



**SPRINGVALE MONASH  
LEGAL SERVICE Inc.**

Celebrating 40 years of Working for Justice

SUBMISSION

Prepared by Springvale Monash Legal Service for the

**Victorian Law Reform Commission:  
Review of the Victims of Crime Assistance Act 1996**  
Date submitted: 6 November 2017

## **Our organisation**

Established in 1973, Springvale Monash Legal Service (SMLS) is a community legal centre that provides free legal advice, assistance, information and education to people experiencing disadvantage in our community. For all of our operation, we have located within the Local Government Area (LGA) of the City of Greater Dandenong. We have been addressing the needs of marginalised community members, the majority who reside within the City of Greater Dandenong and its surrounds. The City of Greater Dandenong is the second most culturally diverse municipality in Australia, and the most diverse in Victoria. People from over 150 different countries reside in Greater Dandenong and 60% of the residents were born overseas. It also has highest number of resettlements from newly-arrived migrants, refugees and asylum seekers in Victoria. Data from the 2011 Census revealed that Greater Dandenong was the second most disadvantaged LGA in Socio-Economic Indexes for Areas (SEIFA) ratings.

SMLS operates a duty lawyer service at various courts in Victoria, including Dandenong Magistrates Court, the Children's Court and provides legal representation at courts and tribunals such as the Victorian Civil and Administrative Tribunal, Fair Work Commission, Federal Circuit Court, Family Court and VOCAT. For most of the 40 years in operation, SMLS has been running a clinical legal education program in conjunction with Monash University's Faculty of Law, whereby law students undertake a practical placement at the legal service as part of their undergraduate degree. Additionally, as a community legal centre, we offer legal assistance as well as an extensive community legal education program that is developed in response to feedback from the range of community engagement and community development activities that we are and have been involved in. For example SMLS has contributed to reforms in family violence laws and practices, access to civil procedure reforms, discrimination towards young community members in their use of public space and their interactions with the criminal justice system, as well as in highlighting the needs of refugees and asylum seekers, particularly unaccompanied humanitarian minors and women escaping family violence.

## **SMLS and Victims of Crime**

SMLS has significant experience and expertise providing legal support for individuals who have experienced sexual assault. For over 20 years SMLS and SECASA have run a Joint Legal Clinic specialising in Victims of Crime Tribunal applications. SMLS prepares applications to the Victims of Crime Assistance Tribunal (VOCAT) under the Victims of Crime Assistance Act 1996 (VIC) for clients who have experienced sexual assault. We also assist victims of other crimes such as family violence (family violence) and assault in a non-familial context. Our Centre has assisted approximately 170 clients with applications to VOCAT. Many of these applications involved an alleged perpetrator who met the definition of 'family member' under the Family Violence Protection Act.

In addition to a specialist family law clinic, we have a Health Justice Partnership focusing on Family Violence (family violence) with largest public health service in Melbourne Victoria Australia, Monash Health. We are also co-chairing the Victorian Health Justice Partnership Learning Network. We provide a number of duty lawyer services for both family violence and criminal lists at the Dandenong Magistrates' court, as well as a Children's Family Violence duty lawyer at the (Dandenong) Children's Court. Our specialist family violence clinic assisting clients with child protection, child support, intervention orders, parenting plans, and court representation. Through these various services, our staff are trauma informed and have significant expertise in assisting families impacted by sexual assault and family violence. We employ a holistic method of service delivery, where legal assistance is partnered with other social services to provide a wrap-around support to address both legal and non-legal issues.

## Acronyms:

SMLS: Springvale Monash Legal Service

The Act: Victims of Crime Assistance Act 1996

VLRC: Victorian Law Reform Commission

VOCAT: Victims of Crime Assistance Tribunal

## INTRODUCTION

In December 2016, the Victorian Law Reform Commission (VLRC) received terms of reference seeking a review of the *Victims of Crime Assistance Act 1996* (“the Act”) as it applies to family violence. This request arose from recommendation 106 of the Victorian Royal Commission into Family Violence.

In July 2017, the VLRC received supplementary terms of reference seeking a review of The Act as to its effectiveness relating to all victims<sup>1</sup> of crime, including family violence victims. Inter alia, the VLRC has been asked to consider whether the Victims of Crime Assistance Tribunal (VOCAT) is the most effective and appropriate model, or if there scope to implement a new model, such as an administrative model.

SMLS is grateful for the opportunity to provide a submission to the VLRC’ Review of the Victims of Crime Assistance Act.

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<sup>1</sup> We note that some people who have been subjected to violence prefer the term ‘victim’ and others prefer the term ‘survivor’. In this submission we use the term ‘victim’ as reference to both victims and survivors, in keeping with the terminology of the legislation.

## Chapter 5: Eligibility for assistance

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### The victim categories

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

##### 1.1 Issues

1.1.1. The Springvale Monash Legal Service ('SMLS') have identified two main issues relating to the wording of s 7 of The Act and the adverse effect of current victim categories.

1.1.2. The currently law under s 7(2) of The Act requiring an attempt to arrest, prevent, aid or rescue **proactively**, adversely impacts clients at SMLS because it means that if a person accidentally interrupts an act of violence, even if it ultimately prevents the offence or assists the victim, she or he is not a primary victim. In the case of *Smith v Victims of Crime Assistance Tribunal*,<sup>[1]</sup> a daughter who went to check on her mother and inadvertently interrupted an assault by her father was found to be a secondary, rather than primary, victim.

1.1.3. In relation to the current victim categories, the distinction between primary, secondary and related victims sits uneasily with child victims of family violence. Under the *Victims of Crime Assistance Act 1996* (Vic), children who hear, witness or are otherwise exposed to the effects of family violence are only able to apply as secondary or related victims.<sup>[2]</sup> This is highlighted by the case of *NF v Victims of Crime Assistance Tribunal*,<sup>[3]</sup> where the applicant witnessed his father beat his stepfather to death. NF was unable to apply as a primary victim, despite the severe psychological impact of the violence on him. <sup>[5]</sup>

##### 1.2 Recommendations

1.2.1. SMLS recommends that the term 'proactive' be removed from s 7(2) of The Act because the damage to 'a person who attempts' and 'a person who accidentally interrupts' may be the same. We also recommend that section 7 of the act be amended to include a child if they are present at the scene of an act of violence and are injured as a direct result of witnessing that act. A child is a person under the age of 18 years. This acknowledges that hearing, witnessing or otherwise being exposed to the effects of violence family have far-reaching developmental and psychological consequences for children.

