RYAN CARLISLE THOMAS LAWYERS

Stringer Clark Lawyers

We're on your side

Review of the *Victims of Crime Assistance Act* 1996 (Vic)

Submissions to the Victorian Law Reform Commission

Monday, 6 November 2017

Victorian Law Reform Commission
Level 3, 333 Queen Street
GPO Box 4637
MELBOURNE VIC 3000

To Whom It May Concern,

Review of the *Victims of Crime Assistance Act* 1996 (Vic) ('the Act')

In December 2016, the Victorian Law Reform Commission ('**VLRC**') received terms of reference seeking a review of the Act as it is applicable to victims of family violence and related abuse. The request from the Attorney-General for the State of Victoria arose from the Royal Commission into Family Violence and its eventual findings and recommendations.

Since then and in July 2017, the VLRC received supplementary terms of referencing seeking a review of the Act as to its current operation and effectiveness in achieving the purposes of the Act in favour of all victims of violent crime, including those that have been subjected to family violence. As part of the review, the VLRC has been asked to consider whether the current model which relies upon judicial decision-making in a Tribunal forum is the most practical and effective way to determine and award state-funded assistance to victims of violent crime; the alternative being an 'administrative' model.

About us

Ryan Carlisle Thomas have a rich and proud history of acting on behalf of victims of crime in relation to:

1. Victims of Crime Applications for Assistance through the Victims of Crime Assistance Tribunal ('**VOCAT**');
2. Applications pursuant to Section 85B of the *Sentencing Act* 1991 (Vic);
3. Claims against individuals and institutions for childhood sexual offences; and
4. In some cases, claims against occupiers and other entities pursuant to the *Wrongs Act* 1958 (Vic).

We are a proudly suburban full-service firm of approximately 45 lawyers and legal executives (including 9 Partners) spanning across 24 offices across Victoria. Many of our lawyers work at more than one office and work closely with community support groups to assist victims of violent crime. In 2007, regional Victorian firm Stringer Clark accepted an offer to join the Ryan Carlisle Thomas group. With strong local roots deep

within the communities of South Western Victoria, the decision was made to retain the Stringer Clark name and brand, and the firm continues to operate under this name in Western Victoria to the present day.

In addition to the services Ryan Carlisle Thomas offers to victims of crime, we have a strong and well-reputed family law team assisting clients with a variety of family law matters including separation and divorce, children and parenting disputes, property disputes and intervention order matters. Our firm is closely aligned with the Australian Nursing and Midwifery Federation ('**ANMF**') and recently partnered with the ANMF to publish "*Pathways to Change*"; a new digital family violence strategy and resource guide produced to address and respond to the prevalence of family violence our family lawyers face daily.

In response to the two consultation papers published by the VLRC, we make these submissions to the Commission on behalf our firm. We have responded to the questions published by the VLRC in its Supplementary Consultation Paper published in June 2017. The questions posed have been well-thought out and drafted to address the entirety of the current State-funded system, and to explore the viability of potential reforms.

The names of victims in all case studies forming part of our submissions have been anonymised for the purposes of privacy.

The firm, it's partners, lawyers and staff, are immensely grateful for this opportunity to make submissions to the Victorian Law Reform Commission (**VLRC**) on this important topic. This review of the current State-funded system presents an unmissable opportunity to drastically improve victims' recovery and allow them to 'get on with their lives' following the unfortunate experiences of being a victim of violent crime.

Yours faithfully,
RYAN CARLISLE THOMAS LAWYERS
Per:

Ryan Carlisle Thomas Lawyers

Table of Contents

Executive Summary

As members of the VOCAT's User Group and other related working groups, we are acutely aware of just how stretched the VOCAT is in having to deal with the number of applications that are made to it each year. The very real effect of this is that the VOCAT cannot always deal with, and determine, applications in a timely fashion. There have been instances where applications have been drawn out for more than 12 months, preventing victims from accessing the timely treatment they need in order to recover from the violent crime. Victims may, of course, apply for interim awards in the meantime; however, the delay in providing that final resolution for the victim should not be overlooked.

The question we ask, before any drastic changes to the current system are made, is simple – what could the VOCAT achieve with the current Act and State-funded scheme if it were adequately funded and resourced to deal with the number of applications for assistance it receives each year?

Our firm appreciates that the Victorian State Government is rightly concerned to ensure that the scheme of assistance administered under the Act is done so efficiently and costs are properly kept under control through continued reform and adjustment. Our argument is that reforms can, and should, be made to the existing State-funded scheme first, which would improve its efficiency, before any consideration is given to replacing it with a totally different model which would undermine the justice principles on which the current Act is based. While the submissions we offer to the Commission in this paper may appear to broaden eligibility, they are fundamentally intended to streamline and simplify the application process in order to make the VOCAT more workable, more efficient and more affordable for State Government.

For example, there are cases where the VOCAT is unable to make an award without receiving additional submissions or argument on a matter. Rather than deciding to award or refuse to award assistance, the information the VOCAT has requested may take investigating police members months to provide. Alternatively, the applicant may need to make a further freedom of information application to police or another statutory body. The inevitable delays expensively prolong matters for months prior to a final determination being made.

Consider another example. It is well accepted that current VOCAT staffing ratios compare poorly relative to other compensation schemes in Victoria. As a result of this sub-standard resourcing, VOCAT staff (Registrars, Judicial Registrars and Magistrates) struggle to spend enough time in venues outside of Melbourne to review and determine applications. While it may appear counter-intuitive, the impact of better resourced staffing levels would shrink the number of matters that need to be clarified by the VOCAT in each application, reducing (for example) the number of directions hearings and hearings required before awarding assistance. These directions hearing alone currently cost the State-funded scheme anywhere

between $335 and $520 and are clearly wasteful of resources as well as prolonging the resolution of matters for victims if they can be limited or avoided in some circumstances.

Judicial decision-making versus an administrative model

We understand the commission is gathering information and submissions from the profession and community at large about the possibility of implementing an administrative model, such as those which exist under comparable State-funded schemes in some other state jurisdictions, or indeed within Victoria's WorkCover and transport accident schemes. In our view, the adoption of such a model would compromise the principles which underpin the *Victims of Crime Assistance Act* 1996 (Vic), with serious consequences for the quality of justice available to victims.

Under the existing scheme, members of the judiciary are able to exercise their judgment in seeking to better understand the true impact that offending has had on the victim. As a result of their judicial experience in the sentencing of offenders, VOCAT Members are better able to uncover and take into account the true impact of an offence when determining applications for assistance. This is an invaluable adjunct to what might otherwise have been gleaned simply from a written victim impact statement. Allowing VOCAT Members to continue to hear VOCAT applications in circumstances where they may routinely hear and determine criminal matters (including sentencing) can only inform their work in both jurisdictions.

Our firm regularly receives requests from the presiding Magistrate in some criminal proceedings for the victim to request that their VOCAT application be directed to that same Magistrate (when it is made) so that the Magistrate can ensure that the victim receives the assistance they clearly require, having already heard some of the adverse effects they have suffered as part of the sentencing process.

These are significant benefits of the judicial decision-making that we enjoy as part of the current scheme.

Possible alternative administrative models such as those adopted by the WorkCover and transport accident schemes in Victoria operate on an entirely different model of claims management. These claims are made and determined within a strictly finite period. Conversely, applications for assistance to the VOCAT are lodged, acknowledged some weeks later, and are finalised by filing a statement of claim some months later. It is only then that they are ultimately put before a decision-maker in order to determine what amount of assistance, if any, ought to be awarded to that applicant.

The very real and significant deficiencies in a transition to an administrative model are:

- An inability to deal with complexity. For example, the number of considerations that need to be had in determining whether or not a victim is entitled to assistance is far greater than that required in order for a WorkCover or TAC claim to be accepted and compensation paid;

- In the absence of a formal hearing, an inability to take into account the particular circumstances of an application;

- An inherent and unavoidable increase in the number of victims challenging or disputing decisions. Allowing this to happen runs the risk of prolonging the legal process through continuing disputation and dispute resolution times which is not consistent with the purpose and objectives of the Act;

- The removal of access to legal representation in a dispute which might have led to a less protracted process in the original application process. This is because legal representation allows for the issues in dispute to be narrowed prior to an application being lodged or a hearing being held, resulting in a far less protracted process for the applicant and the VOCAT; and

- The inability of an administrative body to deal sensitively with sexual offences and offending (childhood, in particular), and other family violence-related acts of violence through victim impact statements.

Central to the notion of access to justice is the right to legal representation. Giving what are often disadvantaged and marginalised people access to intelligent and informed legal voices in lawyers across the State practising in the jurisdiction is one of the best features of the current State-funded scheme.

It is common knowledge that undertaking legal work in this field is not a commercial proposition. The reason why many law firms, ours included, provide legal assistance to clients with VOCAT applications is that we consider victims of violent crime are better served by justice where they have access to a trained legal representative in order to allow them to clarify and state their views. If an administrative model were adopted, the earliest access applicants would have to legal representation would be through an appeal to the Victorian Civil and Administrative Tribunal ('**VCAT**'), by which time the opportunity to avoid an appeal is clearly lost.

The potential for the number of disputes to escalate would in turn put cost pressures on other parts of the justice system and State Government branches, including:

- Increases in the cost of having to engage the Victorian Government Solicitor's Office ('**VGSO**') to represent the VOCAT in a significantly larger number of VCAT appeal proceedings; and

- Increases in the amount of time required to resolve applications for assistance.

Summary

As a law firm which has been involved in, and has contributed to, the legislative framework and the operation of the VOCAT since it was established by the current Act, Ryan Carlisle Thomas has a deep

understanding of how the State-funded scheme functions. The Victorian scheme is unique because it delivers better access to justice for victims of violent crime.

It is incumbent on any reform that it first determines what might be done to make the existing State-funded more efficient and more fair, before considering replacing it with a new system that would risk undermining the principles of justice which underpin the Act. In the process, any such reforms would run the risk of re-victimising the very victims for whom the VOCAT was established.

1. Eligibility for Assistance

1.1. The victim categories

1.1.1. How do the victim categories in the Act impact on people applying to VOCAT for financial assistance?

There are three categories of victim who may be eligible for assistance and generally those categories do cover all victims who wish to make an application. But the question is often asked which category is most appropriate to some victims. In the cases of primary and secondary victims, there are often situations where the line between the two is blurred and a secondary victim is arguably a primary victim. Often secondary victims are right 'in the mix' of the crime, but the act of violence was not *actually* against them. Their fear of danger can be high and, at times, they are at significant risk of injury although the actual crime is against another person.

For example, children in a domestic violence matter can be caught in the cross fire but the crime is against the spouse. Even if they do not suffer physical injury, they often suffer psychological injury and the recognition provided by Special Financial Assistance can go a long way to assist in their recovery and be of significant benefit when they attain 18 years of age.

A primary victim can also be a person who attempts to arrest, prevent or goes to the aid and rescue of a person they believe is a victim, but they have no entitlement to Special Financial Assistance as there was no act of violence against them.

Related victims are clear as they relate to a death. Even in the case of related victims, there is frequently argument and controversy as to whether an applicant is indeed a related victim having regard to the definition of a 'close family member'; such often requires an in-depth analysis of the relationship between the applicant and the deceased, which is generally examined by the VOCAT by way of *viva voce* evidence at a hearing of the application. Another example are grandparents; they ordinarily do not meet the definition of a close family member, but are often a huge part of the deceased's life and often act as a parent or guardian, but without the formal qualification of a parent or guardian.

1.1.2. Should the victim categories in the Act be amended? If so, what changes should be made to the Act?

The categories, and the definitions of those categories, in and of themselves are not necessarily a problem. However, in order to obtain Special Financial Assistance it must be an act of violence against a person and this often disqualifies some victims. There is a problem with some family violence being recognised as an act of violence as some of the abuse is emotional or financial and not physical. Although not physical,

repeated emotional and financial abuse over a period of time can be a significant contributing factor to mental health injuries sustained, the effects of which can be significant and long-lasting.

Submission:

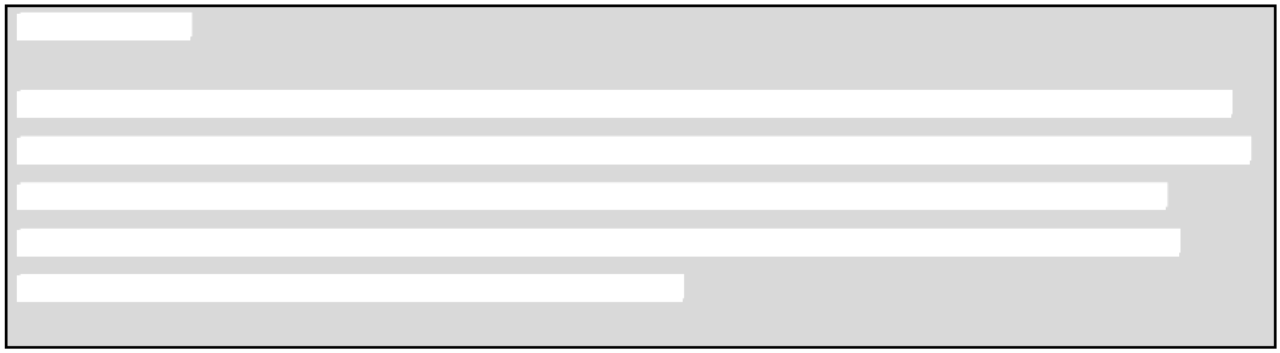
i. For the reasons that follow, a greater level of clarity with regards to the definitions of 'act of violence' and the types of offences that are compensable may resolve any difficulties or deficiencies that arise from the categories of victims under the Act.

1.2. The definition of an 'act of violence'

1.2.1. How does the definition of 'act of violence' in the Act impact on people applying to VOCAT for financial assistance?

The definition of 'act of violence' impacts people also in the way we described above at 1.1.2.

Crimes of arson and some aggravated burglaries do not qualify as an act of violence against a person even though the fear of injury and the injuries sustained can be significant and require treatment.



Joanne's case is one that best illustrates the grey line as to whether or not someone will be considered to be a victim of an 'act of violence'. Joanne was awarded assistance under the State-funded scheme as it was determined that she had direct contact with the offender. However, there are cases similar to Joanne's where offenders gain access to a residence, burgle and then abscond without the victim's awareness (for the simple reason they were not woken), but the fact they have been burgled while they were present in the house often causes distress and, in some cases, significant psychological/psychiatric injuries. Victims who find themselves in this position routinely have their applications for assistance (whether primary or secondary) refused on the basis they have not been a victim of an act of violence.

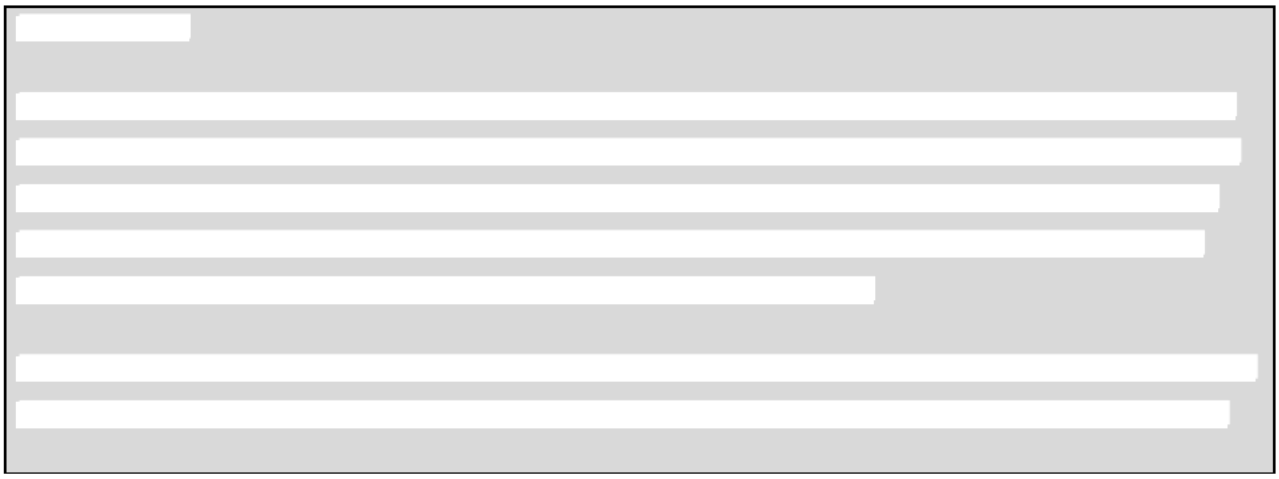
There is also some confusion in cases like Joanne's as to which category of victim (primary or secondary) is most applicable to the applicant. In the majority of cases applying the current Act, applicants are either considered to be a primary victim or not a victim of an act of violence at all. Having regard to the purpose

and objectives of the Act and the violent nature of such offending, the effects many of these victims suffer ought to require clarity on what category of victim they are considered to be. Clarity on the act of violence or alternatively specific inclusion of such similar acts of violence (potentially as a criteria for being secondary victim) would ensure such victims have that clarity.

