the applicant;
- the physical or psychological effect of the act upon the applicant;
- whether the delay in making the application would cause the Tribunal any difficulties in making a fair decision;
- whether the applicant was a child at the time of the act and if so, whether the application is made within a reasonable time after reaching 18 years of age;
- all other relevant circumstances.

#### Section 4. REPORTING DETAILS

Unless there are special circumstances, you must:

- report the violent crime to the police within a reasonable time; and
- provide reasonable assistance to the police in investigating the matter, arresting or prosecuting the offender.

In most cases, calling the police to attend the scene of a crime is not enough. You should make a formal report, including a sworn statement (if requested), so the police can fully investigate the matter. You should give the Tribunal full details of the relevant police officer's station, rank and registration number. If you do not provide this information, it may lead to delays in processing your application.

If you did not report the incident to police, delayed in reporting the incident or you have not assisted the police with an arrest or their investigation, you may not be entitled to assistance. You will need to demonstrate that special circumstances prevented you from doing so. You must provide a statutory declaration setting out the circumstances of the violent crime and the reason you did not report the matter to the police or provide them with reasonable assistance in their investigation. There is a form for statutory declarations on page 7 of the application form for you to outline this information. You must sign the statutory declaration in front of a person who is authorised to witness statutory declarations. A list of these people is set out in Section 12 of this guide.

The Tribunal will obtain information about the crime and the criminal investigation from Victoria Police once the application is lodged.

#### Section 5. WHAT EFFECTS HAVE RESULTED FROM THE ACT OF VIOLENCE?

You need to tell the Tribunal if you have suffered physical or psychological injuries because of the violent crime. If you are claiming special financial assistance or distress, you should give brief details of your grief, stress or trauma.

##### *Physical injuries*

- If you are seeking assistance for physical injuries, you should forward copies of the invoices and/or receipts for your treatment. If you are entitled to a rebate from Medicare or your private health fund, you should make the claim for a rebate before sending the invoice or receipt to the Tribunal and provide details of any gap you are claiming from the Tribunal.
- You should also send copies of any doctor's reports, medical certificates or hospital discharge summaries in your possession.
- You should not request a report from your doctor, dentist or hospital without the Tribunal's authorisation because the Tribunal may not compensate you for the cost of obtaining that report. If you wish to obtain a medical or dental report, you should ask the Tribunal first.
- If you attended a public hospital, the Tribunal will obtain the hospital records. The information the Tribunal obtains from police often contains reports or statements about medical and dental treatment. This means the cost of obtaining a report or making a Freedom of Information request is not necessary.

### *Psychological injury*

- If you are seeking assistance for psychological injury and need assistance to pay for counselling, you should attach a report from a qualified psychologist or psychiatrist. Your psychologist can obtain further information about the Tribunal's requirements for preparation of psychological reports and requests for assistance for counselling from our website: [www.vocat.vic.gov.au](http://www.vocat.vic.gov.au)

### *Grief, stress or trauma*

- If you suffered grief, stress or trauma because of a violent crime, you may be entitled to special financial assistance. The Tribunal awards special financial assistance in recognition of the harm suffered because of a violent crime. It is paid in addition to medical, counselling, safety-related and loss-of-income expenses. Claims for special financial assistance may be supported by psychological reports, statutory declarations or other evidence.

## Section 6. DETERMINATION OF YOUR APPLICATION

You can elect to appear before a Tribunal Member at a hearing or ask the Tribunal to decide your application in your absence.

### *Hearings*

A hearing gives you an opportunity to tell the Tribunal about how the crime has affected you. Hearings usually take about half an hour, but they may take longer. They are usually open to the public but you can ask the Tribunal to exclude members of the public. You can also ask the Tribunal for an order restricting publication of the hearing. A Tribunal hearing is less formal than a normal court hearing. You may come alone or bring a friend or family member for support.

### *Application decided in your absence*

The Tribunal decides many applications in the absence of the victim with consent. The Tribunal member reads all the documents that you and/or your lawyer have provided. If the Tribunal member needs further information they will ask for it. In some cases, the information provided is not enough and the Tribunal member will ask you to attend a hearing so it can obtain additional information.

### *Interpreters*

If you need the assistance of an interpreter at a hearing, the Tribunal will arrange for the interpreter to attend.

If the Tribunal makes an award you can have it deposited directly into your bank account or alternatively a cheque will be sent to you. It is important to ensure your banking and address details are up to date with the Tribunal at all times.

## Section 7. HAVE YOU APPLIED FOR ASSISTANCE UNDER ANY OTHER SCHEMES?

You must tell the Tribunal if you are eligible, or think you may be eligible, for financial assistance from another source, for example:

- the Victims Assistance Program
- Medicare
- private health insurance
- Workcover, if the crime occurred at work
- the Transport Accident Commission, if the crime involved a motor vehicle
- the offender, if the court makes an order at the conclusion of the criminal case. (Ask the police informant, the Office of Public Prosecutions or a lawyer)

- the offender, through a civil claim for compensation
- Victoria Police, under the Police Assistance Act, if you were injured assisting the police
- insurance, including life and income insurance
- superannuation benefits

If you are entitled to receive assistance from another source, the Tribunal may not be able to assist you. If you obtain compensation from another source, for instance, settlement of a common law claim, after the Tribunal has made an award of assistance, the Tribunal may request you to repay its award. This is to prevent people being compensated more than once for the same incident.