1.2.2. Amending section 7 of the act to include a child if they are present at the scene of an act of violence and are injured as a direct result of witnessing that act, recognises children and young people experiencing family violence as victims in their own right. It also allows them to apply for special financial assistance, which is a lump sum payment for which the applicant is not required to establish that she or he has suffered an injury. Given the difficulty of anticipating the level of injury and suffering that a child victim of abuse will experience in the future because of the complex nature of family violence experiences, this may more appropriately compensate the victim.

1.2.3. In relation to child victim categories, the Royal Commission stated, 'children and young people experiencing family violence should be recognised as victims in their own right.'<sup>[4]</sup> As it is often difficult to anticipate the level of injury and suffering that a child victim of abuse will experience in the

future, [5] it is beneficial for all child victims of family violence to be able to access lump sum payments as primary victims, irrespective of how they experience family violence.

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

[2] The definition of ‘primary victim’ in s 7 of the *Victims of Crime Assistance Act 1996* (Vic) only extends to persons who are injured or die ‘as a direct result of an act of violence committed against him or her.’

[3] [2012] VCAT 1740 (16 November 2012).

[4] Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume II* (2016) 142.

[5] Forster and Parkinson describe this as the ‘sleeper effect of childhood abuse’ see Christine Forster and Patrick Parkinson, ‘Compensating Child Sexual Assault Victims Within Statutory Schemes: Imagining a More Effective Compensatory Framework’ (2000) 23(2) *University of New South Wales Law Journal* 172.

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

2.1. See recommendations in Q1 in relation to changes to s 7 of the Act.

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## 3. How does the definition of ‘act of violence’ in the Act impact on people applying to VOCAT for financial assistance?

3.1. Issues

3.2.1. SMLS submits that the definition of an ‘act of violence’ is too narrow. By limiting compensation to victims of a criminal act or a series of related criminal acts, VOCAT denies assistance to victims of family violence that falls short of a criminal offence. In doing so, VOCAT does not reflect the community’s attitude towards family violence.

3.2.2. The establishment of the Royal Commission into Family Violence on 22 February 2015 highlights the State’s recognition that family violence is an important community concern. As voiced by the Victorian Premier, family violence is ‘the most urgent law and order emergency occurring in our state and the most unspeakable **crime** unfolding across our nation’. As a health concern, intimate partner violence contributes to more death, disability and illness in women aged 18-44 than any other preventable risk factor.[1] As an economic concern, KPMG’s 2017 report *The Cost of Family Violence in Victoria* estimated the total cost of family violence in Victoria as \$5.3 billion in 2015-16.[2]

3.2.3. Because VOCAT does not provide compensation to victims of non-criminal forms of family violence, the Act implicitly sends a message to these victims that the State of Victoria does not recognise the significant adverse effects suffered by them as victims of violence. This is concerning in light of the fact that VOCAT was introduced, at least in part, to achieve its overarching aim of expressing the community’s sympathy towards victims.[3]

3.2.4. At SMLS, we recognise that the *Victims of Crime Assistance Act 1996* is framed in such a way to **only** provide assistance to victims of **crime**. [4] However, VOCAT was introduced in 1996 where family violence was not recognised as the significant community concern that it is today. Consequently, VOCAT’s terminology and scope does not meet present-day community standards.

## 3.2. Recommendations

3.3.1. In light of the community's current understanding that victims of family violence are adversely affected in a similar way to victims of crime,[5] SMLS advocates that the VOCAT Act should be changed to reflect community standards.

3.3.2. We suggest that the definition of 'an act of violence' should be extended to mean: a criminal act or a series of related criminal acts or ***'family violence within the meaning of section 5 of the Family Violence Protection Act 2008 (Vic)***, whether committed by one or more persons, that has:

- a) occurred in Victoria; and
- b) directly resulted in injury or death to one or more persons, irrespective of where the injury or death occurs;

3.2.3. By extending the definition of 'an act of violence' to include family violence within the meaning of s 5 of the *Family Violence Protection Act 2008*, the Act would provide assistance to victims of:

- Physical abuse,
- Sexual abuse,
- Emotional abuse,
- Psychological abuse,
- Economic abuse, thereby protecting against property loss and damage too;
- Threatening behaviour,
- Coercive behaviour,
- Dominating behaviour that causes the family member to feel fear for the safety or wellbeing of that family member or another person, and
- Behaviour that causes a child to hear or witness the above behaviour.

3.2.4. A similar approach has already been adopted in Queensland by the *Victims of Crime Assistance Act 2009* (Qld). We also note that other areas of law, such as the *Infringements Act 2006* (Vic) (**'Infringements Act'**), have made similar changes in recognising family violence as a 'special circumstance' that would entitle a Magistrate to discharge the payment of certain fines. If Magistrates are already given the discretion to discharge financial obligations on the basis that family violence is a special circumstance under the *Infringements Act*, then similarly tribunal members should be given the discretion to recognise family violence as a special circumstance that would empower VOCAT to order compensation to a victim.

[1] Department of Premier and Cabinet (Vic), *Ending Family Violence: Victoria's Plan for Change* (2016) 2.

[2] KPMG, *The Cost of Family Violence in Victoria*, Summary Report (2017) 2.

[3] *Victims of Crime Assistance Act 1996* (Vic), s 1(2)(b).

[4] *Ibid*, s 1.

[5] Victoria, Royal Commission into Family Violence, *Report and Recommendations Volume II* (2016) 20-23.

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

4.1. See Q3. The definition of family violence should be amended to include ***family violence within the meaning of section 5 of the Family Violence Protection Act 2008 (Vic)***.

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**5. Should the definition of ‘act of violence’ in the Act be amended to include non-criminal behaviour? If so, what forms of non-criminal behaviour should be included?**

5.1. See Q3. The definition of ‘act of violence’ should be amended to include *family violence within the meaning of section 5 of the Family Violence Protection Act 2008 (Vic)*.