As the Act currently reads, the arguable lack of clarity regarding where victims stand in terms of 'act of violence' and category of victim is indeed a source of confusion, particularly for self-represented applicants.

1.2.2. Should the definition of 'act of violence' in the Act be amended to include other offences? If so, what offences should be included?

In our view, the definition of 'act of violence' in the Act ought to be amended to include other offences. Arson and some aggravated burglaries (in particular those where victims do not necessarily have direct contact with the offender(s)) do not qualify or come within the current definition of 'act of violence' against a person, even though the fear and the injuries sustained as a direct result can be significant and require long-term treatment.



Although the crime is aggravated burglary, Felicity's application was refused by the VOCAT on the grounds that there was no 'act of violence' against a person; that because Felicity didn't have the direct contact with the offenders, her application was refused and she received no assistance whatsoever, even though the adverse effects of the crime are significant and brought about a fear that could only be adequately settled by the incursion of safety-related expenses from her own pocket, not to mention the costs associated with her medical treatment.

The definition of 'act of violence' ought to also be amended to expressly include chronic family violence, as opposed to applicants being required to prove to the VOCAT that the chronic events of family violence constitute 'related criminal acts'. If such amendments were made, it would expressly acknowledge that

some victims of violent crime are not necessarily exposed to an acute event or instance of violence, but rather extended periods of physical, mental, emotional and/or financial abuse. It would also simplify the application process for applicants and legal practitioners (including ourselves) who are strained to identify the best means to 'plead' the application to the VOCAT. It would also mean that applicants would simply be required to factually prove the family violence (in the absence of any findings by a Court).

Submission:

ii. Amend the definition of 'act of violence' in the Act to include:
   a. Offences such as arson and aggravated burglaries (regardless of the requirement of having contact with the offender(s)); and
   b. Chronic and extended family violence.

1.2.3. 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?

It's not necessarily clear what the Commission means here by 'non-criminal'. We presume that the Commission is referring to matters of family violence where there is not necessarily a crime committed by a perpetrator, but the adverse effects suffered by a victim of family violence can manifest.

If our above submission with regards to amending the definition of 'act of violence' to expressly acknowledge chronic and extended family violence, it may also be necessary to define 'family violence' for the purposes of the Act, or alternatively for the Act to adopt the definition from another legislative instrument. If such a definition is afforded, we envisage that would be sufficient to encapsulate any family violence non-criminal behaviour perpetrated.

Submission:

iii. Amend the Act to include a definition for 'family violence', which can then be relied upon in any amendments to expand the definitions of 'act of violence'. Such definition of family violence could easily be adopted and applied from other legislative instruments.

1.3. The definition of 'injury'

1.3.1. How does the definition of 'injury' in the Act impact on people applying to VOCAT for financial assistance?

The definition of injury can cause some problems at times when victims suffer from psychological/psychiatric injuries and do not wish to seek treatment and go over their circumstances again by way of re-traumatisation, or seek treatment from practitioners not qualified to diagnose an injury. A lot of

victims are referred to social workers or counsellors who provide them with much comfort but cannot diagnose an injury, or otherwise are not qualified to the satisfaction of the VOCAT to provide an opinion as to 'injury'.

The current definition is:

a. *Actual physical bodily harm; or*
b. *Mental illness or disorder or an exacerbation of a mental illness or disorder, whether or not flowing from nervous shock; or*
c. *Pregnancy; or*
d. *Any combination of matters referred to in paragraphs (a), (b) and (c) arising from an act of violence;*

but does not include injury arising from loss of or damage to property.

The definition, as it presently reads, anticipates an 'exacerbation' of a mental illness or disorder only and does not necessarily or expressly anticipate any pre-existing physical condition. In our submission, the definition of injury ought to be adopted from either the *Workplace Injury Rehabilitation and Compensation Act* 2013 (Vic) ('**the *WIRC Act***'). The definition afforded in Section 3 of the *WIRC Act* is:

> *"… any physical or mental injury and, without limiting the generality of that definition, includes:*
> a. *Industrial deafness; and*
> b. *A disease contracted by a worker in the course of the worker's employment (whether at, or away from, the place of employment); and*
> c. *A recurrence, aggravation, acceleration, exacerbation or deterioration of any pre-existing injury or disease;"*

Clearly, the definition cannot wholly be adopted by the Act given the definition makes references only to a workplace, but we would suggest the following definition:

> "Any physical or mental injury and, without limiting the generality of that definition, includes:
> a. Pregnancy; and
> b. Any recurrence, aggravation, acceleration, exacerbation or deterioration of any pre-existing injury or disease".

In our submission, the inclusion of 'pregnancy' as an injury for the purposes of the Act must remain as there are imaginable cases where a victim may fall pregnant due to the commission of a sexual assault/rape. If such a reference were removed, it would immensely prejudice these victims and would prevent them from applying for assistance in respect of medical expenses associated with either aborting the pregnancy or giving birth to the child in circumstances where the child is a living reminder of the offending.

Similarly, children or related victims sometimes do not wish to see a psychologist but, in our experience, it's unusual for them not to suffer an injury or significant adverse effect because of a crime, particularly when they are primary victims of violent crime.

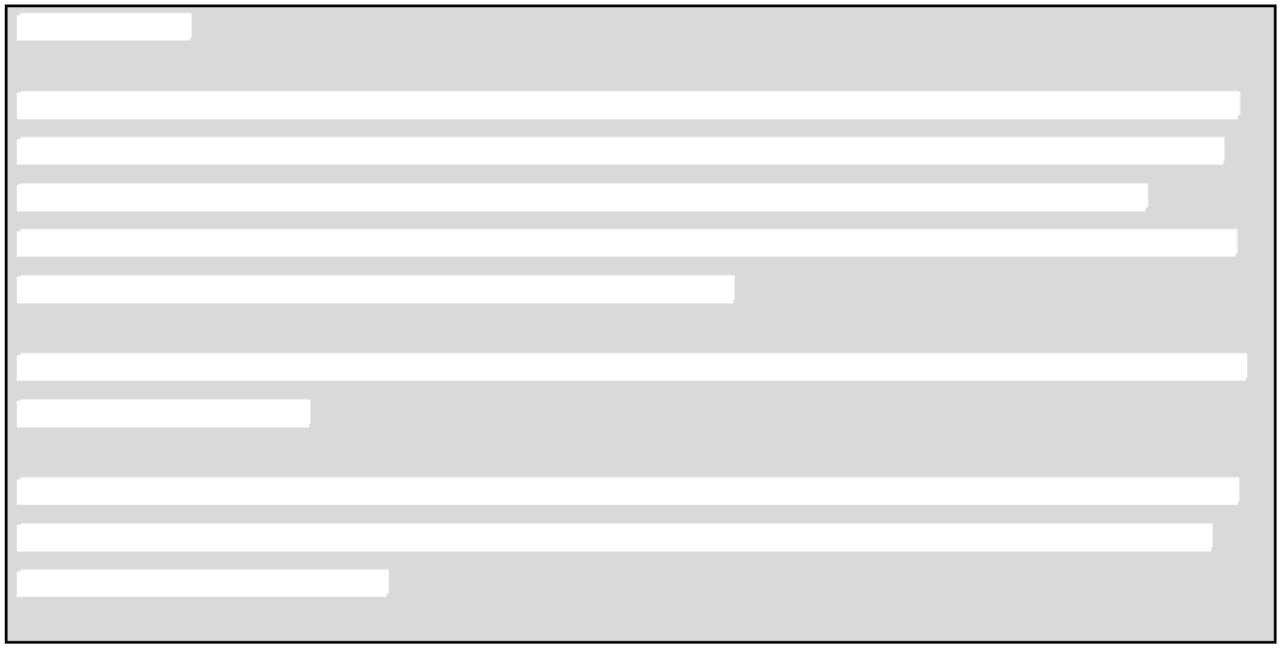
Having to seek treatment or attend an assessment can be re-traumatising for some victims but to prove an injury, it is a necessary step of any application. We have assisted some clients who have declined to make an application for assistance simply because they did not want to be 'medico-legally' assessed for the purposes of satisfying the injury criterion.

Submission:

iv. Amend the definition of 'injury' in a form similar to that detailed so that the Act is clear on the status of pre-existing injuries.

1.3.2. 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?

For the reasons explained in the previous question, the definition of injury ought to include other forms of harm. Of note, is the anticipation of the fact that some applicants do have pre-existing physical injuries which is not necessarily or expressly included in the definition as it currently reads.



John's case is a clear example where a pre-existing condition has prevented the VOCAT from making an award of assistance in an applicant's favour on the existing definition of 'injury'. Common sense would

suggest that assistance would be awarded to John; however, the current definition is somewhat ambiguous on pre-existing condition(s).

Submission:

v. The definition of 'injury' in the Act ought to more adequately anticipate the possibility an applicant may suffer from a pre-existing related condition, which would provide clarity to all (including the VOCAT) as to whether or not the applicant satisfies the injury criterion.

1.3.3. Should the requirement of injury in the Act be removed for victims of certain crimes? If so, for which categories of victim should the requirement be removed?

In our submission, there are some offences in which the injury criterion should *not* be applicable including, but not limited to:

a. Related victim applications in respect of offences such as murder/manslaughter;
b. Childhood sexual abuse; and
c. Violent sexual offences.

Requiring victims of these offences to 'prove' injury can be burdensome for applicants (and their legal representatives), particularly in circumstances where they do not wish to attend for treatment of a psychological/psychiatric condition and do not wish to be assessed for the purposes for fear of being re-traumatised. In these extreme cases, it is our submission there ought to be a presumption in favour of 'injury' to avoid requiring these applicants to be exposed to the rigours of the application process which is likely in these circumstances to require a hearing potentially exposing victims to further re-traumatisation.

Submission:

vi. The requirement of 'injury' in the Act should be removed for victims of certain crimes and all child victims. Victims of the above certain crimes would ordinarily suffer distress as a result of the act of violence. Related victims (subject to the nature and extent of the relationship between the applicant and the deceased) are a prime example. If the applicant does not wish to be examined, nor seek treatment for injuries that may or may not yet be diagnosed, they ought not be forced to by the Act in order to satisfy the injury criterion.

1.4. The causation requirement

1.4.1. 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?

The phrase 'direct result' isn't defined in the legislation and is therefore unclear and entirely open to the VOCAT to consider what is a 'direct result' and the extent of the causal connection between the 'injury' and the act of violence and determine the remoteness of the injury to the act of violence. A common-sense approach generally prevails in our experience. For example, if a client requires dental treatment as a result of an assault, as well as general dental treatment for problems not related to traumatic injuries, that is taken into account and the latter is not funded by the VOCAT.

Difficulties occur when there is an act of violence that has caused injury (for example, an assault in the context of family violence) as well as conduct that does not entitle the applicant (for example, domestic violence emotional abuse), but the applicant's need for assistance arises from both. Domestic and family violence is the most prevalent example of this 'gap' in these causal considerations. If the family violence is a catalyst for separation, there are other processes applicants go through including divorce and in some cases family law proceedings which in and of themselves are a source of anxiety for victims which often exacerbate the injury they have suffered as a result of the act(s) of violence.

Another example is historical sexual abuse where the applicant has gone on to lead a life marred by other psychological torments as a result (for example, substance abuse, which is sadly a common occurrence). In some circumstances, those applicants are shut out of much needed treatment because the need arguably arises from both the act of violence and other events, notwithstanding the other events may not have happened but for the act of violence.

Connecting the cause of an injury to the act of violence can also be difficult if the victim suffers pre-existing injuries or conditions. In our experience, a common-sense approach prevails provided there is medical evidence to support the contention that the applicant's injury has been aggravated and/or exacerbated. If our suggestions as to the definition of 'injury' under the Act were accepted, then we consider this would assist greatly in terms of being in a position to clarify whether or not the 'injury' has been caused by the alleged act of violence. Naturally, this would also expedite the processing of claims as the VOCAT will be in a better position to draw the necessary causal nexus between the two while perhaps avoiding the need to obtain any further medical evidence beyond that that is ordinarily requested by applicants and/or their legal representatives.

We, again, suggest the approach adopted by other instruments such as the *WIRC Act* may be adopted to simplify the VOCAT's approach with regards to causation. Section 39 of the *WIRC Act* provides:

> *"If there is caused to a worker an injury* ***arising out of or in the course of*** *any employment, the worker is entitled to compensation in accordance with this Act".*

If the words employment and worker were substituted for 'act of violence' and 'victim' respectively, this causal requirement would apply the but-for test which is applied in many WorkCover and TAC claims. In other words, but for the act of violence would the applicant have suffered the claimed injuries? If the answer to this query is in the affirmative, then the requirement ought to be considered satisfied.

Submission:

vii. Amend the Act to adopt the causation requirement under other legislative instrument(s) such as the *WIRC Act* as it would simplify the approach and the reasoning required to determine the causal nexus between the act of violence and the claimed injuries.

2. Assistance Available

2.1. Quantum of awards

2.1.1. Total financial assistance available – 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?

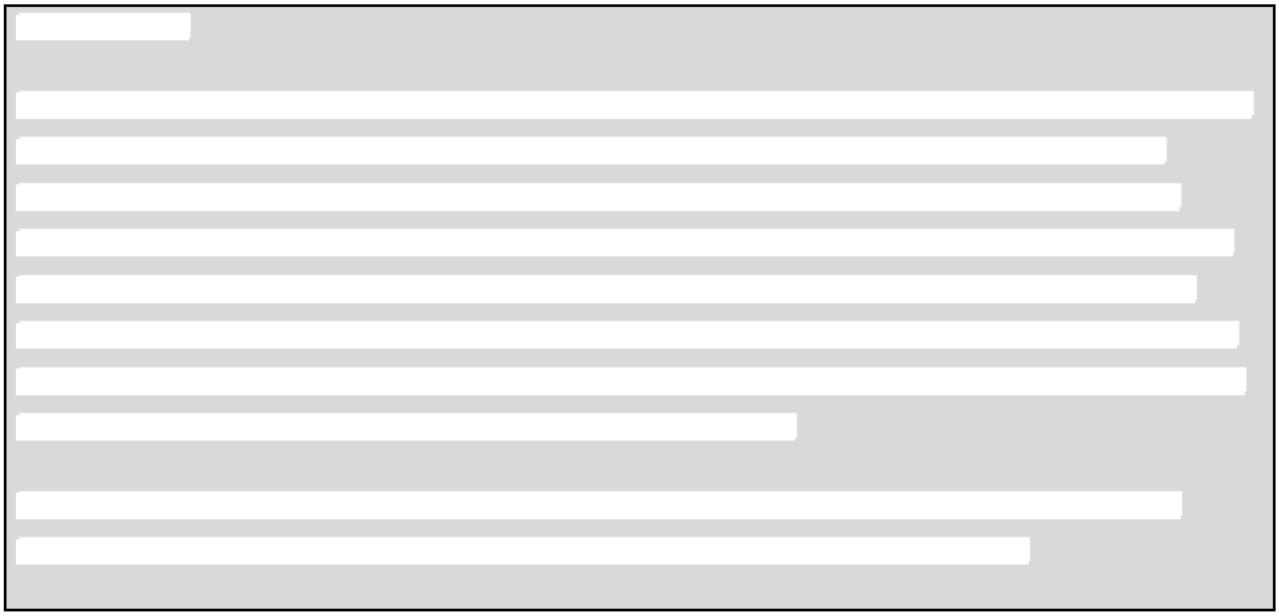
The quantum of awards is very limited and it's worth noting that the maximum quantum of awards under the Act has not been increased since the Act's commencement date. Special Financial Assistance ('**SFA**') was implemented following the commencement of the Act to pay assistance to victims as a symbolic gesture of the community's sympathy towards the victim having been exposed to the violent crime. SFA was implemented in January 2000 and increased in July 2007, and *has not been increased since this time*. This despite other compensation schemes such as those entitlements available to injured workers and transport-users being tied to inflation and CPI increases, and increased accordingly.

It's worth noting that, under the *Criminal Injuries Compensation Act* 1972 (Vic), victims could be awarded a maximum of a SFA-like payment of $20,000. In other words, the amount of assistance a victim could receive by way of SFA (or similar payment) has in fact decreased as time has worn on. Considering the objectives and purpose of the Act, in our view the quantum of SFA available to victims of violent crime is in need of urgent review.

Insofar as loss of earnings is concerned, the maximum of $20,000 for a two-year period beyond the act of violence is far below the minimum wage and often does not even cover 6 months of an applicant's full time wage. Victims of violent crimes can require more time than this off work. We recognise that the Act is not a 'compensation scheme' *per se*, but the maximum amounts payable in respect of loss of earnings, in our opinion, fall short of community expectations and do not meet the ordinary costs of living for even a reasonable amount of time. This leaves victims out of pocket thousands, sometimes tens of thousands, of

dollars and left to rely on social security benefits alone to fund their recovery should they require more time off work. In our experience, once victims become so dependent and reliant on these payments and essentially become de-conditioned from the work force, the task of re-joining the work force can be as traumatic as the act of violence itself. In other cases, applicants may be forced to return to work having not recovered from the act of violence as the demands of their ordinary lives is beyond what they could receive from the VOCAT or social security, or both.