If you have applied for assistance from another source, you must tell the Tribunal and indicate how much you have received.

## Section 8. TYPE OF ASSISTANCE SOUGHT

Please refer to the category which applies to you (this is the category you selected in Section 1)

Tick the box for the type of assistance you are seeking. You make tick more than one box.

The Tribunal cannot assist you with loss of, or damage to property (other than loss of or damage to clothing you were wearing at the time of the violent crime and safety related expenses where appropriate).

### A. Primary Victim

Primary victims may receive awards of up to \$60,000 for the following expenses incurred (or reasonably likely to be incurred) as a result of the violent crime.

#### *Counselling*

The Tribunal has guidelines for the payment of counselling fees and the preparation of reports. See counselling information at [www.vocat.vic.gov.au](http://www.vocat.vic.gov.au)

#### *Medical expenses*

Medical expenses must be reasonable. They include dental, optometry, physiotherapy, hospital and ambulance expenses. Claims for medical expenses must be supported by invoices and receipts and information about claims to Medicare or private health insurers.

#### *Safety-related expenses*

Safety-related expenses must be reasonably incurred or reasonably likely to be incurred as a direct result of a violent crime. Claims should be accompanied by invoices or receipts.

#### *Loss of earnings*

The Tribunal can make awards for loss earnings up to \$20,000 as a direct result of total or partial incapacity to work during a period of up to two years after a violent crime. The Tribunal has a guideline to assist in the preparation of a claim for loss of earnings which is available on the Tribunal's website.

#### *Loss or damage to clothing worn at the time of the violent crime.*

Claims should be accompanied by invoices or receipts.

#### *Other*

In exceptional circumstances, other reasonable expenses will be considered, that will assist in recovery from the crime.

#### *Special Financial Assistance*

In addition to the above expenses, the Tribunal can make awards for special financial assistance of between \$130 and \$10,000 in the following circumstances:

- Criminal acts which occurred on or after 1<sup>st</sup> July 2000,
- Childhood sexual abuse which occurred on or after 1<sup>st</sup> July 1997,
- Childhood sexual abuse prior to 1<sup>st</sup> July 2000 where no previous application has been made to the Tribunal, **provided** that the alleged offender after 1<sup>st</sup> July 1997 –
  - has been committed or presented for trial; **or**
  - has been charged and the charge has been heard and determined by the Magistrates' Court; **or**
  - having been charged dies without the charge having been determined.

## B. Secondary Victim

Secondary victims may receive awards of up to \$50,000 for the following expenses incurred (or reasonably likely to be incurred) as a result of the violent crime.

### *Counselling*

The Tribunal has guidelines for the payment of counselling fees and the preparation of reports. See [www.vocat.vic.gov.au](http://www.vocat.vic.gov.au)

### *Medical expenses*

Medical expenses must be reasonable. They include dental, optometry, physiotherapy, hospital and ambulance expenses. Claims for medical expenses must be supported by invoices and receipts and information about claims to Medicare or private health insurers.

### *Loss of earnings*

In exceptional circumstances secondary victims may receive awards for

- loss of earnings up to \$20,000 (please refer to Primary Victim information on page 5 for details)
- other reasonable expenses that will assist in recovery from the crime

### *Other*

The Tribunal can only award reasonable expenses to assist in recovery if the secondary victim was:

- under 18 years and witnessed an act of violence against certain family members; or
- the parent or guardian of a primary victim who was injured as a direct result of becoming aware that a primary victim, under 18 years, was the victim of an act of violence.

## C. Related Victim

For related victims, the maximum amount the Tribunal can award to **all** applicants related to one deceased victim of a violent crime is \$100,000. The Tribunal can only increase the amount of the pool in exceptional circumstances.

To each applicant, the Tribunal may award assistance of up to \$50,000 for -

- distress
- dependency payments for up to two years
- funeral expenses
- reasonable counselling services

- medical expenses

In exceptional circumstances, the Tribunal may also award other reasonable expenses to assist a related victim to recover from the primary victim's death.

*Note: Related victims must complete sections 9 and 10 of the application.*

#### D. Funeral Expenses Only

The Tribunal may award assistance to pay for funeral expenses where a person has incurred these expenses as a direct result of the death of a primary victim and is not a related victim.

The Tribunal has a guideline about the amounts it will pay for funeral expenses available online at [www.vocat.vic.gov.au](http://www.vocat.vic.gov.au)

### Section 9. IF DEATH WAS CAUSED BY THE ACT OF VIOLENCE

You must fill out the details of the deceased person.