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**The definition of ‘injury’**

**6. How does the definition of ‘injury’ in the Act impact on people applying to VOCAT for financial assistance?**

6.1. Issues

6.1.1. SMLS have identified two primary issues in relation to the current definition of ‘injury’ in the Act.

6.1.2. Firstly, the current definition of ‘injury’ is not appropriate for victims of family violence who have not suffered physical injury, or do not suffer from a mental disorder or illness, as these circumstances unfairly bar victims from receiving financial assistance.[2] Furthermore, victims of family violence whose primary injury is property damage or destruction are barred from receiving assistance under the scheme.

6.1.3. Secondly, the requirement under section 3(2) of the Act that medical or psychological evidence must be provided to demonstrate that the trauma requires counselling or treatment is an issue as it may prevent some victims of family violence from being able to claim that they have suffered an injury. Similarly, this may also discourage applications for assistance.[3]

6.1.4. Psychiatric assessments are a non-therapeutic tool used to assess the level of mental injury,[4] and if administered poorly, there is a risk that they could re-traumatise victims.[5] Preliminary consultations undertaken by the Commission also identified that the need to prove mental injury with psychiatric or psychological assessments can result in victims of family violence being redirected from family violence counselling and social work services, which may be of the greatest benefit to their recovery, to medical professionals so they can obtain medical reports that support their VOCAT application. This is a particular concern for victims of family violence living in rural or remote areas, where there are few practising psychiatrists or psychologists, as it can result in them seeking support outside of their community.

[1] *RBA v Victims of Crime Assistance Tribunal* [2009] VCAT 2225 (26 October 2009) [21].

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

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

[4] Ibid.

[5] Ibid.

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## 7. Should the definition of 'injury' in the Act be amended to include other forms of harm? If so, what forms of harm should be included?

### 7.1. Recommendations

7.1.1. SMLS advocates for the definition of 'injury' in the Act being expanded to the same extent in Q3, which is to include **family violence** within the meaning of section 5 of the Family Violence Protection Act 2008 (Vic). The practical result of this, is that property damage and destruction will be included in the definition of 'injury' if a 'criminal act' definition was to include economic abuse.

7.1.2. We also make recommendations as to the definition of 'mental injury'. The less restrictive definitions of 'mental injury' in other jurisdictions, which refer to 'psychological or psychiatric harm',[1] 'mental and nervous shock'[2] and 'impairment of ... mental health',[3] could be adopted in Victoria. These lower thresholds should not require formal psychological or psychiatric assessments, however, should require evidence from a counsellor.

7.1.3. We further advocate that the requirement of medical or psychological evidence under section 3(2) of the Act also be removed. This would make the scheme more accessible to victims of family violence who do not have a recognised mental disorder or illness. It would also reduce the need to obtain a psychiatric assessment report, thereby allowing victims of family violence to pursue counselling or other services that are suited to their needs, rather than medical reports geared only toward their legal application.

7.1.4. Alternatively, or additionally, the Act could be amended to include a broader range of injuries for victims of family violence. Both the Australian Capital Territory and Queensland schemes recognise an expanded category of injuries for victims of sexual offences and family violence, including a sense of violation, a reduced sense of self-worth, increased fear or feelings of insecurity, and reduced capacity to participate in sexual activity.[4]

[1] *Victims Rights and Support Act 2013* (NSW) s 18.

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

[3] *Victims of Crime Assistance Act 1976* (Tas) s 2(2).

[4] *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 9(1)(c). The *Victims of Crime Assistance Act 2009* (Qld) currently only recognises this expanded range of injuries in relation to victims of sexual offences, see s 27(1)(f). However, the *Victims of Crime Assistance and Other Legislation Amendment Act 2017* (Qld) (not yet in force) will amend this provision so that it also applies to victims of domestic violence, see s 30.

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

8.1. The requirement of proof of injury for victims of family violence should be removed for all categories. Forster suggests that this would have 'the potential to provide victims of family violence with an easier and less traumatic means of accessing compensation for their non-financial losses'. [1]

8.2. This is the approach of the Northern Territory victims' financial assistance scheme in relation to sexual offences. The *Victims of Crime Assistance Regulations 2007* (NT) set out a range of sexual offences that constitute 'compensable violent acts' for which a lump sum can be awarded to a victim without evidence of injury.[2] This approach could be applied to family violence in the Victorian Act in recognition of the lasting effects of family violence.

8.3. Forster advocates for a model of financial assistance whereby victims of family violence can access set categories of award depending on the severity of the family violence, without requiring proof of injury.[3] We refer to our submission in Q7 in relation to expanding the definition of 'injury' in the Act, but not completely removing the proof of injury.

8.4. We also refer to our recommendations in Q18 and Q19 which advocate for the special financial assistance formula be amended to take into account the cumulative harm of a series of related criminal acts and the experiences of vulnerable victims. This model could be incorporated into the Act by explicitly adding different forms of family violence to the categories of special financial assistance.

8.5. As the Victorian scheme currently stands, this would mean that victims of family violence would only need to prove that they had suffered a '*significant adverse effect*' in order to be eligible for assistance. Alternatively, the Act could be amended so that victims need only establish that the family violence occurred.

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

[2] *Victims of Crime Assistance Regulations 2007* (NT) reg. 17 and schedule 1.

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

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## The causation requirement

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

#### 9.1. Issues

9.1.1. Victims of family violence can encounter difficulties in establishing that their injury was a 'direct result' of the act of violence. This is particularly so if they are suffering from a mental disorder or illness and there are other contributing factors.

9.1.2. The applicant in *NF v Victims of Crime Assistance Tribunal*, [2] sought assistance on the basis of having witnessed his father beat his stepfather to death. VOCAT initially refused his claim for

counselling costs on the grounds that the incident in question was only one of many causes of the difficulties that he faced. The other issues to which VOCAT pointed included a sexual assault, a period in residential care, and a period in youth detention.

9.1.3. In *CS v Victims of Crime Assistance Tribunal*,<sup>[3]</sup> both VOCAT and VCAT rejected the victim's application partly because there were a number of other very serious matters in her life that had had a significant effect on her but were unrelated to the sexual assaults by family members for which she was making a claim. VCAT's reasoning behind these refusals was that 'the State should not be required to pay unlimited counselling for treatment of issues that may be unrelated to any injury caused by the act of violence'.<sup>[4]</sup>

## 9.2. Recommendations

9.2.1. A 'but for' test is not the only way to establish causation under the Act. SMLS recommends that the Act only requires that an act of violence must '*directly contribute*' to the victim's suffering, injury or death.