The time limitations on loss of earnings, being the 2-year period from the date of the crime, often does not reflect the time where the loss of earnings occurred. At times, the loss of earnings is from the date of disclosure or the date of the criminal trial. In other words, losses can be incurred as a consequence of the act of violence at a date beyond the 2-year limitation period. Victims ought to be able to recover these amounts up to the statutory maximum regardless of the time limitation.



Luke's case is an example of how loss of earnings may not be immediately incurred, and therefore the 2-year limitation period is a disadvantage for these applications.

The related victim's entitlement, Special Financial Assistance and Loss of Earnings need to be increased to be more in line with current day financial standards.

In any event, the maximum cap of awards (like SFA) should be tied to inflation or increases in CPI to ensure that the awards of assistance are (effortlessly, at least insofar as reviewing the appropriateness and reasonableness of awards of assistance are concerned) meeting community expectations and the ever-increasing costs of living.

Submissions:

viii. Amend the Act to increase the maximum awards of SFA to a 'base rate' and thereafter subject to increases in CPI.

ix. Amend the Act to increase the maximum cap on awards of assistance (as an aggregate) subject to increases in CPI.

x. Amend the Act to remove the time limitation on loss of earnings (but to retain a statutory maximum). Alternatively, to permit the VOCAT to award loss of earnings beyond the limitation period in certain circumstances.

2.1.2. Cap on quantum available for related victims

2.1.2.1. 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 victims be increased?

The 'pool of assistance' prejudices related victims who're members of large families. A death that was caused as a direct result of an act of violence may give rise to one related victim application, or many, depending on how many applicants are either a close family member, a dependent or had an intimate personal relationship with the deceased.

The fact a related victim has more close family members, dependants or people who had an intimate personal relationship with a primary victim should not be held against them and prevent them from receiving the same amount of assistance as someone who has a lesser number of eligible related victims. It is arguable that such a proposition is not in accordance with the purpose and objectives of the Act.

Submission:

xi. Amend the Act to remove the 'pool of assistance' for related victims and subject related victims to a maximum award akin to primary and secondary victims. The imposition of such a limit would ensure that related victims of a larger family ought to receive the same amount of assistance as a related victim in comparable circumstances to applicants with a lesser number of related victims.

2.1.2.2. 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?

The Act should be amended to reflect the rising cost of funerals. The maximum 'pool' of $100,000 has not increased at all despite the number of family members and related victims per deceased primary victim often increasing, taking into consideration the increase of blended families and the many close relationships a deceased victim may have with their loved ones. It is not unusual for there to be more than six (6) related victim applications for one death. Once the funeral expenses and counselling expenses of all related victims are deducted from the $100,000 'pool', there is not much left to award the related victims by way of assistance in respect of their distress.

It is for these reasons that we consider the practical, and simplest, way to amend the Act (if it were to be amended) would be to remove the cap on the 'pool' entirely and subject related victims to the same maximums applicable to same maximum amounts of assistance primary victims are able to seek from the VOCAT ($60,000 or whatever new maximum may be implemented as a result of any reforms).

Funeral expenses ought to be paid as a separate amount outside of the maximum caps awardable to victims. As with primary and secondary victims, medical and counselling expenses ought to be also separate to amounts of assistance for distress just as special financial assistance is with primary victims.

Submission:

xii. Amend the Act to remove reasonable funeral, medical and counselling expenses from being considered as part of the maximum awards of assistance payable to victims, whether or not our submissions concerning the 'pool' are accepted or rejected.

2.2. Categories of award

2.2.1. 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?

Most expenses incurred by Victims do fit into the categories available.

We take the opportunity here to mention the requirement for exceptional circumstances to claim assistance from the VOCAT in respect of expenses that are likely to assist in recovery. The requirement of having to prove extraordinary circumstances can re-traumatise a victim. There should not be anything 'ordinary' about being a victim and so, accordingly, we consider the requirement to show exceptional circumstances ought to be abolished. The expenses must still be reasonable and likely to assist in the applicant's recovery (in the therapeutic sense) as opposed to simply being enjoyable for the victim to undertake.

Applicants' ability to claim an interim award is imperative to commence recovery and, in most circumstances, are dealt with in a timely manner.

Submission:

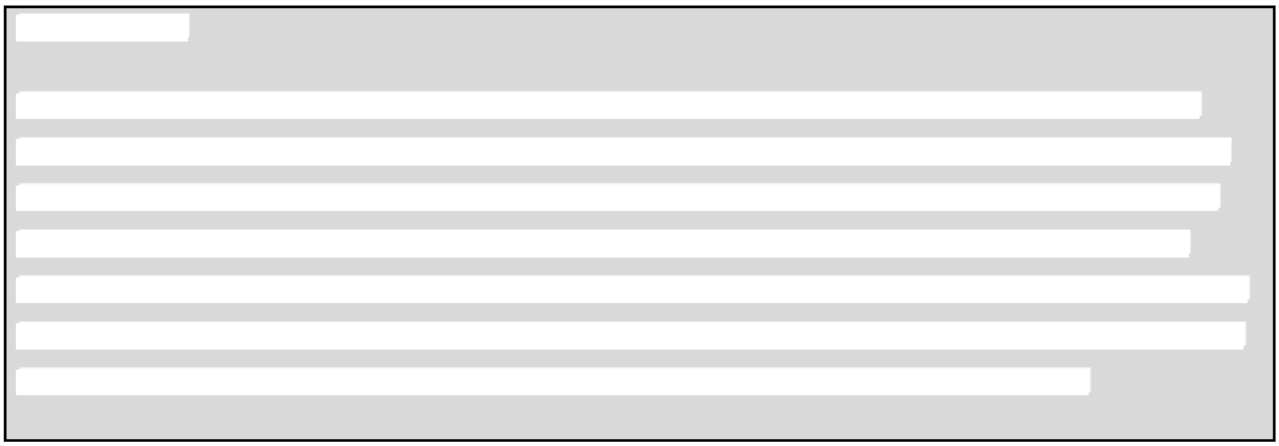
xiii. Amend the Act to abolish the current requirement in Section 8(3) of the Act of the applicant to prove exceptional circumstances. While we concede a potential response to such a submission could be that it would 'open the floodgates'; in response, we would suggest that there are other hurdles in Section 8(3) applicants need to prove before the VOCAT may award such assistance, specifically that:

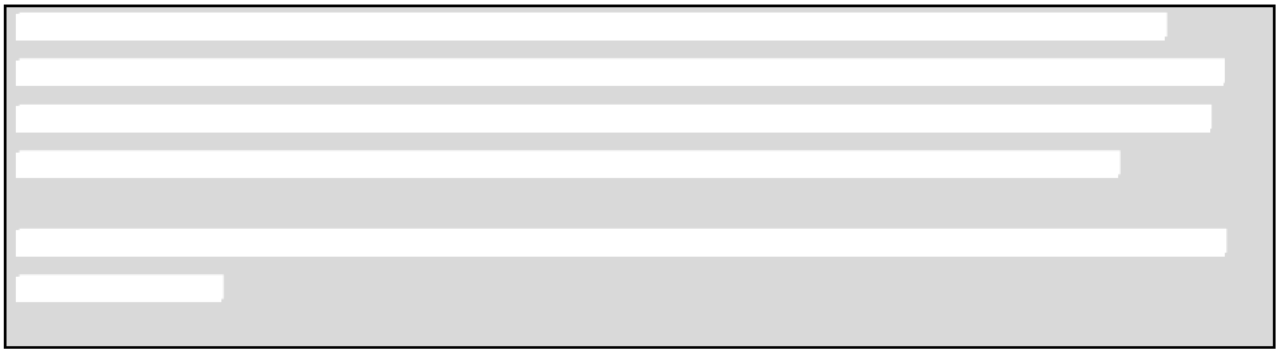
a. The expenses are actually to be incurred; and
b. That such expenses are reasonable in all of the circumstances; and
c. That such expenses are likely to be therapeutic for the applicant, and not merely enjoyable.

2.2.2. 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?

Insofar as counselling expenses are concerned, the VOCAT must rely on the medical opinion before it in determining what is reasonable. As to what is considered 'reasonable' depends on the circumstances of each case and it's entirely open to the VOCAT to consider what is reasonable. In other words, there is discretion and it's regularly applied in a practical and pragmatic way.

A common feature of applications for assistance are requests for safety-related expenses. Section 8(1)(e) of the Act permits the awarding of assistance for such expenses actually and reasonably incurred, or reasonably likely to be incurred, by the primary victim as a result of the act of violence. The difficulty we are facing in some applications is that VOCAT Members are being asked from a distance and 'on the papers' to make conclusions about the 'reasonableness' of safety-related expenses. In many cases, safety-related expenses such as the changing of locks, the reparation of gates and fences, and the installation of modest security systems are being determined by the VOCAT as unreasonable, and not subject to assistance.





Felicity's case can be referenced to highlight this is a case where it was considered by Felicity (and her legal representatives) that the safety-related expenses were, in fact, reasonable and in accordance with the Act. Nonetheless, the effect of this determination by the VOCAT is that the only way applicants can then seek such assistance from the VOCAT (which in many cases may not be in excess of $1,000) is to seek the listing of a hearing of the application, and all the re-traumatisation and distress that goes with exposing applicants to the processes of litigation. Further, the listing of a hearing and the resolution of the application once and for all make take a matter of months.

Submission:

xiv. The requirement of reasonableness should be retained in respect of counselling and medical expenses, but should be abolished in respect of expenses not of a medical nature (including safety-related expenses, and expenses that are likely to assist applicants in their recovery). In the case of the latter, a 'therapeutic' definition ought to be introduced. That way, if there is medical evidence to suggest that the expenses are likely to assist in the applicant's recovery or reduce the symptoms associated with their 'injury', then they ought to be awarded by the VOCAT.

2.2.3. 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?

This is another aspect of the State-funded scheme that is not defined. As the Act currently reads, there are terms such as 'exceptional circumstances', 'special circumstances', and 'reasonable', none of which are afforded a definition under the Act. This leaves the job up to the VOCAT to determine on a case by case basis what falls within the ambit of those terms.

Applicants who have been subjected to severe acts of violence, such as long-standing and traumatic family violence, and instances of sexual abuse (whether childhood or otherwise) are subject to exceptional circumstances in all cases of such offending. To suggest that victims of these types of offences are not subject to exceptional circumstances is offensive to some applicants and tarnishes the formal recognition some of these applicants are seeking from the VOCAT. In our experience, 'exceptional circumstances' has

been interpreted as meaning the severe end of the scale or out of the ordinary. In our submission, no crime should even have the potential as being described as ordinary.

In the same sense as our submission at 2.2.2, the same 'therapeutic' definition should be applied to awards for recovery expenses.

Submission:

xv. We refer to, and repeat, our submission at 2.2.2.

2.2.4. 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?

On the basis of our above submissions with regards to the current 'exceptional circumstances' requirement, and amending the Act to a 'therapeutic' requirement, we consider that such amendments would ensure that victims and applicants are assisted adequately.

The implementation of a 'therapeutic' requirement under the Act for any Section 8(3) expenses would ensure that those victims that require that assistance to recover from the crime would receive such assistance and not be exposed to a more 'legal' test of 'exceptional circumstances' and the suggestion it carries with it; for example, a situation where someone has been the subject of a sexual assault, but has not suffered exceptional circumstances.

Submission:

xvi. We refer to, and repeat, our submission at 2.2.2.

2.2.5. 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?

Interim awards are a great way for applicants to get urgent assistance sooner rather than later, particularly for vulnerable victims.

The problem with interim awards comes back to the VOCAT's ability to deal with these awards expeditiously. As mentioned in our Executive Summary, some VOCAT venues are only manned by decision-makers one day per week. The resultant effect of this is that it may take up to 8-12 weeks for interim awards to be even responded to in the first place. The effect of this delay on applicants in vulnerable situations (such as where they need to be relocated or to receive urgent further counselling or treatment) is

significant. The delays have the very real potential to significantly hinder the recovery of victims and, in the cases of family violence, often places vulnerable victims and their children in a state of peril.

Procedurally and in the age of technology we live in today, interim awards could be decided by a different decision-maker than the one allocated the application at first instance, particularly if that decision-maker is not readily available to consider the application for interim assistance. Procedurally, Registrars should have the ability to refer urgent matters such as these to other VOCAT venues or alternatively the VOCAT in Melbourne where access to a decision-maker is likely to be much earlier than that in regional locations.

2.3. Limitations on the special financial assistance provision

2.3.1. 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?

Currently, the only way to recognise a series of related criminal acts is to separate them and if there are criminal acts of violence over a long period time with varying adverse effects and severity, then separate charges ought to also be considered. However, the fact of life is that police may not necessarily pursue all criminal acts on behalf of the applicant.

In family violence matters in particular, it is not uncommon for the violence to commence on a fairly minor basis and this is often dealt with but the relationship continues. The violence then increases in nature and severity, and police involvement is required for a second, third or fourth time over a period of years. It would not be unreasonable for the minor crimes to be acknowledged as well as the more serious ones without them being treated as one 'act of violence'.

The *Victims of Crime Assistance (Special Financial Assistance) Regulations* 2011 currently provide for when categories of SFA can be uplifted. The VOCAT is already empowered by the Regulations to uplift the SFA it proposes to award to an applicant. Accordingly, an amendment to these Regulations to incorporate recognition of family violence related incidents (incorporating and adopting the definition of family violence from other incidents) would adequately recognise the fact that applicants may have been subjected to long-standing family violence but is afforded recognition for only the more severe and, in many cases, recent episodes.

Submissions:

xvii. Amend the *Victims of Crime Assistance (Special Financial Assistance) Regulations* 2011 to implement specific provisions and empower the VOCAT to uplift SFA in circumstances where applicants have suffered from family violence, adopting the definition of 'family violence' from other legislative instruments, to ensure consistency of definitions.

2.3.2. 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?

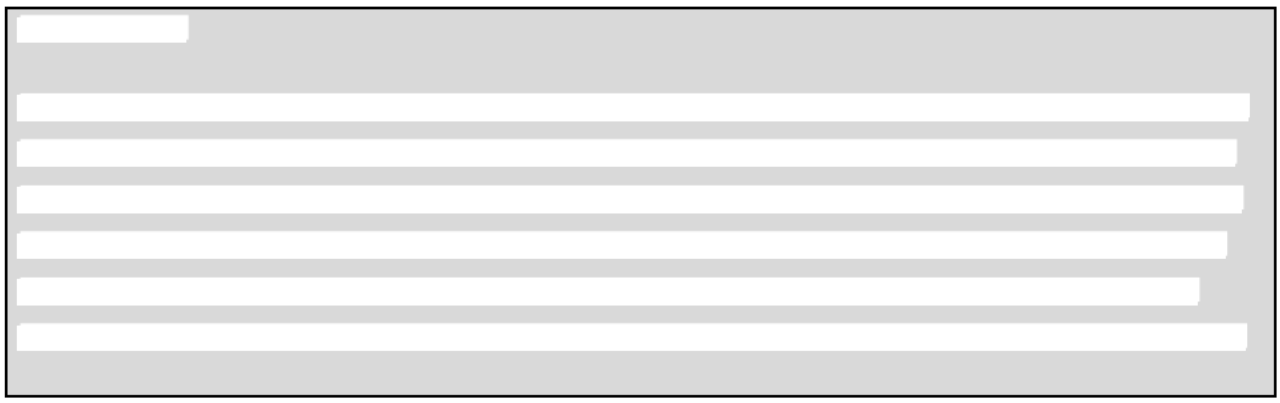
The Special Financial Assistance ('**SFA**') formula and categories do currently take into account aggravating factors of the offending and vulnerable victims. The *Victims of Crime Assistance (Special Financial Assistance) Regulations* 2011 provide for certain circumstances where categories of SFA can be uplifted to a higher category of SFA. In our experience and based on the current model, this formula works well and the VOCAT has the ability to consider the particular circumstances of each case.

The formula would need to be entirely re-worked if an administrative model were implemented as that 'discretion' currently borne by the VOCAT to uplift SFA would likely be removed.

2.3.3. Who should be eligible for special financial assistance under the Act?

All primary victims should be eligible for SFA under the Act, subject to other considerations the VOCAT is statutorily required to take into account. The objective of SFA is to acknowledge and offer a symbolic recognition from the community that an applicant has been a victim of violent crime. SFA provides primary victims with that recognition.

There are imaginable circumstances where a secondary victim may suffer significant and extreme consequences as a result of the primary victim's exposure to an act of violence.



Sarah's case is an example where an applicant has arguably suffered a serious injury and would arguably have her entitlement to SFA uplifted to category B in accordance with Regulation 8 of the *Victims of Crime Assistance (Special Financial Assistance) Regulations* 2011 (Vic). While she has suffered significant

adverse effects, she (by the simple reason she was not the target or recipient of a punch) is not eligible for the symbolic gesture and recognition afforded by any award of SFA.