Related victim applications must be sent to the Victims of Crime Assistance Tribunal, G.P.O. Box 882, Melbourne 3001 or lodged at 233 William Street, Melbourne

### Section 10. RELATED VICTIMS APPLICATIONS

It is important that you list every person you believe may:

- be a related victim of the deceased, or
- claim they are a related victim, or
- apply for assistance for funeral expenses.

The Tribunal uses this information to notify potential related victims about their ability to make an application for assistance.

Once all related victims have lodged their applications for assistance, the Tribunal considers all the applications relevant to the deceased primary victim.

### Section 11. AUTHORISATION OF THE APPLICANT

The Tribunal requires your authorisation to obtain any additional evidence or documents it considers necessary to determine your application. If you do not complete this section, the Tribunal will not be able to consider your application. It will be returned to you.

The additional evidence or documents the Tribunal will seek may include information from Victoria Police about the violent crime and your criminal history (if any) and your hospital records.

### Section 12. ACKNOWLEDGMENT OF THE APPLICANT

Before lodging your application, you must acknowledge that all information that has been provided is true and correct to the best of your knowledge and that you understand that providing false or misleading information to the Tribunal is a criminal offence.

### ON COMPLETION OF YOUR APPLICATION

**If you are a primary victim or secondary victim** – you must lodge your application at the Magistrates' Court venue closest to where you live. Please contact your local magistrates' court for further details.

**If you are a related victim-** you must lodge your application at the Melbourne office of the Tribunal at the Melbourne Magistrates' Court.

**If you are Aboriginal or Torres Strait Islander** you must lodge your application with the Tribunal at the Melbourne office of the Tribunal at the Melbourne Magistrates' Court so it can be managed in the Koori List. (Please see our website for more information on the Koori List)

**If you live outside Victoria,** you must lodge your application with the Tribunal's Melbourne office:

233 William Street (GPO Box 882) Melbourne 3001  
Telephone (03) 9628 7855 Toll Free: 1800 882 752

For the contact details of your nearest court see the Tribunal's website at [www.vocat.vic.gov.au](http://www.vocat.vic.gov.au).

## WHAT HAPPENS NEXT

Once you have lodged your application, the Tribunal will send you a "Directions for Preparation" form to help you provide the evidence the Tribunal needs to decide your application. The evidence may include:

- a report from your treating doctor if physical injury is claimed
- receipts or invoices for the expenses you are claiming
- a copy of your police statement
- intervention orders
- a report from your counsellor if you are seeking counselling
- information about Medicare rebates

Please note that you should not pay for a report from a doctor or counsellor without prior approval from the Tribunal.

The Tribunal will give you a date for filing all your supporting material. Contact the Tribunal if you need extra time.

Sometimes the Tribunal will decide to wait until criminal charges are finalised before hearing your application but it is not necessary for an offender to be charged or for the charges to be finalised in every case.

Once the Tribunal has all the information it requires to make a decision, the Tribunal will advise you if it wants to hold a hearing. In some cases, even if you have elected for the Tribunal to hear the application in your absence, the Tribunal may decide that it needs to have a hearing and you will be asked to attend.

Legal advice and representation may help you and, in the majority of cases, the Tribunal will pay the reasonable costs of a legal practitioner. A legal practitioner cannot obtain legal costs from you without the Tribunal's permission.

If you need an interpreter for a hearing or you cannot attend a hearing on the date set, please advise the Tribunal as soon as possible.

## URGENT ASSISTANCE

If you need urgent assistance, the Tribunal may make an interim award. The Tribunal has a special form for applications for interim awards. You should attach all relevant supporting documents such as invoices for medical or safety-related expenses or letters from your doctor or dentist.

If you seek urgent counselling, your counsellor must provide a report and request that comply with the Tribunal's practice direction about counselling expenses. The practice direction is available either from the Tribunal or you can download it from the Tribunal's website – [www.vocat.vic.gov.au](http://www.vocat.vic.gov.au)

You can obtain urgent assistance by contacting the Victims of Crime Helpline on 1800 819 817 or your local Magistrates' Court.

## WHERE CAN YOU GET HELP OR ADVICE?

Further information including copies of all forms and Tribunal practice directions can be obtained from the Tribunal website:

**[www.vocat.vic.gov.au](http://www.vocat.vic.gov.au)**

For further information, please contact:

- The VOCAT Registrar at your local Court House
- Victims of Crime Assistance Tribunal (Principal Registry) (03) 9628 7855  
1800 882 752
- Victims Support Agency (03) 8684 6700  
1800 819 817
- Victorian Court Network Service (03) 9603 7433  
1800 681 614

To speak with a lawyer contact:

- The Law Institute of Victoria (03) 9607 9311
- Victoria Legal Aid (03) 9269 0120  
1800 677 402 (country callers)
- Aboriginal Legal Service Co-Operative (03) 9419 6024
- Aboriginal Family Violence Prevention and Legal Service (03) 9244 3333  
1800 105 303
- The Women's Legal Resource Group 1800 133 302







Victorian  
Law Reform  
Commission

**Review of the Victims  
of Crime Assistance Act 1996**  
SUPPLEMENTARY CONSULTATION PAPER

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