9.2.2. This would cover situations where victims are suffering from a mental disorder or illness and there are other contributing factors. Given that injuries can be multidimensional, the victim should only have to prove that the act of violence was one contributing factor to the injury or part of the injury. The State would not be required to pay unlimited counselling and if the act of violence directly contributed to the victim's injury then it is not unrelated.

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

[2] [2012] VCAT 1740 (16 November 2012).

[3] [2006] VCAT 1061 (9 June 2006).

[4] *Ibid* [58].

## Chapter 6: Assistance available

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### Quantum of awards

#### Total financial assistance available

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

#### 10.1. Issues

10.1.1 There is a symbolic significance in the fact that the sums available for victims are relatively small, in comparison with other compensation schemes such as TAC and Work Cover, or the Commonwealth redress scheme. If one of the objectives of the Act is to symbolically express sympathy and condolence to victims, the very modest compensation awarded may struggle to achieve this objective.

10.1.2. Since the Act was introduced in 1997, however, the assistance available to primary victims has remained at \$60,000 pursuant to section 8(1) of the Act, and has not differed since. For some victims, such as those suffering permanent and serious disability this maximum amount may be inadequate.

10.1.3 By way of example for those unable to participate in employment, the total maximum of \$70,000 may not be able to assist them for long.[2] Notably, the average award paid out by VOCAT has been \$7784, likely due to the categories of award available under the act rather than total financial assistance available.

## 10.2. Recommendations

10.2.1. Medical expenses, counselling fees, cost of clothing and safety related expenses have all increased since the Act was introduced. At a minimum, the assistance available to primary victims should be increased in line with inflation, which since the act was introduced has been an average of 2.6% per annum, resulting in a total change in cost of 63.1%.[3]

10.2.2. Consequently, if the amount is updated in line with the rising cost of goods and services, the amount available to primary victims should be \$97,875.84 or approximately \$100,000. This amount is a conservative recommendation [is the minimum we would recommend], as it assumes both that \$60,000 in 1997 in real terms was adequate and that the cost of counselling, medical expenses, clothing and safety related expenses have increased in line with inflation and not higher.

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

[2] William Vallely, 'Damages Do Not Fit the Crime: Victim', *Bendigo Advertiser* (online), 21 July 2017, <[www.bendigoadvertiser.com.au/story/4804647/victims-plea-for-justice/](http://www.bendigoadvertiser.com.au/story/4804647/victims-plea-for-justice/)>.

[3] Reserve Bank of Australia, '*Inflation Calculator*' (online) <<https://www.rba.gov.au/calculator/annualDecimal.html>>

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## Cap on quantum available for related victims

### 11. Should the Act be amended to remove the pool of assistance for related victims? If not, should the total maximum cumulative amount of assistance available for a pool of related victims be increased?

#### 11.1. Issues

11.1.1. The pool of financial assistance adds complications to the process of applying for assistance. Under the present law, a related victim must list *all* potential related victims on the form. VOCAT will notify all of them and wait for claims to be made before considering any application. This results in delays. Related victims typically receive assistance one month after other victim categories.

11.1.2. The pool of assistance also means applications must be timely. Children (who typically require more time to apply) or those who only become aware of their injuries later can miss out on receiving assistance if the pool is already exhausted. In exceptional circumstances, VOCAT can exceed the pool however there is no guarantee victims will receive assistance.

11.1.3. The pool cap unfairly, disproportionately effects and arbitrarily impacts victims, for example where there are multiple dependants. This cap pushes against the idea of supporting victim needs because it introduces an arbitrary consideration that may undermine the objectives of the act.

## 11.2. Recommendations

11.2.1. SMLS recommends that the cap on the pool of financial assistance for related victims be removed, which as recently as this year has been enacted in Queensland.[1] A pool of assistance has also never been present in NSW or ACT schemes, which have similar victim categories to Victoria.

11.2.2. Removing the cap would, in practice, remove the “pool” of funds. The removal would have the benefit of speeding up the process of application without needing to name and notify all potential related victims of crime. SMLS further advocates that removing the limitation on financial assistance would not signal that funds cannot be exhausted but instead have the effect of ensuring each application is considered on their own merit.

[1] *Victims of Crime Assistance and Other Legislation Amendment Act 2017* (Qld) s 38.

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## **12. Should the Act be amended to reflect the rising cost of funerals? If so, what amendments should be made? Should funeral expenses be excluded from the total maximum cumulative amount of assistance available under the Act for a pool of related victims?**

### 12.1. Issues

12.1.1. Funeral expenses, however, have dramatically increased since the amounts of assistance under the act were set, and currently range from \$4000 to \$15,000.[1]

### 12.2. Recommendations

12.2.1. With reference to our recommendation in Q11 to remove the cap on the pool of financial assistance available, this will include funeral expenses.

[1] Australian Securities and Investments Commission, ‘ASIC’s Moneysmart | Paying For Your Funeral’ (20 June 2017) <<https://www.moneysmart.gov.au/life-events-and-you/over-55s/paying-for-your-funeral>>

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## **Categories of award**

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

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

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

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

##### 14.1. Issues

14.1.1. The term 'reasonableness' is undefined in the Act. Some expenses such as counselling may be deemed unreasonable because of a lack of improvement in the applicant's health, as sometimes the injuries sustained are permanent. [1]

##### 14.2. Recommendations

14.2.1. SMLS recommends that the term 'reasonableness' should focus on whether assistance is provided to the victim rather than whether the victim makes progress towards recovery, as some victims may not be able to overcome their injuries such as psychological harm, especially in a sexual assault or family violence context.

14.2.2. When considering reasonable expenses, regard should be had to the holistic benefit of the treatment, including supporting the victim, promoting stability and reducing pain. A tangible improvement in mental or physical health is not required for the expense to be reasonable.

[1] *CS v Victims of Crime Assistance Tribunal* [2006] VCAT 1061.

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

#### **15. Is it appropriate for the Act to limit awards for recovery expenses to 'exceptional circumstances'? If not, what changes should be made to the Act?**

##### 15.1. Issues

15.1.1. The emphasis on whether the applicant's response to the act of violence is abnormal or uncommon rather than the severity of the act of violence or harm suffered may mean awards for recovery expenses are not always made to those who need it most.