If 'serious injury' were defined in the Act, then we consider that there should certain circumstances where secondary victims may also be eligible for SFA. The key point we make here is that it is not always the money that matters in extreme cases, but the formal recognition that an award of SFA offers. Some of the secondary victims we have assisted have complained that there is no recognition of the effects they have suffered as a result of the primary victim's exposure to the act of violence. The introduction of certain circumstances where secondary victims may be eligible for SFA would provide the recognition that secondary victims who find themselves in these extreme circumstances seek.

Submission:

xviii. If a secondary victim satisfies the VOCAT that they have suffered a 'serious injury', then the VOCAT ought to be awarding SFA to secondary victims in such circumstances.

2.3.4. 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?

We do not consider the removal and replacement of minimum and maximum amounts of SFA to be a step forward for the scheme. One of the vital aspects of the judicial decision-making currently available is that the decision-makers have the ability to assess and determine the appropriate level of SFA applicable to each and every application and the varying adverse effects they suffer.

Abolishing these ranges and replacing them with (if the current SFA model is retained) four set amounts of SFA runs the very real and significant risk that someone who has suffered injuries that require significant surgery (such as a fusion of a level in their spine) could be awarded the same amount as someone who suffers a much less severe injury, simply because the nature of the offending is the same. This would not be an ideal or preferred outcome having regard to the purpose and objectives of the Act.

Submission:

xix. Retain the current maximum and minimum amounts of SFA in the Act, but update the value of such maximums and minimums to ensure they remain within community expectations and in accordance with CPI and the ever-increasing cost of living to ensure the sympathy, recognition and condolence is not diminished by the effluxion of time.

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

As at 2.1.1, the maximum quantum of awards under the Act has not been increased in a very long time. It is our view that the awards of SFA ought to be increased to an initial 'base rate', and thereafter tied to inflation or increases in CPI. This would ensure that the awards of SFA remain within community expectations and the ever-increasing costs of living, whilst ensuring that the recognition afforded by awards of SFA is not diminished over time.

Submission:

xx. We refer to, and repeat, our submissions at 2.1.1.

2.4. Treatment of 'related criminal acts'

2.4.1. 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?

At present, Section 4 of the Act defines 'related criminal acts' as follows:

"… a criminal act is related to another criminal act for the purposes of this Act if –…"

So long as the discretion afforded to the VOCAT to consider and have regard to the particular circumstances of the subject related criminal acts, we consider the definition as it currently reads in the Act is serving its purpose.

As mentioned at 2.3.1, it is worthy to note that there are some circumstances where incidents should *not* be considered as 'related criminal acts'.

Another situation where this arises is where there has been sexual abuse by a group on the basis that each person in that group is committing their own act of violence against the victim, and therefore the victim ought to be able to pursue an application (and an award of SFA) in respect of each offender. Alternatively, the VOCAT ought to be empowered by the Act to take the more extreme circumstances of that scenario in awarding SFA.

2.4.2. Should the Act be amended to give victims an opportunity to object if claims are to be treated as 'related'?

The VOCAT does have some discretion in this regard as per Section 4(1)(iii) of the current Act. If this particular provision remains untouched under the Act, then relevant submissions can be made to the

VOCAT on this point, which the VOCAT can then administratively consider and determine as to the future conduct of the application(s).

Submission:

xxi. Retain Section 4(1)(iii) of the current Act to ensure that the VOCAT retains the discretion to object to the 'amalgamation' of applications for reason that they are considered to be 'related'.

2.4.3. 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?

If related acts of violence are to be separated, then it should follow that there should be separate awards of SFA and other forms of assistance in respect of each of the separated acts of violence.

However and if it is determined that the related criminal acts be amalgamated into the one application, then the VOCAT should be able to consider any uplifts in the SFA awarded subject to the considerations required by the Regulations.

Submission:

xxii. We refer to, and repeat, our submissions at 2.4.1.

3. Time limits for making an application

3.1. Is the time limit a barrier for victims of crime?

In short, we consider the time limit is indeed one barrier for victims of crime. There are others, which we will address in the relevant parts of our submissions.

There is a raft of reasons why an applicant may not make an application within the prescribed time limit. The most common example, in our experience, is because applicants have been dealing with trying to get their lives 'back on track', particularly in circumstances where they have been victims of long-term abuse or long-standing family violence. Victims in those circumstances cannot be blamed for delaying their application for prioritising their own personal circumstances ahead of any civil litigation. Further, we routinely assist victims who are referred by support groups, investigating and prosecuting police, and even members of the judiciary only once the criminal proceedings have been finalised. Often, such proceedings are finalised beyond the 2-year time limit.

We have assisted some applicants who have been expressly told be investigating/prosecuting police members *not* to pursue their application for assistance until the criminal proceedings have been finalised. Applicants in these circumstances have no reason to research the matter any further and are solely and wholly reliant on the information they are fed from authorities.

Many victims, including those who find themselves in the above circumstances, are simply not aware of the state-funded financial assistance scheme. The Act does not allow the Tribunal even an opportunity to further consider the matter, notwithstanding they may well have a very meritorious case to make an application to the Tribunal. Some police members will refer victims to victims' support groups, others may not. Regardless of whether victims do or do not engage with victims' support groups, some victims prioritise their own personal circumstances ahead of dealing with the fallout of the act(s) of violence. In these circumstances, they have no knowledge of the scheme, and it's not appropriate that this election to try and 'get back on their feet' before dealing with an application be held against them in that regard.

Submission:

xxiii. Amend the Act to the effect that the VOCAT has the discretion to hear and determine any matters out of time and any relevant circumstances it deems fit to consider, as opposed to requiring the VOCAT currently to refuse to further hear or determine matters out of time in some particular circumstances.

3.1.1. 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?

The two-year time limit to make an application to VOCAT is not appropriate for a number of reasons:

1. The time limit imposed by the Act is inconsistent with the time limits prescribed in the *Limitation of Actions Act* 1958 (Vic);
2. In many cases, VOCAT's time limitation is just another time limit they have to remember and diarise (if their legal representatives haven't done so);
3. When victims are subject to long-term abuse which spans a period longer than 2 years, it's arguable (although perhaps not convincingly) that the 2-year time limitation period began from the time the abuse began. In this situation, an application could be made out of time on the grounds of 'special circumstances', but it is another burden the applicant is required to discharge simply because they have been a victim of long-term abuse.

The time limit imposed by the Act is inconsistent with the *Limitation of Actions* 1958 (Vic). In many cases, victims have recourse to a number of different actions (including an application to the Tribunal for assistance). In circumstances where this is the case, the time limits ought to be similar or made uniform.

While Plaintiffs routinely make applications for extensions of time (when the expiry of the limitation is raised as a defence by a Defendant), it is a further burden they are forced to discharge before the Court may consider hearing or further dealing with their case any further. Specific to VOCAT applications for assistance, It is another time limitation that we, as legal practitioners in this area, are required to inform our clients about particularly in circumstances where they may have recourse to financial entitlements elsewhere arising from the same set of circumstances. For a victim, having to remember potentially three (3) different time limitations is overly burdensome and it's not appropriate that they be overloaded with information when they are trying to get their lives back on track and recover from act(s) of violence.

In our submission, the time limitation ought to be aligned with that of claims for personal injury damages pursuant to the provisions of the *Wrongs Act* 1958 (Vic), specifically three (3) years. This would mean that victims have a further year within which to make an application for assistance, and one less limitation date to remember if they have entitlements that could be recovered in other claims. It is also a further year they have to learn of the scheme from one source or another if the Act is not amended in respect of section 29(4).

Aligning the time limitation with other types of claims as submitted would simplify the process for applicants and would certainly assist us, as legal practitioners, to properly advise clients of their entitlements.

Currently, the Tribunal is required by the Act to refuse or further hear and determine an application that is made out of time only because the applicant was unaware of the victims of crime financial assistance scheme. The second reading speech of the Act makes reference to "meeting the needs of victims of violent crimes while at the same time achieving an appropriate balance between the interests of victims and the state and the rights of offenders". Taking into account the raft of reasons why an applicant may be making an application of assistance out of time, it's simply not appropriate for such a legislative provision to exist and such ought to be left to the discretion of the Tribunal.

Submission:

xxiv. Amend the Act to adjust the time limitation for VOCAT applications to three (3) years, in line with the time limitation for actions made claiming personal injury damages pursuant to the provisions of the *Wrongs Act* 1958 (Vic).

3.1.2. 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?

In our view, there are certain crimes that ought to be excluded from the time limit provisions entirely. Any proposed amendments to exclude certain crimes from the application of time limit provisions would most appropriately apply to childhood sexual offences.

Our firms proudly represent victims of institutional abuse, many of whom have come forward with their complaints since the *Royal Commission into Institutional Responses to Child Sexual Abuse* ('**IA Royal Commission**'). Since this inquiry, we have seen a larger number of clients present with complaints of childhood sexual abuse than ever before. Many of these cases concern act(s) of violence that were perpetrated years ago. Some victims report the crime straight away but do not pursue any avenues of assistance at the time, but many don't and suffer for decades before seeking assistance whether financial, medical, or both. The IA Royal Commission has removed much of the stigma surrounding these types of crimes.

In 2015, the State Government retrospectively removed time limits for claims of childhood abuse in Victoria by the passage of the *Limitation of Actions Amendment (Child Abuse) Act* 2015 (Vic) ('**the LOACA Act**'), which amended the *Limitation of Actions Act* 1958 (Vic). The LOACA Act removed restrictive limitation periods for actions relating to death or personal injury arising from child abuse. Our firms saw first-hand the significant legal barriers, where restrictive limitation periods created a relatively short period of time within which pursue civil proceedings. Survivors who were outside the previous limitation periods faced expensive and lengthy court proceedings if they wished to be granted an extension of time. This severely affected their prospects of success and, in turn, meaningful out of court negotiations and/or settlements. As acknowledged by the IA Royal Commission, many survivors take many years to disclose the abuse they suffered due to the trauma associated with the abuse. The removal of limitation periods for actions relating to child abuse has been an important step forward in ensuring survivors of child abuse are fairly compensated by those responsible for their abuse.

There may well be other types of crime(s) that ought to be excluded from this category, including family violence. Any such amendments should be focussed on protecting these victims from being over-exposed to the processes of litigation and ensuring there is a practical and pragmatic way for these types of offences to be recognised by the Act and the VOCAT outside the 2-year time limit. Naturally, the VOCAT is afforded the discretion to accept applications out of time; however, in our submission this is some applicants who're victims of these types of offences are required to jump in order to eligible for assistance.

Submission:

xxv. Amend the Act to exclude crimes of sexual abuse (whether childhood, penetrative/non-penetrative, long-standing or once-off) from any time limitation provisions in the Act entirely, aligning the Act with the *Limitation of Actions Act* 1958 (Vic), and following the amendments made by the LOACA Act.

3.1.3. 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?

The Act currently legislatively **requires** VOCAT to have regard to:

a. The age of the applicant at the time of the occurrence of the act of violence;
b. Whether the applicant is intellectually disabled within the meaning of the *Disability Act* 2006 or mentally ill within the meaning of the *Mental Health Act* 2014;
c. Whether the person who committed, or is alleged by the applicant to have committed, the act of violence was in a position of power, influence or trust in relation to the applicant;
d. The physical or psychological effect of the act of violence on the applicant;
e. Whether the delay in making the application threatens the capacity of the Tribunal to make a fair decision;
f. 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 act of 18; and
g. All other circumstances that it considers relevant.

We would suggest the following proposed amendment to the Act is one that ought to be considered by the Tribunal, in light of our submissions with respect to section 29(4) of the Act (VOCAT not to further hear/determine an application made out of time only because the applicant was unaware of the Act or of the time within which applications must be made under any such Act):

- Whether or not the applicant knew of the scheme or of the time within which applicants must be made under the scheme; and

- Whether it's likely or not the applicant would have made any such application within the prescribed time had they been aware of the scheme and the applicable time limitation.

We otherwise consider the discretion of VOCAT is appropriately applied in accordance with section 29(3)(g). The above additions would ensure that applicants are able to make applications for assistance if it's reasonably likely that they would have done so had they been aware of the scheme and/or time limitation. This is not to suggest that all applicants would likely have done so; examples where an applicant may not have been likely to make an application is when other circumstances prevent(ed) them from doing so.

Submission:

xxvi. Amend the Act to add to the factors to which the Tribunal **must** have regard under section 29 of the Act;

3.1.4. 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?

In response to this question, we make the following points:

- VOCAT is a body established by section 19 of the Act.
- VOCAT is established with the functions, powers and duties conferred on it by the Act as per section 20 of the Act. As a Tribunal created by an Act of Parliament, it can be likened to the Victorian Civil and Administrative Tribunal ('**VCAT**'), which was created by section 8 of the *Victorian Civil and Administrative Tribunal Act* 1998 (Vic) ('**the VCAT Act**') and has powers and duties as conferred on by the VCAT Act.
- That being the case, VCAT publishes its decisions. We see no reason (other than for privacy and the protection of victims, who can elect not to have any such decision in relation to their application published by so electing on the application form) why VOCAT should not be publishing its data and reasons for decisions made, let alone any rulings it makes in relation to section 29 of the Act.

As legal practitioners, a necessary part of our jobs is to be aware and research the standing case authority. It follows that if we are not able to properly research case authority to the greatest extent possible, then the quality of our own (and self-represented applicants') submissions is not going to be as high as it would be if access were allowed to the VOCAT's reasons for decisions and rulings.

Any applicants who, on the original application form, seek to have publication of their applications restricted ought to be entitled for any published reasons by the VOCAT to have their identity anonymised to ensure that their privacy is adequately protected.

Submission:

xxvii. Publish VOCAT decisions (with the exception of those that have asked for the publication of their application to be restricted on their application form) on its website and on the website of the Australian Legal Information Institute ('**AustLII**').

4. Making an award

4.1. Requirement to report to police within a reasonable time

4.1.1. 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?

The requirement to report incidents and/or act(s) of violence to police must be considered in the context of the application process generally. For example, if a victim of long-standing family violence is relieved of the obligation to report the incidents of family violence to police entirely, there are other issues in any such application the applicant faces in order for the VOCAT to be satisfied the applicant is deserving of an award of assistance; for example, the absence of a conviction against the alleged offender. In the absence of such a conviction (or any finding that the charges have been 'proven'), the applicant is forced to prove on the balance of probabilities that the injuries they complain of are as a direct result of the act(s) of violence claimed.

Applicants who have been victims of childhood sexual offences, sexual offences generally and family violence (whether long-standing or otherwise) ought not be required to report the matter to police to be eligible for assistance. It naturally remains that they will still be required to prove the act of violence which, from the perspective of State Government, is still a significant safeguard to State funds in ensuring that only those entitled receive assistance.

Many victims of these types of crimes have very reasonable reasons why they do wish to involve police, particularly in cases of family violence. In those circumstances, they should not be denied assistance purely for the fact that they have not reported the incident to police and asked them to prosecute, in some of those cases, the offender who lives under the same roof. In practice, if there is a consistency in contemporaneous medical records or documents from other government agencies, then it remains it's open to the VOCAT to consider whether or not the act of violence criterion has been discharged by applicant **on the balance of probabilities**. We routinely rely upon the consistency in records (whether medical or obtained from other sources) in argument that it's more likely than not the act of violence actually happened. If applicants of the above types of offending are able to discharge this burden of proof, then they ought to be entitled to assistance by the VOCAT accordingly.

Submission:

xxviii. Amend the Act to remove the requirement of applicants to report the incident and/or act(s) of violence to police.

a. Further, or in the alternative, the requirement of applicants to report the incident and/or act(s) of violence police should not be applicable to certain types of offending including, but not limited to:
    i. Childhood sexual offences;
    ii. Sexual offences generally; and
    iii. Family violence.

4.2. Requirement to provide reasonable assistance to police and prosecution

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

In short, yes. The Act currently requires VOCAT to "refuse to make an award of assistance if:

a. It is satisfied that:
    i. The act of violence was not reported to police within a reasonable time; or
    ii. The applicant failed to provide reasonable assistance to any person or body duly engaged in the investigation of the act of violence or in the arrest or prosecution of any person by whom the act of violence was committed or alleged to have been committed

unless the Tribunal considers that special circumstances brought about that result".

The requirement of special circumstances affords the Tribunal some discretion in determining what 'special circumstances' are. However, there is no definition or even factors in which the VOCAT ought to have regard to when determining whether the burden of proving there are 'special circumstances' is discharged. We are not suggesting a definition be implemented, but rather a set of factors the VOCAT ought to have regard to, similar in the way Section 54 provides for a number of factors the VOCAT must consider in addition to any other matters it considers relevant.

There are plenty of circumstances where victims may not wish to pursue criminal charges against an alleged offender or which may amount to 'special circumstances'. The following are some examples of these, in our experience:

- The attending/investigating police member has told them that there is no point in taking a statement from them as all they would get is a 'slap on the wrist' and obtain a 'statement of no complaint' from the victim applicant which is then relied upon by the VOCAT to refuse assistance;
- The alleged offender is a family member in circumstances where it's likely the victim will continue to have contact with the alleged offender and is fearful of what the alleged offender may do to them if they make, or pursue, any police complaint;
- The victim is reasonably frightened of the alleged offender harming them further, particularly in circumstances where the alleged offender remains at large and free to attend on the victim again;

- The alleged offender is a work or school colleague so ongoing contact is likely to certain to continue and proceeding with charges will be a disadvantage in their current circumstances; and
- The alleged offender is a person of recognition/public figure or of well-known identity and proceeding with charges will be a disadvantage to the victim or attract unwanted media attention.

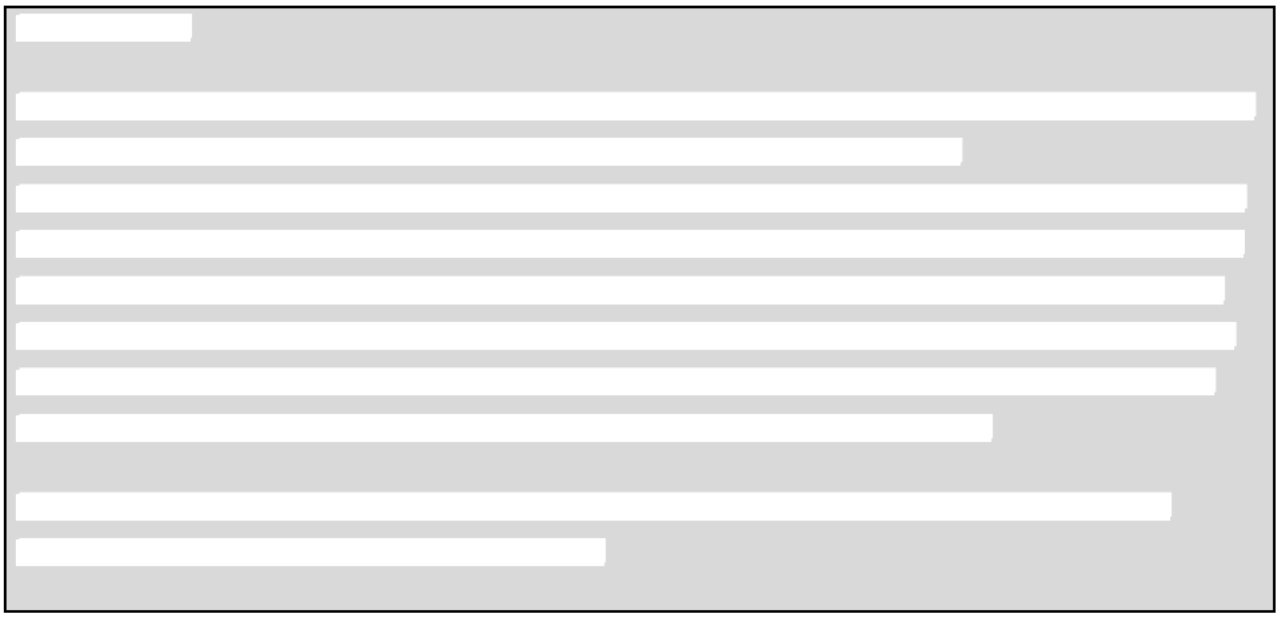
Submission:

xxix. Amend the Act to include factors in which the Tribunal must have regard to when determining whether or not there are 'special circumstances' in a particular application when considering the application of Section 52 of the Act.

4.2.2. 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?

'Reasonable assistance' is not defined in section 3 of the Act. Accordingly, VOCAT is left with determining what is tantamount to 'reasonable assistance' on a case-by-case basis. In our submission, if the above amendments are made to the Act to implement factors which the Tribunal must have regards to when determining what special circumstances are, then there may not be any need to make amendments to the Act with regards to the 'reasonable assistance' provisions. If such factors are implemented into the Act, then such implementations would cure any deficiencies arising from the 'reasonable assistance' provisions.

There have also been some cases where the operation of Section 52 is not working fairly and consideration must be given to amending Section 52 to ensure that it operates in accordance with the intention and objectives of the Act.



Whether police choose to investigate the matter is a matter for the police. The fact in this case police elected not to investigate and/or pursue the alleged offender is not an election that ought to prejudice applicants such as James; this is clearly not the intention, or in accordance with the objectives, of the Act.

Submission:

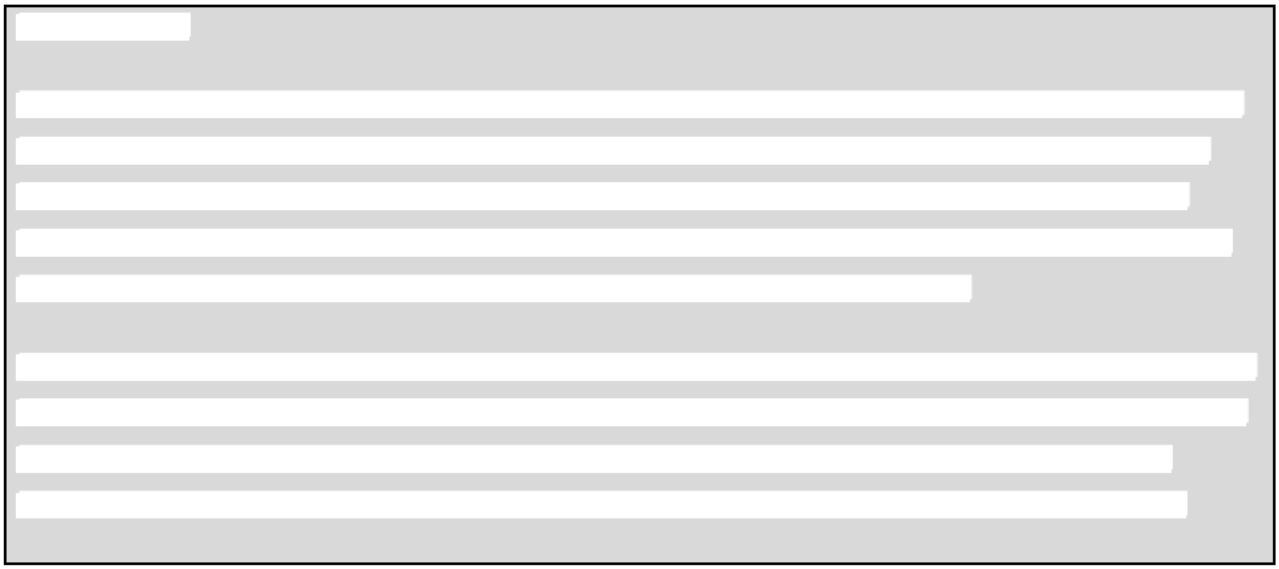
xxx. Amend the Act to introduce a definition for 'reasonable assistance' that focusses on the actions of the applicant, not the investigative bodies that may be duly engaged to investigate or prosecute the alleged offences.

4.3. Character and behaviour considerations

4.3.1. 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?

We understand Parliament's intention behind the section 54 considerations for victims are to protect the state-funded scheme from financially assisting victims who do not fall within the ambit of 'certain victims' in the objectives of the Act.

In our experience, we do not consider these provisions are operating fairly. Our submissions in respect of this particular question ought to be read in the background of our submissions in relation to the objectives of the Act and 'certain victims'.



As it currently reads, the Act requires the VOCAT to take into account the circumstances of Brett's offending. Brett's drug-related offending prejudiced him totally as no awards have been made in his favour by the VOCAT to date, despite police's decision not to charge him formally with any offences whatsoever (an election we consider is significant, particularly in circumstances where they likely had the evidence to prove a conviction with relatively little effort).

In Brett's circumstances, he has acted as a police informant to obtain a conviction against the offenders' more violent offending at great cost to himself. He now is wholly and solely reliant on his parents and social security benefits to live at further cost to the tax payer. Had he had access to treatment and counselling in a timely fashion, it is academic that such would assist in his recovery and help him to get back on his feet and avoid reliance on others and government benefits.

4.3.2. 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?

Our firms' 24 offices are spread across Victoria. Many of our offices practice in lower socio-economic areas such as Werribee and the Western Suburbs, and the Frankston/Dandenong regions. Our head office is located in Robinson Street, Dandenong. Many of the clients we see who have been victims of crime have *some* form of a criminal record, which of course is encapsulated by the factors in the current form of section 54 of the Act.

What is concerning to us is that these factors (which VOCAT is mandated to take into account) are being taken into account and held against applicants. The 'certain victims' in the objectives of the Act makes it clear that not everybody ought to be provided with state-funded assistance as a result of being a victim of violent crime. Having said that, we have assisted many through the VOCAT application process who have had *historical* criminal convictions and have been denied assistance by VOCAT because of the section 54 factors.

There are some section 54 factors that need amending

If a person's criminal history follows or is after the 'act of violence' then consideration must be given as to whether they were in the right frame of mind at the time they committed those offences. They may well have been suffering an injury which precludes them from really thinking about their own actions or alternatively whether the act of violence influenced them in any way and, if so, whether or not it's likely they

would not have committed the offending but for being placed in that vulnerable state by the original act of violence.

If a person has a long criminal history for petty or less serious crimes but is then the victim of a very serious act of violence such as attempted murder or armed robbery, totally unrelated to their criminal history, then their criminal history ought to be ignored or at least considered to a lesser degree. While it is open to the VOCAT to consider these factors currently, it is a benefit of the judicial decision-making we currently have as such effects and factors may not be considered at such a deep level by an administrative body.

If a person has had a very disadvantaged background or upbringing then this should also be considered as well on the basis that, in their mind, they were acting in a 'normal' manner. An example of this might be where the child was brought up witnessing domestic violence and then, when they leave their first home, they don't necessarily know that their behaviour, mimicked from their upbringing, is actually a criminal offence or an 'act of violence'. Similarly, victims new to Australia may not totally understand our laws and do commit some minor offences initially. While there are undoubtedly some cases where this type of offending may escalate into more serious offending, where such is limited to that of a less-serious nature, this is something that ought to be recognised.

Whether the applicant provoked the act of violence is a provision that, in our experience, is rarely relied upon by VOCAT to deny assistance to an applicant explicitly as there are other section 54 factor(s) that are more relevant than this particular factor to deny assistance to applicants.

5. Variation and refund of awards

5.1. Amending the variation 'window'

5.1.1. 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?

The six-year time period for variations of awards *should* be extended for those victims with long-term needs. As a result of very serious act(s) of violence, victims may find themselves entirely dependent on Commonwealth Medicare rebates, social security and the State public health system.

With the current six-year time period, those with long-term needs cannot receive any long-lasting assistance from the VOCAT. This usually arises in cases where it's unlikely the victim will ever fully recover from the act of violence. In those scenarios, victims ought to be provided with access to as much assistance as they need, whether that be by way of medical treatment or otherwise, subject to the maximum caps on assistance payable to any one victim.

Submission:

xxxi. The 6-year time limitation window should be extended at the VOCAT's discretion for those victims of long-term needs provided the applicant satisfies the causation requirement.

5.2. Reducing the administrative burden and delay in seeking variations

5.2.1. How does the variation process impact on victims of crime?

In our experience, the current six-year variation window is a little-known facet of the State-funded scheme. However, many who are suffering from long-term effects as a direct result of the act of violence may not think or have the capacity to make an application to vary an award of assistance. Further, applicants may not think to return to us in the years following an award of assistance but instead rely on the public health system and other sources of assistance.

In our experience, clients are currently disinclined to make variation applications for want of value versus effort required. As it currently stands, applicants seeking a variation are required to complete an application for a variation of award (in paper form) and submit it to the VOCAT with any, and all, supporting documentation before the expiry of six years from the date of the original award of assistance. By this time, they may not have the original application number, or even the venue at which they were awarded assistance from.

If the process were made solely online (as it has been for the original application process), then we consider it's more likely applicants with those long-term needs will apply for that assistance and be able to have access to that assistance in a more timely fashion. This would naturally, of course, require the VOCAT to be properly funded making it able to deal with the likely increased number of applications, by way of a variation. We consider the VOCAT's already-established online form could be replicated for the purposes of variation applications, which we consider would make the variation application process much more accessible and user-friendly for victims. By creating an online record, it would also ensure that variation applications do not get lost in the post or the vast amount of incoming mail the VOCAT would receive on a daily basis at all of its venues.

It would also of assistance if health providers and victims support groups had the capacity to apply informally on behalf of the applicant much in the way health providers currently request treatment from WorkCover insurers and the TAC.

Submission:

xxxii. The VOCAT ought to replicate its online application form to be appropriate for variation applications, making the variation process more accessible and user-friendly for victims seeking further assistance from the VOCAT.

xxxiii. Allow health providers and victims support groups (whether or not our above submission is accepted and/or implemented) the ability to apply for further assistance on behalf of the applicant.

5.2.2. 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?

As per above, the variation process is a little-known facet of the state-funded scheme. We routinely advise clients they have six years from the date any award of assistance is made to return to the VOCAT to apply for further assistance (provided it is as a direct result of the act of violence, of course). However, few actually do as far as we know. If they do, they do not necessarily seek our assistance.

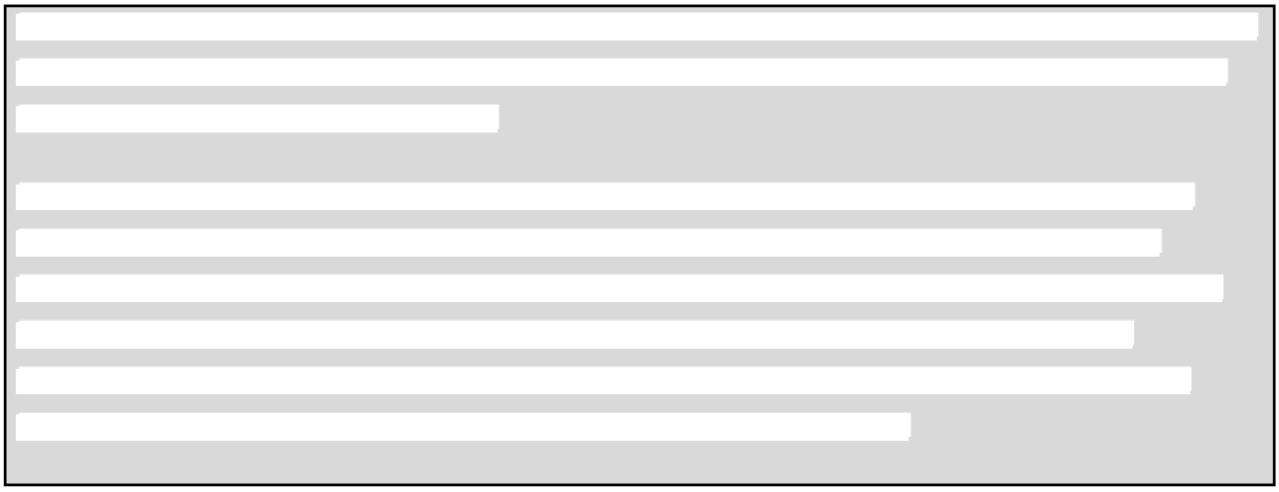
We otherwise refer to, and repeat, our submissions at 5.2.1.

5.3. Review and refund provisions

5.3.1. 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, what circumstances?

The legal authority on this particular issue is clear. If the VOCAT makes an award of assistance and the applicant subsequently receives an award of compensation whether from the offender or some other entity in respect of the act of violence the subject of the application, the VOCAT is entitled to seek a refund of the assistance paid pursuant to Section 62 of the Act.

However, in our experience the VOCAT has, in a very few applications, attempted to 'pre-empt' applicants' entitlement to damages or other forms of compensation, specifically WorkCover entitlements. The VOCAT should be making such payments of assistance to applicants before seeking refund from the applicant, and only if they receive compensation in other forms from the offender or some other person in respect of the act(s) of violence the subject of the application.



Clearly, Michael was entitled to the assistance from the VOCAT, until such as he was successful in receiving an award of damages from his pre-injury employer or their WorkCover insurer. There ought to be a presumption held by the VOCAT that until this happens, VOCAT is liable to pay the applicant SFA pursuant to the provisions of the Act.

However, there are some situations such as Michael's where an injured worker who is also a victim of an act of violence is only able to pursue a damages claim pursuant to Victorian worker's compensation legislation for pain and suffering damages only, and not compensation in respect of loss of earnings. Any refund pursuant to Section 62 of the Act should be confined to the nature of the assistance/compensation paid to the applicant. In other words, if the applicant is successful in his common law damages claim under workers' compensation legislation, then he ought only to be required to refund to the VOCAT any amounts received for the same as what they have already claimed from the VOCAT. Unless an applicant is successful in claiming economic loss damages in any such claims, they ought not be required by the Act to refund to the VOCAT any amounts paid by the VOCAT in respect of loss of earnings.

Submission:

xxxiv. The Act ought to only require an applicant to refund to the VOCAT amounts of assistance received from the VOCAT of the kind similar to what has been received from the offender, or some other entity.

5.3.2. When might victims seek a review of a VOCAT award? Are there any barriers to seeking a review of an award? If so, how should these barriers be addressed?