15.1.2. For example, in *RN v Victims of Crime Assistance*, [3] in which the applicant had been the victim of a rape in her own bedroom, VCAT found that exceptional circumstances did not exist. This was because it held that her resulting post-traumatic stress disorder, anxiety and depression were 'depressingly common' for victims of rape and therefore not 'unusual, special or out of the ordinary'.

##### 15.2. Recommendations

15.2.1. SMLS advocates for a definition of *exceptional circumstances* to be inserted in the Act. We further suggest that the definition of *exceptional circumstances* take into account the severity of the act of violence or when the harm suffered is high. This would change the focus from whether the victim suffered an abnormal reaction, to whether the severity of harm suffered justifies the payment of recovery expenses.

15.2.2. While this broadens the class of applicants to claim expenses, the requirement for expenses to assist in the recovery from an act of violence has been shown to preclude the claiming of certain expenses which do not directly contribute to recovery such as Versace sunglasses, holidays, movie tickets,[4] or a mini hi-fi system,[5] which were interpreted as merely “providing temporary relief or distraction”[6] rather than matters going to the heart of assisting in recovery from the act of violence.

[1] *RN v Victims of Crime Assistance Tribunal* [2005] VCAT 2651.

[2] *RN v Victims of Crime Assistance Tribunal* [2005] VCAT 2651.

[3] [2005] VCAT 2651.

[4] *ML v Victims of Crime Assistance Tribunal* [2006] VCAT 292.

[5] *RN v Victims of Crime Assistance Tribunal* [2005] VCAT 2651.

[6] *ML v Victims of Crime Assistance Tribunal* [2006] VCAT 292.

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## **16. In addition to the financial assistance available under the Act, are there other ways to promote the recovery of victims from the effects of crime? If so, is there a need for these other ways to be supported by the Act?**

### 16.1 Issues

16.1.1. Conviction rates in relation to sexual offences against children are statistically very low. In fact, charges are infrequently laid in these cases. Of those cases where charges are laid, very few result in a conviction. Hence, victims often feel extremely “let down” by the criminal justice system.

In cases such as this, being heard and believed by a verbal acknowledgement from the Tribunal can assist enormously in recovery. Often Tribunal members apologise on behalf of the state for the suffering victims have experienced. The impact of such well-measured and kind words cannot be understated in terms therapeutic effect. In many cases, this is the only recognition a victim may have received and it can be extremely powerful.

16.2.1 SMLS recommends a special list of Tribunal members for VOCAT determinations. This special list would include members who are;

- Trauma-informed; undergo specialised training on the complex considerations in sexual abuse and family violence cases;
- Specialised in the purpose and application of the Act,
- Specialised in the treatment of vulnerable witnesses in a judicial and/or quasi-judicial context.

## Interim awards

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

#### 17.1 Issues

17.1.1 Many Tribunal members refuse to make interim awards on the basis that a criminal prosecution has not been finalised, despite urgency for suicidal victims, or victims in desperate need of relocation to avoid further harm. In many cases, the delay in determining interim awards means that they are often processed no earlier than when a final determination is made. "In any circumstances it considers appropriate" is too broad and provides little guidance to Tribunal members in the exercise of this discretion.

17.1.2 Current delays in determining interim applications run counter to the Tribunal's obligations under section 32 of the Act.

#### 17.2. Recommendations

17.2.1 SMLS recommends that Section 56 should be amended to give guidance as to when interim awards must be granted including:

- When the psychological well-being of the applicant will be adversely affected by deferring or denying the granting of the interim request
- Where the psychological and physical safety of the applicant is at risk.

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## **Limitations of the special financial assistance provision**

### Recognising cumulative harm

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

18.1.1. The current special financial assistance formula is expressed in ways related to single acts of violence, thereby neglecting the potentially more severe effects of ongoing related criminal acts. This has a disproportionate effect on victims of family violence, as family violence almost inherently involves ongoing related acts of violence by the same offender.

18.1.2. Although isolated acts of violence can cause severe trauma to victims, the experience of SMLS is that the psychological and emotional impact of ongoing acts of family violence can be more severe and enduring. Despite this, victims of ongoing category B, C or D acts of violence are restricted to receiving the maximum amount prescribed for their relevant category.

#### 18.2. Recommendations

18.2.1. The *Victims of Crime Assistance (Special Financial Assistance) Regulations 2011* (Vic) regulation 7 goes some way to recognising these issues, by allowing a category A maximum amount to be awarded for category B, C or D acts of violence where the victim is the “victim of a series of related criminal acts of indecent assault or sexual penetration”. However, by restricting this ‘uplift’ to only being available for these types of crimes, the regulation continues to neglect the circumstances faced by family violence victims.

18.2.2. SMLS therefore submits that the regulation be amended to specifically recognise victims of family violence so that the *Victims of Crime Assistance (Special Financial Assistance) Regulations 2011* (Vic) reg 7 reads as follows:

*For the purposes of section 8A of the Act, the maximum amount in relation to a category A act of violence is prescribed as the maximum amount in relation to a category B, C or D act of violence where as a direct result of the act of violence the victim has:*

- (a) Suffered a very serious physical injury; or*
- (b) Been infected with a very serious disease; or*
- (c) Been the victim of a series of related criminal acts being acts of indecent assault, sexual penetration **or acts of family violence within the meaning of Family Violence Protection Act 2008 (Vic) s 5.***

18.2.3. We also refer to our recommendations in Q3 and Q7 which advocates for the integration of family violence into the Act within the meaning of s 5 of the **Family Violence Protection Act 2008 (Vic).**

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

### **19. 1. Issues**

19.1.1. It is the stance of SMLS that the Act’s current recognition of vulnerable victims is too fixed and simplistic. By only recognising three categories of vulnerability, being children, the elderly and the impaired, the regulations fail to recognise the fluid nature of vulnerability, where different types of vulnerability can emerge from particular and unique situations. Currently, regulations 8 and 9 only allow the Tribunal to consider vulnerability when the case falls within fixed categories, rather than allowing it to assess its existence within each individual case.

19.1.2. Furthermore, these regulations fail to recognise the particular prevalence of these concerns within the context of family violence. In the experience of SMLS, acts of violence often most acutely impact children and other vulnerable victims in a family violence context, as their effects can last throughout a lifetime. One SMLS client for example, ‘Cassie’, was repeatedly raped between the ages of 3 and 17 and continues to suffer from severe mental health difficulties into her 40s, including post-

traumatic stress symptoms, agoraphobia, difficulties developing personal relationships and multiple incidents of self-harming and attempted suicide.