Victims are most likely to seek a review of a VOCAT awards on a legal issue. In some cases, there are barriers to seeking an award. Currently, applicants are able to elect on the application form whether they would like a hearing or would prefer to have their application determined in their absence. Electing for a

hearing does not necessarily mean that the application will require a hearing, but the option is there for the applicant at the outset.

The alternative to electing for a hearing at the outset is to elect for the application to determine the application administratively in the applicant's absence. If they then, following the award of assistance (or indeed lack thereof by way of a refusal to award any assistance), wish to review the award the applicant is forced to make an application to the Victorian Civil and Administrative Tribunal ('**VCAT**') and is subjected to the application fees accordingly (subject to any concession). Because of the legal costs involved with pursuing an appeal to VCAT, a simple cost benefit analysis of what could be gained from the appeal makes it an unfeasible for option for some applicants.

In some cases, and where a Judicial Registrar makes a decision on the application, such decisions can be appealed to a Magistrate by way of a simple application form. As per our earlier submissions at 5.2.1, there is no reason why such appeal to a Magistrate cannot be applied for by way of an online application form.

Submission:

xxxv. Implement a method for applicants to make an application to review a decision of a Judicial Registrar to a Magistrate via the VOCAT's website, as applicants currently do in making original applications for assistance.

6. Timeliness of awards

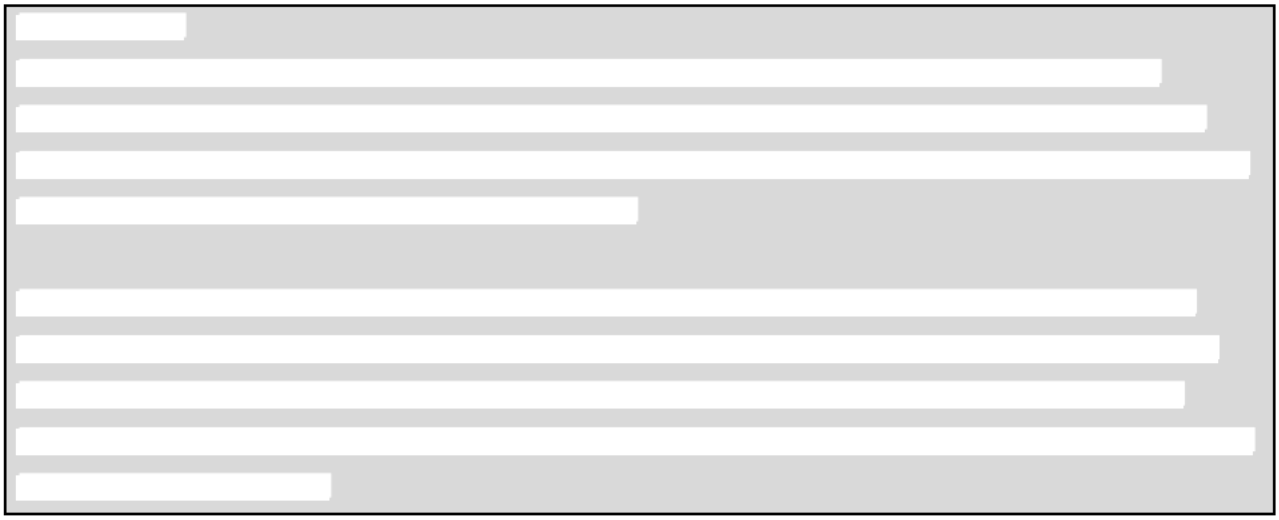
6.1.1. Is there a need to amend section 32(3) and section 41 of the Act to clarify the need for speedy determinations? Alternatively, would an appropriate Practice Direction provide sufficient guidance?

Section 32 requires the VOCAT to act fairly, according to the substantial merits of the case and with as much expedition as the requirements of the Act and proper determination of the matter permit. It also states the VOCAT is not prevented from hearing and determining an application only because there is a civil proceeding, or a proceeding under Subdivision 2 of Part 4 of the *Sentencing Act* 1991 (Vic), pending in a court relevant to the matter.

Conversely, section 41 gives the VOCAT significant discretion to adjourn the matter to order an adjournment of the consideration (not just any hearing of the matter) to such times and places, for such purposes and on such terms as to costs or otherwise as it considers necessary or just in the circumstances.

These two sections, in practice, are at odds with one another. On the one hand, the VOCAT is required to expeditiously deal with matters, but is given the broadest possible discretion not to deal with matters in the Act for any reason "it considers necessary or just in the circumstances".

A significant hurdle in progressing applications for assistance, in our experience, is the finalisation of the related criminal proceeding(s). VOCAT is routinely placing matters in abeyance for want of a finalisation of these related proceedings. However, in many applications, applicants are able to discharge their onus of proof prior to the finalisation of their applications for assistance. There is, in these circumstances, an opportunity for VOCAT to make a brief assessment as to whether the applicant has discharged their civil burden of proof before placing the matter in abeyance until the finalisation of the criminal proceeding. If not, then the VOCAT can await the finalisation of the criminal proceedings and, if there is a conviction recorded or the matters found proven, then make a decision with regards to the related application(s) for assistance.



While we make no comments whatsoever on the merits of the application the subject of the above case study (and seek no comment from the Tribunal as to same), keeping such matters ongoing for such a long period of time cannot said to be:

1. in the interests of the victims; nor
2. in accordance with the purpose and objectives of the Act.

Other examples of such applications include those arising from the Bourke Street tragedy on 20 January 2017. Many of these applications are subject to a *Pham v VOCAT*[1] scenario in that victims are likely to either have eligibility for a claim to either the Transport Accident Commission (TAC) or to their employer's WorkCover insurer (if they were on an authorised lunch break when they suffered their injuries). Where

[1] [2016] VSCA 102.

these claims have been accepted, it's been accepted by the TAC or the WorkCover insurer that they have suffered injuries as a result of the incident, on the balance of probabilities. If it's good enough for the claims to be accepted by the TAC and the WorkCover insurers, we consider that the applications carry with them enough merit to enable to the VOCAT to make a decision with regards to these applications. This is particularly in circumstances where the Victorian Coroner has delayed the holding of an inquest into the incident, and investigating police members are yet to file a hand-up brief to the Court (which is expected to take a matter of months).

In our submission, emphasis needs to be placed on the needs of victims, and the purpose and objectives of the Act, in these sections. Such emphasis would then allow the Tribunal to consider whether or not the burden of proof borne by applicants (the civil standard of 'on the balance of probabilities') has already been discharged on the materials filed by the applicant, investigating police members and/or public hospital(s).

To statutorily require the VOCAT to consider the merits of the application would be overly burdensome on the Tribunal; thus, we consider the publishing of a practice note concerning this topic would be the most appropriate, cost-effective and practical way to implement such improvements to the scheme.

Submission:

xxxvi. Amend the Act to place emphasis on the needs of victims, and the need for timely outcomes, in *both* sections 32 and 41; and

xxxvii. Publish a practice note putting guidelines in place for the VOCAT to consider the merits of finalised applications where the related criminal proceeding(s) have not yet been finalised.

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

The VOCAT has already implemented procedures such as this with regards to applications concerning family violence and indigenous applicants; the VOCAT has implemented a Koori List and appointed a Family Violence Registrar. We consider these are fantastic steps towards having applications dealt with by specialist Registrars and/or Magistrates as each are able to deal with the specific issues each category of applications faces, whether it be particular complexities of the types of applications or the particular needs of applicant victims.

Another example of these procedures was the VOCAT's response to the Bourke Street tragedy on 20 January 2017. The VOCAT arranged for all applications concerning the incident to be sent directly to the VOCAT at Melbourne. All of these applications appear to be dealt with by a select group of staff who are conversant with the matters.

There are wide-ranging benefits of the VOCAT's further implementation of these initiatives, including:

1. Specialised lists are likely to result in the earlier finalisation of applications and the earlier receipt by applicants of the financial assistance they are entitled to, and require, to recover from the act(s) of violence. Specialist knowledge is likely to identify key issues in each application at an early stage which can be rectified without the incursion of lengthy delays if the same issues were identified at a later point in time;

2. Inconsistencies are less likely with a specialised list as common issues are dealt with on a more regular basis.

The option of appointing only some VOCAT-only Magistrates is an option we submit is viable and worthwhile. Their Honours Magistrates Metcalf and Capell have been fantastic advocates for improving VOCAT procedures and processes, to ensure that VOCAT is achieving its objectives and obligations to victims. Their User Group initiative has been well-received by firms practising in this area, including our own, and we hope this initiative continues to allow an active dialogue between solicitors and the VOCAT so that systemic issues can be raised directly with the VOCAT in an informal setting. If the VOCAT were able to have Magistrates supervising its operation on a full-time basis, there is no doubt the capacity of the VOCAT would increase, which would naturally have a positive effect on the timeliness of VOCAT decisions, as well as consistency in the decisions made. Given the benefits of specialist lists and specialist Magistrates in the management of family violence matters, there is every reason to believe the implementation of such an initiative in the context of the VOCAT would positively impact on its operations.

Having said that, a significant limitation on the VOCAT's ability to practically triage applications and appoint specialist Magistrates is its level of funding. As at May 2017, we understand the VOCAT had only 26 dedicated staff members (excluding Magistrates) to deal with applications spanning some 52 venues. This, naturally, requires staff to travel and work at multiple locations throughout the course of an ordinary week and continuously prioritise tasks and applications. If any further steps are taken to introduce specialist streams or to further triage cases, then there needs to be adequate funding for the VOCAT to be in a position to administer such specialist streams without affecting the timeliness of awards.

Submission:

xxxviii. The VOCAT should consider implementing further specialist streams, triaging or co-location; however, the funding issue needs to be addressed by State Government.

6.1.3. 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?

An administrative approach, in our submission, would be a step backwards for victims for a number of reasons:

1. An administrative approach which places less reliance on solicitors is not likely to meet the needs of victims, and is likely to make the process even more burdensome for victims of violent crime. Several victims present to our office for that very reason because they want someone to 'take care' of the process for them without them having to worry about what they need to do or what they need to get from their medical practitioner(s) in support of their claim. This would be particularly difficult for victims to do when they are trying to recover and focus on their recovery.

2. The current system provides the VOCAT with wide discretion in order to separate the more severe cases from the rest. If an administrative model were adopted, the VOCAT may not necessarily have the discretion to make appropriate awards to the circumstances of the offending and of the victim, which in turn could result in cases where applicants suffering from more severe adverse effects could be receiving the same award of assistance as someone suffering from only mild adverse effects. Many victims are not educated, do not speak English, and come for relatively lower socio-economic regions and so having access to that legal representation and source of advice is vital for these applicants as it's unlikely they would have the ability (or even the capacity) to navigate an administrative model.

3. The current system already has an ability vested in the VOCAT to offer to applicants Section 33 Advices, which are essentially administrative 'offers' put to applicants by the VOCAT as a way of finalising and determining the application without the need for a formal hearing of the matter.

Submission:

xxxix. An administrative model should not be adopted in lieu of the current system; there are already administrative features of the system which, if certain amendments were made to the Act, could be more frequently relied on by the VOCAT to deal with a greater number of applications which could then result in decreasing the cost of the scheme to the State.

6.1.4. 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?

This proposition could be advantageous in some arenas, for example in intervention order matters in which security expenses could be awarded by a Magistrate/VOCAT Member immediately on an oral application by an applicant.

The disadvantage is that if interim awards are made in open Court, it removes the confidentiality that victims of violent crime are presently afforded. There is also the risk that the scheme could be taken advantage of, particularly in intervention order matters where both parties are granted intervention orders against one another by way of a cross-application.

6.1.5. 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?

Applicants ought to be able to support their applications with any form of evidence admissible in any ordinary Court. The list of documentation to be filed with VOCAT in support of an application on page 138 of the Supplementary Consultation Paper should not be an exhaustive list of documentation applicants are able to submit to the VOCAT in support of their application. Allowing the list to be so considered would not be in the interests of victims, let alone justice. The VOCAT should be given the discretion to consider any evidence submitted on behalf of an applicant it deems relevant to its decision-making process.

Having said that and in our experience, the VOCAT has not sought to prevent or disallow any of our clients from relying upon evidence that has been filed with the VOCAT.

As part of the VOCAT's User Group, our firm has sought to clarify with the VOCAT what forms of documentary evidence they are most keen to have filed in support of the applications, particularly in circumstances where victims have recourse to financial assistance from TAC, their employer's WorkCover insurer or some other body. Where applicants have such eligibility under such other schemes, there are often relevant document(s) held by the relevant body(ies) that could be filed with the VOCAT as part of the application(s) for assistance.

Submissions:

xl. VOCAT ought to be given discretion to consider any, and all, documentation submitted by an applicant in support of their application(s) for assistance. The VOCAT should equally be given the discretion to not consider something it deems irrelevant or otherwise have no bearing on it's decision-making process.

6.1.6. Should more assistance be provided by VOCAT to help victims satisfy the evidentiary requirements?

While we consider VOCAT is providing helpful resources online for applicants, there is always room for improvement.

As per the Supplementary Consultation Paper,[2] the VOCAT provides applicants with some clarity on the types of documentary evidence the VOCAT requires for the varying entitlements under the state-funded scheme. As part of the application process, applicants provide the VOCAT with authorisation to obtain information and documentary evidence from the investigating or any other police member and/or any public hospital(s) the applicant attended for treatment of injuries claimed to have been sustained as a result of the act(s) of violence. This covers much of the 'investigative' work applicants are required to do. However, it doesn't necessarily assist applicants who did not attend a public hospital for treatment of claimed injuries; in those cases, the most convenient method for them to establish they have suffered an injury within the meaning of the Act is to request copies of their medical records from their treating medical practitioner(s) and file those records with the VOCAT.

Victims' VOCAT awareness, in our experience, is crime-dependent. We have found clients we have assisted through the application process are more likely to be notified by investigating police members of VOCAT's existence if they were victims of serious act(s) of violence such as some form of sexual abuse, or long-standing family violence. If police had not referred these such clients, they were linked in with victim support groups who did make appropriate referrals to solicitors. We understand the VOCAT has a referral list which it provides to prospective applicants if they wish to seek legal advice, which is clearly being used by applicants.

While it's not technically anything the VOCAT can doIn complex applications (such as those involving long-standing abuse), applicants are floundering in the throws of their legal positions. Our firm regularly assists clients who present to us with applications they have started themselves, but have been overwhelmed by the process to the point where they need to seek assistance to simply finalise their application. Alternatively, the VOCAT has raised issues in their respective applications that are of a legal nature and victims simply cannot respond in any meaningful form to the VOCAT's correspondence. In these situations, the VOCAT ought to be recommending to applicants to seek early legal advice so that the specific complexities in any such application(s) can be dealt with as soon as possible and the application progressed towards finalisation. We have assisted clients who have been referred by the VOCAT for legal assistance, and we thank the VOCAT for it's pragmatic approach to these applications.

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[2] Victorian Law Reform Commission, Family Violence and the *Victims of Crime Assistance Act* 1996 (Vic), Supplementary Consultation Paper – August 2017, 138.

Submission:

xli. The VOCAT ought to encourage applicants to seek early legal advice in complex applications.

7. VOCAT Hearings

7.1. Perpetrator notification and right to appear

7.1.1. How do the rights of perpetrators – to be notified or appear – fit with the purpose(s) of the Act, which is to provide assistance to the victims of crime?

The rights of perpetrators or alleged offenders ('**AO**') are not necessarily a consideration that is brought into the equation of determining an application for assistance, unless there has not been a finding of fact by a Court by way of conviction or finding of the charges proven.

Our democracy and the legal principles of due process and procedural fairness dictate that those accused have a reasonable opportunity to respond to charges levelled against them. In circumstances where there is no conviction or no finding of fact by a Court,

In our experience, the VOCAT tends to notify the applicant of its intentions with regards to notifying AO's prior to actually notifying them. This does give the victim the opportunity to make submissions against the alleged offender notification. Any ongoing contact between the victim and the alleged offender ought to be considered as many family violence victims withdraw their applications if the alleged offender is notified; this decision is often made for the benefit of children that may not be involved directly in the application process, but will likely be effected by the notification of the AO.

Submission:

xlii. Democracy dictates that offenders have the right to respond to allegations levelled against and test those allegations. However, there are 'special circumstances' where the effect of notifying offenders and allowing them to participate in the application process outweighs the benefit they afford to the VOCAT Member's decision-making and in almost every case has a detrimental impact on the applicant's state of mind (particularly so if they have significant psychological/psychiatric injuries as a result of the act(s) of violence).

7.1.2. Should the Act be amended to include a legislative presumption against perpetrator notification? If so, how should the Act be amended?

In our view, there ought to be a presumption against AO notification in 'special circumstances'. We routinely assist victims with their applications and, in some cases, victims decide against proceeding with their

application based solely on the fact the AO is, or will likely be, notified of the application for assistance. This is almost more often than not the case in matters concerning family violence.

If the purpose and objectives of the Act are to focus on the victim, these practical considerations must be taken into account determining whether the Act in its current form is achieving that purpose. In our view, it is not and such a presumption would protect victims (particularly those recovering from family violence) from re-traumatisation and retribution through the application process.

Submission:

xliii. There should be a presumption against AO notification in 'special circumstances'. Such an amendment would require the VOCAT to be satisfied that there are *not* special circumstances before making decision to notify the AO.

7.1.3. 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?

The offender notification provision ought to be amended to recognise the very serious safety concerns of victims. We have already discussed situations where victims have very real concerns about their safety at 7.1.1 and 7.2.2 and providing victims with formal recognition of these concerns could go a long way in assisting them through the application and/or hearing process with as little re-traumatisation as possible.

As to how the provision ought to be amended, a presumption against offender in special circumstances may operate to provide victims with this recognition indirectly. If such a presumption were implemented and it indeed operated in such a way, then any further provision may create ambiguity in the Act, which ought to be avoided.

7.1.4. 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?

Arguably, the Act already has a guiding principle protecting the victims from undue trauma, intimidation or distress during VOCAT hearings. Such is embedded in the Section 1 purpose and objectives of the Act.

In any event, there ought to be specific protections in place protecting victims from what is effectively re-traumatisation. We appreciate that the needs of the victim do need to be weighed up against the demands of our democracy and the right of the alleged offender to respond to allegations that have been levelled against them.

In practice, it may be more appropriate for the VOCAT to publish a practice direction that specifically deals with how victims should be assisted through the hearing process to avoid re-traumatisation. Such a practice

direction could include certain processes requiring the applicant to notify the VOCAT of certain requirements of the applicant (including whether they will require remote witness facilities etc.) for a proposed hearing. We otherwise refer to, and repeat, our submission at 7.2.1 below.

7.2. Evidentiary and procedural protections for vulnerable witnesses

7.2.1. Should the act be amended to include increased protections for victims during VOCAT hearings? If so, what procedural and evidentiary protections should be provided?

Currently, we have not assisted a client with an application where a VOCAT Member has allowed an alleged offender to cross-examine the victim; while this has not been allowed by VOCAT Members in practice, it should be given statutory effect in prohibiting it altogether.

Victims also don't want particular offenders knowing what they're doing and the AO learning of this is often a source of distress for the victim applicant. It is also often a very significant reason why victims withdraw their application if they are notified by the VOCAT that a hearing of the application will be required, which may or may not involve the offender. While alleged offenders should be given the right to respond to allegations that have been levelled against them (or at least in the more serious circumstances) as our justice system requires, the greatest level of protections ought to be afforded to the victim applicants so that the hearing does not re-traumatise; in many cases, the victims have already been re-traumatised by the related criminal proceedings and should not be subjected to the same in their own applications for assistance.

Submission:

xliv. Amend the Act to include a statutory prohibition on the AO cross-examining the victim applicant and;

xlv. Every protection available to victim applicants needs to be afforded to avoid re-traumatisation through the application process, and any hearings of those applications for assistance.

7.3. Restricting access to and the use of VOCAT records

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

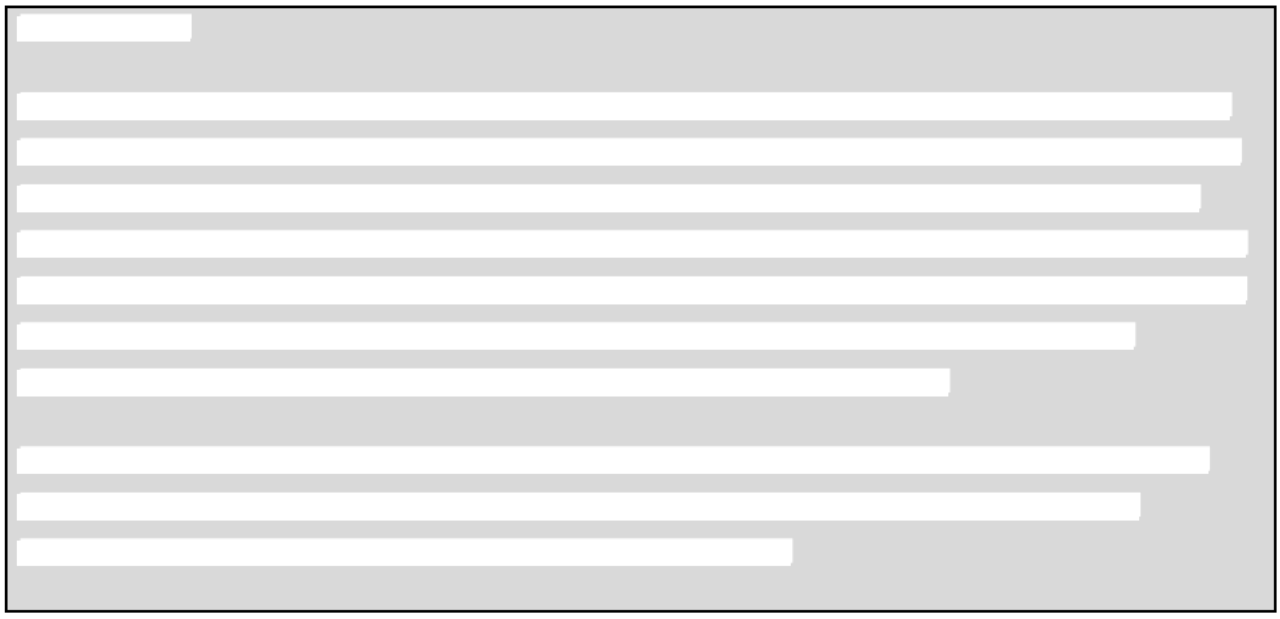
In many cases, VOCAT applications come after the event, being criminal or family law proceedings. There are some cases in which family law proceedings may follow a family law application. If the purpose and objectives of the Act are to assist victims to recover from violent crime by paying them financial assistance, then it must follow that allowing access to VOCAT application materials in some family law proceedings is

detrimental to the applicant victim; particularly so when the respondent in the family law proceedings is the (alleged) offender. Protections need to be afforded accordingly.

Allowing VOCAT materials to be admitted as evidence in a family law proceeding could be hazardous because they are both forms of a civil proceeding. A common feature of civil proceedings is that they are often and significantly influenced by the outcome of criminal proceedings. Given their status as a civil proceeding, allowing the VOCAT application materials to be admissible as evidence in family law proceedings could result in a delay in the family law proceedings which, if resolved, could easily benefit the applicant's recovery from the act(s) of violence; this would be particularly so if the VOCAT application were awaiting finalisation of the related criminal proceedings.

In terms of criminal law proceedings, the VOCAT is currently declining to further hear or determine VOCAT applications until such time as the criminal law proceeding has been finalised. While in many cases this is appropriate given the particular factual circumstances of the case, it does cause delays in the outcome for the victim and in many of those cases they do not have access to regular counselling and/or medical treatment they need.

However, where a victim is the subject of criminal proceedings, they should be permitted to adduce the evidence from their VOCAT application materials as such is likely to inform the judge/jury hearing the matter as to the circumstances of the offending.



Jane's case is an excellent example where a victim is vulnerable in family law proceedings if/when VOCAT application materials were to be admitted as evidence in those proceedings. We are sure that if Jane's ex-

partner (and the applicant in the family law proceedings) were to learn of her VOCAT application and the reason for it, Jane would never have sought assistance from the VOCAT in the first place.

In any event and in our experience, we have found the VOCAT is protective of its files and application materials; we, as practitioners assisting applicants with their applications, applaud such a stance.

Submission:

xlvi. VOCAT application materials should *not* be admissible as evidence in family law proceedings.

xlvii. VOCAT application materials should be permitted to be admissible in criminal proceedings brought against the victim applicant, or otherwise with the express permission of the applicant.

7.4. Improving the transparency and consistency of VOCAT processes and decision making

7.4.1. How could transparency and consistency in VOCAT processes and decision making be improved?

As at 6.1.2, we discussed the benefits of the VOCAT specialist lists and the potential for these lists to be expanded into other areas, as opposed to only family violence and the Koori List that the VOCAT currently caters for.

The value in an increase in the level of funding afforded to VOCAT's administration cannot be underestimated. In discussion groups, we have asked the question what the current State-funded scheme could do if it had appropriate funding and staffing.

Transparency and consistency could be improved by requiring the VOCAT to seek from police (as part of their initial investigations of police members) any and all offences committed by the AO against the applicant. This would greatly assist those applications involving long-standing family violence by improving the VOCAT's ability to identify the nature and extent of such offending before defining it's attitude to an application. This, as opposed to being limited to having the ability to investigate or even be aware of the final offences or one offence in particular.

Concession here about judicial-decision making in that inconsistency is going to happen and cannot be avoided.

8. Awareness of VOCAT and accessibility

8.1. Combining victim support and the financial assistance scheme

8.1.1. 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?

Currently, victims can learn about the availability of VOCAT from investigating police, counsellors, treating practitioners, victim support groups, and members of the judiciary. However, it should be presumed that prospective applicants *will* find out one way or another. On many occasions, investigating police members tell victims about the VOCAT State-funded scheme, but tell them not to pursue their application until such time as the related criminal proceedings have been completed, despite the fact they may need immediate assistance and/or medical treatment.

It is also important that victims are informed of their rights and entitlements, and any applicable limitation period(s). To retain a statutory provision that precludes the VOCAT from making any awards of assistance solely because the victim was not aware of the VOCAT State-funded scheme is not consistent with the Act, and a similar provision does not feature in any other compensation scheme in Victoria. Police members are getting better in working together with victims as part of the prosecution process and related criminal proceedings, but we are still seeing that there are some 'gaps' where some eligible victims are falling and not seeking assistance, when it may be of significant benefit or of vital importance.

When victims report crime to police, they can expect to receive a booklet from the investigating police member (Victoria Police) entitled '*A Victim's Guide to Support Services and the Criminal Justice System*'. The booklet is designed to familiarise victims with the criminal justice system in Victoria, and to also inform victims of the services available to them. The booklet is a 44-page document. Only half a page is devoted to informing victims of their rights and entitlements with regards to VOCAT. In our view, this is manifestly inadequate. The relative lack of detail implies to victims that it's simply not worth pursuing and does not provide any meaningful information for victims to decide whether or not to make a VOCAT application. Nor does it contain any information about the time limitation period under the Act (2 years) or the many evidentiary requirements they must meet to be eligible for such assistance.

Submission:

xlviii. Section 29(4) of the Act should be abolished; it is not consistent with the purpose and objectives of the Act, nor does a similar provision feature in any other compensation schemes in Victoria.

xlix. The booklet '*A Victim's Guide to Support Services and the Criminal Justice System*' provided to victims by investigating police members (Victoria Police) must be reviewed and amended to include

more detailed information about the VOCAT and the kinds (and values) of entitlements available to eligible victims.

8.1.2. 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?

In short, no. Victim support groups work together with victims to ensure they have access to support and legal representation; they are not there to administer state-funded assistance and their focus is primarily on the health, wellbeing and recovery of the victim.

The support groups have so much more to provide to the victim without having to provide. Some groups provide the barebones for daily living including accommodation, childcare, relocation services without having to worry about the ins and outs of a legal system.

Submission:

I. Victim support groups should not be relied upon to administer State-funded assistance.

8.2. Reducing reliance on lawyers

8.2.1. 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?

The current VOCAT and State-funded scheme is plainly not easy to navigate without legal representation. One of the major reasons for this is that there are many more criterion to satisfy in VOCAT applications than for WorkCover or TAC claimants.

For example, WorkCover or TAC claimants merely need to prove at the time of making a claim that they have suffered an injury arising out of in the course of their employment or a transport accident, respectively. Provided these boxes are ticked, the claimant is eligible to receive compensation from their WorkCover insurer or the TAC.

However, in the case of VOCAT applications, there is a much longer list of criteria applicants are required to 'tick' before they can be considered to be eligible. It is, in dot-point form, as follows:

- The applicant is a victim (whether primary, secondary or related) …

- … of an act of violence. In other words, if there is no conviction recorded against the alleged offender, then the applicant is forced to prove that the act of violence actually happened, on the balance of probabilities;
- The applicant suffered injury as a direct result of the act of violence;
- If the applicant has any criminal history, this must be addressed with the VOCAT and, on some occasions, submissions need to be filed with the VOCAT as to why the applicant is deserving of assistance if they have a criminal history;
- If there is a delay in the time the applicant reported the act of violence to police, the applicant must explain to the VOCAT why it's taken them so long to make an application for assistance;
- If there is a delay in the time the applicant made the application to the VOCAT, they must also explain to the VOCAT why it's taken them so long to make the application in the first place; and
- In cases of family violence, or where an applicant has been a victim of long-standing or related criminal acts, then submissions may be required by the applicant (or their legal representatives) in order for the VOCAT to uplift their entitlement to special financial assistance.

It can be clearly seen when it's set out like this that the 'hoops' applicants are required to jump through with the application process are far greater than those associated with WorkCover or TAC claims. Because of this inherent structure of the application process, it is vital that applicants retain the ability to seek legal advice about their applications for assistance to ensure that the applications are submitted in a timely and orderly fashion, which would ordinarily assist the VOCAT in dealing with the applications at the earliest possible stage.

If the VOCAT were to adopt a 'claim-style' administrative process such as that currently used by WorkCover insurers and the TAC, it is plainly not possible on the level of funding currently afforded to the VOCAT. There are simply not enough resources for VOCAT staff to administer applications in a 'claims' management setting. In any event, we do not consider that administering applications in such a way will benefit the State-funded scheme in the most efficient way; there are other ways to make smaller changes to the current system which would achieve Government's desired outcome.

8.3. Providing victim-friendly and accessible information

8.3.1. 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?

We have already discussed many ways in which the VOCAT process can be made more accessible to victims and they are not necessarily changes to the Act, but some changes in the VOCAT process can have major effects on the accessibility for victims. One such way is opening up the VOCAT's online application process to applications to vary an award and applications to review a decision of a Judicial Registrar to a Magistrate.

There are some amendments that would assist in making the State-funded scheme more accessible, such as extending the two-year limitation.

There is also a need to ensure that victims are notified of their rights and entitlements under the State-funded scheme from an early stage, particularly if the two-year limitation period is not to be extended. We have previously spoken about the booklet that is given to victims at 8.1.1 and the paucity of information provided to victims therein on the State-funded scheme; this ought to be reviewed to ensure that victims are absolutely aware of the State-funded scheme in addition to any other rights and entitlements they may have (and to seek legal advice if they wished to pursue any of those entitlements).

9. Victim needs

9.1.1. 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?

As we previously mentioned, victims need support and acknowledgment as well as assistance. With the current Act, it is our experience that this is met in most circumstances.

Victim's needs, particularly by way of the awarding of assistance, can also be made in a more timely fashion if the VOCAT were to have access to a greater amount of resources with which to hear and determine applications. By hearing and determining applications in a more timely and efficient manner, the needs of the victims can be more adequately met which could only have positive effects on the experiences of applicants through the entire process of the criminal proceeding (if applicable) and the VOCAT application process.

With supportive legal representation and other assistance from victim support groups, victims are not alone in the process of obtaining assistance and do *not* have to turn their mind to issues that they are not familiar

with and are not necessarily in the right frame of mind to deal with. With the current practical assistance they are afforded, they can focus on their recovery while at the same time apply for the assistance that is likely to help them in those pursuits.

10. Reforming the existing scheme

10.1. The purpose and objectives of the Act

10.1.1. Is the Act achieving its purpose and objectives? If not, in what respects?

Our response to this question is mixed. Having said that, the minor amendments we have suggested to the current State-funded scheme have the potential to address the current deficiencies of the scheme.

We consider the Act is meeting its purpose and objectives insofar as:

- Providing vital assistance that victims need to begin their recovery and 'get back on track' with their lives;

- Providing victims with 'their day in Court', particularly when they haven't had their chance in the related criminal proceeding, for whatever reason. Many criminal matters proceed without the involvement of the victim and in cases where the adverse effects suffered by the victim are significant, the value of them having the opportunity to voice those effects to a Court can be understated; and

- Providing legal assistance to the victim at no cost, which is a unique feature of the Victorian State-funded scheme and drastically improves the accessibility to justice for those who do not ordinarily have the means or financial capacity to pay for such legal assistance.

There are areas in which the Act is not currently meeting its purpose and objectives, including:

- The timeliness in the processing and consideration of some few awards, and interim awards. By and large, applications are dealt with by the VOCAT expeditiously and to the extent of the VOCAT's capacity to do so. However, there are some few applications where Section 32 is failing in its purpose and applications are being 'strung out' for periods of greater than 12 months to two years.

- The failure of the current Act to adequately recognise the re-traumatisation victims suffer when (alleged) offenders participate in the application process. There are of course circumstances where the VOCAT has the opportunity to decline to notify the alleged offender, but often the prospect of the notification in and of itself is a source of concern for many victims; in many cases, applicants we

have assisted have withdrawn their applications for fear of the perpetrator learning of their application and the effects they have suffered as a result of the allegations. This is particularly so in relation to family violence-related applications.

10.2. Amend the Act

10.2.1. 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?