## 19.2. Recommendations

19.2.1. SMLS submits that the *Victims of Crime Assistance (Special Financial Assistance) Regulations 2011* (Vic) reg 8 and 9 should be amended to provide a broader definition of vulnerability, which would allow the Tribunal to consider whether vulnerability exists within the unique nature of each individual case.

19.2.2. We also recommend regulation 8 be amended to expressly recognise the severity of these concerns within the context of family violence. These regulations would therefore read as follows:

### *Regulation 8*

*(1) For the purposes of section 8A of the Act, the maximum amount in relation to a category B act of violence (apart from regulation 7) is prescribed as the maximum amount in relation to a category C or D act of violence where, as a result of the act of violence, the victim has*

- (a) Suffered a serious injury; or*
- (b) Been the victim of related criminal acts of violence; or*
- (c) Suffered a deprivation of their liberty*
- (d) Been the victim of family violence within the meaning of Family Violence Protection Act 2008 (Vic) s 5***

*And at the date of the occurrence of the act of violence or, in the case of related criminal acts of violence, any of those acts, the victim was **a vulnerable victim.***

*(2) In determining who is a vulnerable victim for the purposes of subsection (1), the Tribunal must have regard to:*

- a. The age of the applicant at the date of the occurrence of the act of violence;*
- b. Whether the applicant was intellectually disabled within the meaning of the Disability Act 2006 or mentally ill within the meaning of the Mental Health Act 2014, or was in any other way disabled or impaired at the date of the occurrence of the act of violence;*
- c. Whether the applicant suffered any financial hardship at the date of the occurrence of the act of violence*
- d. 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;*
- e. The nature of the relationship between the applicant and the person who committed, or is alleged by the applicant to have committed, the act of violence;*
- f. All other circumstances that it considers relevant.*

### *Regulation 9:*

*(1) For the purposes of section 8A of the Act, the maximum amount in relation to a category C act of violence (apart from*

*regulation 7 or 8) is prescribed as the maximum amount in relation to a category D act of violence where—*

*a. As a result of the act of violence, the victim has been the victim of related criminal acts of violence; or*

*b. At the date of the occurrence of the act of violence or, in the case of related criminal acts of violence, any of those acts, the victim was **a vulnerable victim***

*(2) In determining who is a vulnerable victim for the purposes of subsection (1), the Tribunal must have regard to:*

*a. The age of the applicant at the date of the occurrence of the act of violence*

*b. Whether the applicant was intellectually disabled within the meaning of the Disability Act 2006 or mentally ill within the meaning of the Mental Health Act 2014, or was in any other way disabled or impaired at the date of the occurrence of the act of violence*

*c. Whether the applicant suffered any financial hardship at the date of the occurrence of the act of violence*

*d. 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*

*e. The nature of the relationship between the applicant and the person who committed, or is alleged by the applicant to have committed, the act of violence*

*f. All other circumstances that it considers relevant*

19.2.3. SMLS submits that by making these amendments, the Tribunal will still be directed to consider the Act's existing categories of vulnerability, being children, the elderly and the impaired, but allows the Tribunal to consider a broader definition of vulnerability, that can take the individual circumstances of each case into account.

19.2.4. We also refer to our recommendations in Q3, Q7 and Q18 which advocates for the integration of family violence into the Act within the meaning of s 5 of the *Family Violence Protection Act 2008 (Vic)*.

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

### 20.1. Issues

20.1.1. As distinct from primary victims who receive special financial assistance **on top of** financial assistance, secondary victims are awarded a maximum of \$50,000 pursuant to section 10(a) of the Act, inclusive of financial assistance. For example, a secondary victim awarded the maximum \$50,000 in financial assistance would have reached the maximum level of assistance available and not be eligible for special financial assistance on top of this maximum amount.

20.1.2. This means that an awardee of \$50,000 (ie a person who needs the most support) is limited by the legislation.

## 20.2. Recommendations

20.2.1. SMLS refers to our recommendation in Q1 relates to the recognition of children who are victims of family violence in the definition of section 7 of the Act.

20.2.2. In the alternative, SMLS advocates that the limitation posed by section 10A(1) as subject to the maximum imposed by section 10(1) be removed. In effect, children who are “secondary victims” as defined by the Act can receive additional financial assistance.

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

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

#### 21.1. Issues

21.1.1. The Act provides no guidance as to how a decision is made regarding the quantum to be awarded, which can lead to inefficiencies and inconsistent outcomes. On this basis, one solution would be to replace the minimum and maximum amounts with one fixed amount per category.

21.1.2. We acknowledge that the experiences of any two victims are not the same, even if the same offence is committed against each of them. Any scheme risks either classifying all victims into certain categories, or else victims face their suffering being scrutinised and evaluated in comparison with others. We also acknowledge the relatively small amounts available for victims of crime in comparison with other compensation schemes.

#### 21.2. Recommendations

21.2.1. SMLS supports removing the prescribed maximum and minimum amounts, introducing fixed amounts per category and providing for increased amounts where one or more circumstances of aggravation exist, in accordance with the Australian Capital Territory scheme. [1] Importantly, we suggest including a ‘catch-all’ circumstance of aggravation that applies where the circumstances warrant a higher award but do not fall within the prescribed circumstances of aggravation.

For example:

Category of Act of Violence	Default Award Amount
Category A:	\$20,000
Category B:	\$11,500
Category C:	\$6,500
Category D:	\$3,500

21.2.3. In determining the category of the award provided to victims, we recommend consideration is given to:

- the nature of the act(s)
- whether the act(s) form part of a pattern of abuse, including family violence, and if so the overall duration of the pattern of abuse
- whether the act(s) form part of a series of related criminal acts, and if so the period(s) of time between these acts
- whether the victim was in a position of vulnerability with regard to the offender or offenders
- the extent of harm (including cumulative harm) caused to the victim
- the level of financial assistance necessary to appropriately support the victim, having regard to any financial disadvantage suffered by the victim

[1] *Victims of Crime (Financial Assistance) Regulations 2016* (ACT) rr 8-10.