'Supporting victims' and 'assisting their recovery' are one of the same to us. Supporting victims by allowing them access to supportive legal representation and victim support groups is assisting victims in their recovery. Both of these notions need to be considered equally; to suggest favouring one and not the other can only be done to the detriment of victims across the State.

Keeping the focus of the Act on assisting victims' recovery is important. Changing the focus to 'supporting victims' does not necessarily change anything, only changes the terminology used by the Act which has the potential to confuse and create ambiguity as to the purpose and objectives of the Act which are now clear – that the Act exists to assist victims to recover from violent crime by paying certain victims financial assistance.

Submission:

li. Retain the Act's focus on assisting victims in their recovery, as opposed to changing the focus (and by extension the purpose and objectives of the Act) to supporting victims of crime.

10.3. Amend the Act to remove the focus on 'certain victims of crime'

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

In our view, the term 'certain victims of crime' is one that implies that the eligibility for financial assistance is limited and that applicants need to satisfy various criteria before they can be awarded financial assistance. While this is true, the focus of the Act should not discourage applicants from seeking assistance in any way; rather, it should do the opposite.

'Eligible' is a far more positive term that would carry the same legal effect but is more inclusive. There are many situations, such as those we have discussed at 4.3 where applicants are refused assistance, but after some legal argument and making of submissions, the VOCAT awards the applicant assistance either in full or a reduced amount. Paying assistance to eligible victims would also be in accordance with the

community's moral compass. The topic of law and order is set to be a 'hot topic' at the next Victorian State election and so including some reference to eligibility (subject to the provisions of the Act, of course) ensures the protections against the awarding of assistance to those determined not to be deserving of the symbolic expression of the community's sympathy, condolence and recognition.

Submission:

liii. Amend the Act to remove the reference to 'certain victims' in Section 1 of the Act and replace 'certain' with 'eligible'.

10.4. Requiring offenders to contribute

10.4.1. 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?

To the very best of our knowledge, we have not assisted any applicants who have assigned their rights to the State for recovery from the offender. Nor have we known Section 51 to be used.

There is no benefit to the victims in them assigning their recovery rights to the State pursuant to Section 51 of the Act. If a victim were to assign their recovery rights pursuant to the Act, the question would need to be asked whether or not the victim was assigning their rights to the State in respect of any other compensation or damages claims. There are some situations where State Trustees must be involved by reason of the victim's disability; however, their involvement does not require a statutory provision giving victims the ability to assign their rights in respect of the injury or death to which the award relates to the State. Arguably, this provision operates against victims in the sense that victims should not be expected, nor should they even have the ability to, assign their rights at law to the State. The provision should be abolished.

10.4.2. Should Victoria's state-funded financial assistance scheme be amended to include victims' levy payable by offenders? If so, how and on whom should the levy be imposed?

As an alternative to the Section 51 provisions in the current Act, there ought to be the ability of Court's to include victims' levies payable by offenders, but only in certain circumstances and at the discretion of the sentencing Magistrate/Judge. If a levy is imposed, it should not prejudice the ability of the victim to recover from the offender pursuant to Section 85B of the *Sentencing Act* 1991 (Vic) and the victims' eligibility for such an application ought to be considered if/when a levy is imposed.

There are a disproportionate number of impecunious offenders, many of whom do not have the capacity to maintain their cars properly, let alone have the financial capacity to make any payments towards a debt. Many may have repayment plans for outstanding debts and if a levy were imposed in addition to the debts they already have and, in many cases, the financial penalties imposed on them by the sentencing Magistrate/Judge. In those circumstances, the effect of imposing a further levy on impecunious offenders needs to be examined closely. The imposition of such a levy may not necessarily lead to a successful rehabilitation of the offender, which is then likely to result in further offending and (potentially) re-victimisation of past victims.

Nonetheless, we think that there is a place for such a levy, but only in certain circumstances. Sentencing Magistrates and Judges are best placed to determine when and where such a levy ought to be imposed on offenders and they should be afforded ultimate discretion in the matter.

Submission:

liii. Replace the current Section 51 in the Act with a victims' levy payable by offenders, but only in certain circumstances to be determined by the sentencing Magistrate/Judge.

11. A different model?

11.1. Is the current scheme meeting the outcomes specified in the supplementary terms of reference?

11.1.1. Is the current scheme meeting the outcomes for victims specified in the supplementary terms of reference, namely, does it achieve outcomes for victims that are fair, equitable and timely, are consistent and predictable and minimise trauma for victims and maximise the therapeutic effect for victims?

The current scheme is in need of improvement. There are financial restrictions which means awards are not paid for up to eight (8) weeks from the date of an award being made in some applications, and this causes distress to many victims as they look to move on from the act of violence and begin their recovery.

Different Tribunal venues and individual VOCAT Members understandably have different procedures and outlooks. In practice, it an unavoidable fact that certain Courts and Members will give different outcomes, which means there may not be consistency in decisions in respect of applications in favour of applicants in one area of the State to others. But this a naturally inherent drawback of having the benefit of judicial decision-making, which ought to be retained. The benefits of judicial decision-making, particularly in a scheme like the current State-funded scheme that is required to consider all of the factors listed at 8.2.1, far outweigh the detriments of the mode of decision-making. Implementing an administrative model could only

result in a greater level of inconsistency and an inherent increase in the number of disputes arising from a decision in the application.

There can be significant re-traumatising of victims through an application process. One client remarked that following a hearing, the amounts she was awarded and the comments of the VOCAT Member made her "wish that she never made her application". In many applications, applicants take satisfaction and obtain great benefit from the formal recognition of the VOCAT of their status as a victim. However and as per our previous discussion on the topic, the rates of SFA need to be increased to reflect current-day expectations of the community and in accordance with the ever-increasing cost of living.

11.1.2. Is the current scheme efficient and sustainable for the State?

The Victorian State Government is currently in surplus (2017/18 State Budget report) of $1.2 billion, with forward estimates double this. In the 2015/16 financial year, the State-funded scheme awarded $46.3m, a decrease on the previous year of 2.7%. There were 6,221 applications made in the same period (up 2.8%), however awards of financial assistance were only made in 4,161 applications (down 6.7%). The average amount awarded was up 1.8% to $7,784.

The Victorian State Government has announced an $80m package to assist with Victims of family violence. The most recent VOCAT Annual Report only began counting how many applications were in respect of family violence part way through the year and are said not to be accurate.

Proper funding of the State-funded scheme could achieve many positive outcomes for the Department of Justice. The present State Government has already recognised that significant reforms are required in relation to family violence, and if the same emphasis was given to the State-funded scheme, the system would be able to operate much more efficiently and equitably. Given the forward estimates in the budget and the recognised importance of restorative justice, our submission is that the State-funded scheme is entirely affordable and ought to be delivered more funding by the State Government to assist in its timely, equitable and just administration of assistance to those victims in need of assistance.

The possible outcome of reducing the benefits of this scheme will be a burden on social security, Medicare and the public health system. There is also the possibility that if entitlements are reduced, victims may not fully recover and therefore may not be in a position to return as an active member of the community (including the workforce) as early a stage as they would be if they receive the assistance they need. Such would only increase their reliance on other sources of assistance, including other government-funded sources.

11.1.3. Are there other models that would deliver assistance more effectively? If so, which?

There are, of course, other models that deliver assistance in a timely fashion. The examples we are referring to here are the WorkCover and transport accident schemes. These schemes, however, operate under a different model. That is, a claimant makes a claim and it is then borne by the WorkCover insurer or the TAC to either accept or reject that claim within a finite period. Should the claim then be accepted, then the claimant may then claim forms of compensation from the WorkCover insurer and/or the TAC.

This differs from the way in which the VOCAT application process works in that the application process requires victim applicants to gather all supporting documentation after making an application, and finalise the application by submitting all supporting documentation, which may be months after lodging the original application. In the meantime, the applicant can of course seek interim awards for urgent assistance.

The reason the WorkCover and TAC schemes work as well as they do is because the level of funding afforded to the schemes dwarfs that afforded to the current State-funded victims of crime assistance scheme.

We would also suggest that, if the current scheme were to adopt a similar claims-style approach to determining and dealing with claims, then it opens the VOCAT to a greater number of disputes, which may also requirement the involvement of the Victorian Government Solicitor's Office to defend any disputes. This 'hidden' cost also needs to be taken into account in determining whether or not such an 'administrative' model can or cannot work. A key difference between the WorkCover/TAC schemes in Victoria and the current State-funded assistance model for victims of crime is the quite stark variance in the number of disputes. The operation of the WorkCover scheme in Victoria funds a big portion of many big firms (including our own) by reason of the number of disputes that are caused invariably by decisions of WorkCover insurers to terminate entitlements and to make adverse decisions with regards to claims. The same can arguably be said in relation to claims for lump sum compensation. Taking into account the purpose and objectives of the current Act, any move towards an administrative model is likely to take those objectives further away from what the Act is currently achieving for victims.

11.2. Financial assistance as part of case management/victim support

11.2.1. Is state-funded assistance to victims of crime better provided as part of victim support case management? If so, why, and how should this operate?

In short, this could not work. The reason being that victim support groups are overwhelmed already with the number of victims presenting to them that they would certainly not be able to cope with attempting to administer state-funded assistance to victims in need. There have been occasions where clients we have assisted for applications have been attending on counsellors at a victim support group in respect of a

psychological injury from the act of violence, but the group did not even have the capacity to prepare a report in support of the applicant's application because of the such high demand for their services.

The suggestion that state-funded assistance can be administered through victim support groups is totally unsustainable and if such amendments were implemented, it could only result in further unnecessary delays in eligible victims receiving the assistance and recognition they need to move on from the act of violence.

Submission:

liv. Victim support case management *should not* be relied upon as a tool with which to administer state-funded assistance for the simple reason that victim support groups across the State do not have the capacity to take on the ask and adequately attend to the significant role they already play in a victim's recovery from the act of violence.

11.2.2. 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?

For the reasons we have raised at 11.2.1, this would be impractical to ask victims support groups to administer State-funded assistance. Even putting aside the difficulties that such implementations would face in terms of administering that assistance, there would be legal requirements such as auditing that would have to be administered on top of the assistance that's awarded to eligible victim applicants.

Further, requiring solicitors and victim support groups to work together at every step of the application process would be overly burdensome on not just the victim support group, the applicant's legal representatives and the VOCAT, it would not achieve a benefit that would outweigh the burden borne by all in the process. It would also take victim support groups away from the important and vital work they do in supporting victims and would be a waste of valuable resources that could be better spent devoted to assisting victims.

Submission:

lv. Victim support groups and victim support case management *should not* be relied upon to administer State-funded assistance to eligible victims of crime. The task of arguing in favour of, and awarding assistance, should be retained by the applicant (and their legal representatives) and the decision-maker alone.

11.3. A new decision maker?

11.3.1. 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?

Throughout our submissions, we have discussed at length the benefits of retaining judicial decision making. Essentially, the benefits of retaining the mode of determining applications outweighs any disadvantages with retaining judicial decision making. For convenience, we have provided a list below of the benefits and disadvantages associated with retaining the current method of determining applications for State-funded assistance.

Benefits of retaining judicial decision making	Disadvantages of retaining judicial decision making

• Able to hold and conduct hearings, which in many cases are a source of closure and recognition from victims when they get that recognition from a judicial decision maker;
• Able to appropriately consider the in-depth circumstances of each and every case on its merits; such ensures that awards are appropriate and acknowledge:
  ○ The adverse effects suffered by the victim;
  ○ Any Section 54 factors required by the Act to be considered; and
  ○ Any other matters applicable to the applicants' particular circumstances;
• Able to determine which applications are suitable for a Section 33 Advice to be sent to the applicant to administratively deal with the application; and
• The applicants (and the VOCAT for that matter) have the benefit of legal representation who can guide the applicant and the VOCAT through the application process and assist in the timeliness of an
	• Where there is scope for varying awards, there will always be inconsistencies to a greater or lesser extent;
	• Implementing an administrative body with non-judicial decision makers makes inappropriate or disproportionate awards likely; and
	• The level of disputes is likely to increase, which would not be in accordance with the purpose and objectives of the current Act, and it would also require an increased engagement by State Government of the VGSO to defend VCAT appeals.

awards of assistance that may come from the application.	

If our submissions concerning the retention of judicial decision making are not accepted, it is our view that administrative decision makers should only be limited in their powers to determine applications that satisfy specific criteria; such criteria could include:

- That the applicant 'opts in' to having their application administratively determined;
- That a conviction in respect of the subject act of violence has been recorded by a fact-finder;
- That the types of applications referred to a potential administrative scheme are limited to uncontroversial matters that are unlikely to be the subject of a dispute if a decision is made on the matter. For example, where the VOCAT intends to raise Section 54 issues with the applicant, such application is not one that should be referred for administrative decision-making.

There are perhaps other criteria that ought to be included in order for an application to be administratively determined in any 'hybrid' model, but we consider the above criteria are an essential part of what any hybrid model ought to require.

Submission:

lvi. Judicial decision making for the provision of State-funded assistance for victims of crime ought to be retained;

lvii. In the alternative, there ought to be a 'hybrid' model with specific criteria to be met before any applications are referred to an administrative stream to be determined.

11.3.2. Should hearings remain an available option, either at the request of the victim or the decision-maker?

In short, hearings should remain an available option.

Many of the clients we assist mark on their application form that they would like a hearing of their application to be held. In many of these cases, we are able to resolve the application without the need for a hearing on favourable terms for those applicants that do not wish to attend a hearing. Those who wish to seek the formal recognition a hearing provides then have the opportunity to ask the VOCAT for one to be listed. Applicants who choose to accept the VOCAT's proposal are also aware of what is going to be awarded to them, without merely having a decision made without their input and having the outcome sent to them.

There are some cases, however, where an advice has been served by the VOCAT pursuant to section 33 of the Act and the applicant does not agree with one (or more) decisions the VOCAT has made with regards to items they have included on their Statement of Claim. In those circumstances, the evidence is best tested by way of hearing. *Viva voce* evidence arguably retains a "spontaneity and genuineness often lacking in pre-prepared written material".[3] Taking into account the fact there is really no 'defendant' or 'respondent' to a VOCAT application for assistance, we consider the most convenient and reliable form of evidence in applications is for the evidence to be adduced at hearing.

The hearing process provides the victim with a personalised touch to their application rather than just being another application number. At hearings, they have the opportunity to have their say and be understood in relation to adverse effects they have suffered as a result of the act of violence.

12. Other matters

12.1.1. How is the Tribunal dealing with matters that either have no police complaint made by the applicant, no successful (or any) prosecution and no conviction recorded?

In our experience, the VOCAT is dealing with these matters on a case by case basis where it would perhaps be more efficient and convenient to have a practice direction concerning these matters. Requiring the VOCAT to determine these matters on a case by case basis requires time-consuming investigation by the VOCAT with the relevant police members. Alternatively, an even more time-consuming freedom of information request is needed from the applicant or their legal representatives. In practice:

- The VOCAT should provide the applicant or their legal representative with a 'list of issues' the VOCAT considers are relevant to the application. Such a list would, in practice, act in a similar way that a civil defence would in a civil proceeding, limiting the issues in dispute and asking the applicant only to address those matters which prevent the VOCAT from making any awards of assistance;

- The applicant (or their legal representative) could then respond to the list of issues addressing only the matters the VOCAT considers prevent it from making an award. If after having considered the applicant's response, then the VOCAT ought to list the matter for a directions hearing (or alternatively a hearing) without further ado.

Questions also arise where police decline to take a complaint from the victim. We routinely act on behalf of victims where they attend a police station or call police out to the scene of the act of violence but their

[3] *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577, [175].

complaint is not taken by police, or alternatively police determine it to be 'a civil matter', and the matter is taken no further by police. If police take this course of action and decline to pursue the matter any further, the victim then bears the onus of proving the act of violence **on the balance of probabilities only**. In these situations, the VOCAT is more likely to list the matter for a hearing to further determine the matter and require the applicant to go through with a hearing (which is a frightening prospect particularly for victims of family violence, where there are no convictions recorded for much of the abuse) to be eligible for State-funded assistance. While we accept that it is the applicant's case to prove and that they must prove the act of violence actually happened, there are delays associated with being require the applicant to attend a hearing.

It remains entirely open to the VOCAT to consider the individual merits of an application in the absence of a fact finding on the balance of probabilities and should be doing so wherever possible. This is a benefit that could be achieved with the retention of judicial decision making. If the VOCAT were afforded a greater level of resources, VOCAT Members (and potentially Registrars in a hybrid model) would be able to more closely examine the particular circumstances of each application and determine matters administratively and without a hearing which would benefit those applicants in delicate situations that would prefer not to attend a hearing. Currently, the VOCAT is strained in dealing with matters administratively. Unless there is a conviction recorded or the act of violence found to be proven by a previous fact finder, then the VOCAT is more likely than not going to determine that the matter is not appropriate to be considering a Section 33 Advice, and order that a directions hearing (or alternatively a hearing) be listed. A practice direction addressing the above would be of assistance in ensuring that these matters can be dealt with as efficiently as possible whilst also avoiding any undue angst for the victim applicant.