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## The adequacy of amounts of special financial assistance available

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

#### 22.1. Issues

22.1.1. SMLS considers that the amounts payable for each category are not sufficiently high to acknowledge the seriousness of the situations faced by primary victims who suffer significant adverse effects as a direct result of acts of violence. In particular, the amounts awardable for Category C and D offences are woefully low, [1] and in our experience minimise victims' experiences and diminish the community recognition they receive from these payments.

#### 22.2. Recommendations

22.2.1. SMLS recommends increasing the amounts in each category to better achieve the purposes of the act. We recommend that a panel of experts be consulted in determining the fixed amounts.

22.2.2. In the alternative, we recommend that the minimum amount payable under any category should be no less than \$2,000.

[1] See Department of Justice and Attorney-General (Qld), *Final Report on the Review of the Victims of Crime Assistance Act 2009* (2015) 18.

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## Treatment of ‘related criminal acts’

### **23. Should the definition of ‘related criminal acts’ be amended to have regard to the cumulative harm of long-term abuse? If so, what should the definition be?**

#### 23.1. Issues

23.1.1. The ‘related criminal acts’ provision can operate to disproportionately reduce the awards of financial assistance made to cohorts of victims who suffer cumulative harm caused by a pattern of abuse, such as victims of family violence.[1] This effectively blames and punishes victims for remaining in abusive situations, which SMLS considers inappropriate.

23.1.2. Similarly, victims who suffer from multiple offences committed by the same offender are treated as having suffered less harm (by rendering them less entitled to financial assistance) than a victim who has suffered from multiple offences committed by different offenders.[2] In the experience of SMLS, this is factually inaccurate. In fact, the emotional and psychological harm a victim suffers as a result of multiple offences committed by the same offender is often more severe, especially in situations where the victim is vulnerable to and places trust in the offender.

23.1.3. Lastly, treating numerous acts of violence as one act minimises a victim’s sense of community recognition of the harm they suffered, while also detracting from the therapeutic value of allowing a victim to have their matters heard in court.

#### 23.2. Recommendations

23.2.1. SMLS recommends that the definition of ‘related criminal acts’ be amended to have regard to the cumulative harm of long-term abuse and reduce the number of cases that are inappropriately considered ‘related’, specifically by:

- 1) Altering s 4(1)(a) of the Act so that the criminal acts must be committed against the same person and be near contemporaneous or committed by the same person while sharing some other common factor in order for the acts to be considered ‘related’;
- 2) Reframing s 4(1)’s language from mandatory with a discretionary exclusion (i.e., “is” and “unless”) to discretionary inclusion (i.e., “may” and “if”); and
- 3) As the discretion created by our second suggestion risks creating inconsistent findings, providing:
  - a. A list of factors for the Tribunal to consider in assessing whether acts of violence are related; and
  - b. A presumption that serious acts of violence are presumed to be unrelated to others.

23.2.2. With regard to our second suggestion, we consider that the existing discretion for the Tribunal to ‘opt out’ of making a finding that acts are related is inappropriate because it starts from the assumption that acts falling within the criteria *are* related, thereby encouraging the Tribunal to make

that finding. By adopting discretionary language and a neutral starting point, the Tribunal will have greater freedom to deem acts unrelated where appropriate.

23.2.3. Examples of these legislative provisions are as follows:

1. *Subject to this section, the Tribunal may find that a criminal act is related to another criminal act for the purposes of this Act if—*
  - a. *they were committed against the same person and they—*
    - i. *occurred at approximately the same time; or*
    - ii. *were committed by the same person or group of persons and share some other common factor; or*
  - b. *the Tribunal considers that they ought to be treated as related criminal acts.*
2. *In determining whether two or more criminal acts are related under subsection (1), the Tribunal is to consider:*
  - a. *the nature of the acts;*
  - b. *the period of time between the acts;*
  - c. *whether the acts form part of a pattern of abuse;*
  - d. *whether the victim was in a position of vulnerability with regard to the offender or offenders;*
  - e. *the extent of harm (including cumulative harm) caused to the victim, and in light of this whether the level of financial assistance available to the victim would be sufficient to appropriately support the victim if the acts were treated as related; and*
  - f. *any other matter the Tribunal considers relevant.*
3. *For the purposes of subsection (1), criminal acts that attract Category A or Category B special financial assistance within the meaning of this Act are presumed to not be related, unless the Tribunal considers that such treatment is necessary.*
4. *For the purposes of this Act, a series of related criminal acts, whether committed by one or more persons, constitutes a single act of violence.*

23.2.4. We further refer to our recommendation in Q3, in which we proposed changes to the definition of ‘act of violence’ as it relates to our recommendation in this question.

[1] Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act 1996*, Consultation Paper (2017) 65 [7.55]–[7.60].

[2] Christine Forster, ‘Compensating for the Harms of Family Violence: Statutory Barriers in Australian Victims of Crime Compensation Schemes’ (2014) 22 *Journal of Law and Medicine* 188, 200.

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## 24. Should the Act be amended to give victims an opportunity to object if claims are to be treated as ‘related’?

## 24.1. Issues

24.1.1. It is currently impractical for applicants to contest a finding that crimes committed against them are related. This adds to the uncertainty felt by potential applicants and renders the scheme less accessible.

## 24.2. Recommendations

SMLS recommends that the Act be amended to give victims an opportunity to object if claims are to be treated as 'related'.

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## **25. Should there be a higher maximum for awards of financial assistance under the Act for victims of a series of related criminal acts? If so, what changes should be made to the Act?**

### 25.1. Issues

25.1.1. As outlined in Q23, the current law does not recognise the cumulative harm of long-term abuse.

25.1.2. SMLS does not believe that simply increasing the maximum amount of assistance available for a victim of a series of related criminal acts to a higher number is the most appropriate method of alleviating this issue. In particular, this approach may remain overly restrictive to certain victims: for instance, a case involving repeated, serious acts of violence may involve significant cumulative harm requiring more financial assistance than the prescribed fixed limit in order to adequately support them. For this reason, it is more appropriate that a victim is entitled to lodge separate applications for each of the individual acts of violence committed against them.

### 25.2. Recommendations

25.2.1. Provided our recommendations in Q23 are implemented, there would be no need to introduce a higher maximum award specifically for victims of a series of related criminal acts.

25.2.2. In the alternative that only an increase in the maximum award allowed for 'related criminal acts' is implemented, SMLS recommends increasing the maximum award for each category by at least three times the amount available for a single act of violence.

## **Chapter 7: Time limits for making an application**

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

#### **Increasing the application time limit**

## **26. Is The Two-Year Time Limit To Make An Application To VOCAT Under S29 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?

### 26.1. Issues

26.1.1. In cases of family violence, time limits must be appropriate and adequate to account for harm (including harm caused by multiple acts), and also where there is a significant delay in reporting a crime. The strict time limits for making an application under the Act may not recognise that the effects of crime can contribute to delayed applications.

26.1.2. At SMLS, we have identified a number of Issues with the two-year time limit for making an application, in relation to it being a barrier to victims and the factors in section 29(3) of the Act which VOCAT must have regard to in relation to child applicants.

26.1.3. Firstly, the time limit requirements can create specific barriers for some classes of victims, who may take more than two years to identify, disclose and report violence and abuse. Additionally, the time limit for making an application can be a barrier for more vulnerable groups of the community who face other barriers to disclosing and reporting abuse. Although VOCAT may frequently grant extensions of time, the mere existence of the time limit may be a barrier for some victims.

26.1.4. Secondly and in relation to factors in section 29(3) of the Act, this provision is unlikely to assist child victims who may not identify or disclose abuse until later in life. For some victims, some acts of violence may not be disclosed until much later in life. The Royal Commission taught us that the average delay in disclosing childhood sexual abuse is 22 years, [1] and a trauma-informed approach would be able to recognise that disclosure of childhood sexual abuse is not an event, rather it is a process. This approach would also recognise that for victims of family violence, seeking help can often be a time of heightened risk, and that victims of family violence can struggle to identify their abuse as a crime until much later. [2] The effects of family violence is further discussed in Q28.

26.1.5. Although section 29(3) provides a broad range of circumstances that the tribunal is to have regard to in determining whether an application is struck out for being out of time, certain non-legislative barriers to access are not adequately reflected - such as concerns about maintaining family relationships. [3] Furthermore, the section as it currently is, does not provide any yardstick by which determination is to be measured. For example, it does not state whether an extension is only to be allowed when there are very exceptional circumstances. This results in the Tribunal having a broad discretion to consider the reason given for the delay and whether in all the circumstances the justice of the case requires that an extension be allowed. [4] This has resulted in different outcomes of similar applications as there was no standardisation of the rules under which decisions were made. [5]

26.1.6. Combined with a lack of access to written decisions, the varying approaches of Tribunal members can result in a lack of transparency and uncertainty. This raises concerns about the current scheme's consistency and predictability for victims.

26.1.7. A tribunal must contemplate and reflect upon all relevant considerations for an application made out of time. Clients are either penalised or suffer further trauma. In SMLS' experience, the legal approach of the Tribunal in asking a victim to explain why they are making an application out of time can re-traumatise some victims, for example, through having to re-tell their story or as a result of Tribunal members' comment, as exemplified by a case study below.

## Case Study - Leonie

*Leonie was sexually assaulted by her step-father between the ages of 12-17. When Leonie was 19, she moved out of the home she shared with her mother, step-father and siblings (including one young half-brother who was the offender's child) as she could no longer bear to live under the same roof as the offender. When Leonie was 22, her mother separated from the offender. A year later, she reported to abuse to the police. The offender was charged with several counts of incest and sexual penetration of a child under 16 years of age.*

*Leonie gave evidence at the contested committal proceeding, following which, her step-father was committed to stand trial in the County Court.*

*A two-week County court trial ensued in which Leonie gave evidence. However, as is often the case in trials involving sexual offences against children, the offender was acquitted. The acquittal was the result of the onerous standard of proof of "beyond reasonable doubt" which must be met by the prosecution.*

*Leonie applied to VOCAT for assistance. The main expenses she claimed was counselling so that she could attend a psychologist fortnightly to help her work through the various issues brought on by the abuse.*

*Leonie's matter was presided over by a Tribunal member who appeared to have a limited understanding of the complex nature of childhood sexual abuse and its sequelae. The Tribunal member questioned Leonie as to why she had not disclosed the abuse and reported it to police earlier. She was told that her application may not succeed because she had taken too long after she turned 18 to report to the police and to apply to VOCAT for assistance. It was indicated that she had not fulfilled her obligations under sections 29 and 52 of the Act. Sections of the Act were quoted to her and she was asked systematically why she had not complied with each section and how the sections related to her case.*

### 26.2. Recommendations

26.2.1. In light of the experiences of our clients at SMLS, we advocate for the abolishment of time limits for victims of family violence, victims of sexual assault as well as child victims of crime.

26.2.2. We also recommend that clarification be made in the legislation as to what constitutes a reasonable explanation for the delay in making the application.

26.2.3. In order to take into consideration the purposes of the act which is to assist recovery, we further recommend an inclusion in the guidelines outlining that a decision maker should err on the

side of granting any particular application and not to refuse them given that it can be presented without unfairness to the community as represented by VOCAT. It is a beneficial legislation and should be given a wide meaning and interpreted if possible in favour of the person seeking compensation.

26.2.4. For clarity and transparency in decision making under section 29 of the Act, we recommend the publication of decisions and data.

[1] Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, What We Are Learning About Responding to Child Sexual Abuse Interim Report Volume 1, <http://www.childabuseroyalcommission.gov.au/about-us/our-reports/interim-report-html>

[2] Jacquelyn C. Campbell et al, Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study | *AJPH*, Vol. 93 Issue 7. See also: J Duncan and D Western, Addressing ‘the ultimate insult’: responding to women experiencing intimate partner sexual violence, Australian Domestic and Family Violence Clearinghouse stakeholder paper, no. 10, Australian Domestic and Family Violence Clearinghouse, Sydney, 2011, p. 4, viewed 17 August 2011, [http://www.austdvclearinghouse.unsw.edu.au/PDF%20files/Stakeholder\\_Paper\\_10.pdf](http://www.austdvclearinghouse.unsw.edu.au/PDF%20files/Stakeholder_Paper_10.pdf)

[3] *J v Victims of Crime Assistance Tribunal* [2002] VCAT 532.

[4] *Clement v Victims of Crime Assistance Tribunal* [2002] VCAT 495 per Michael Strong J.

[5] See *Clement v Victims of Crime Assistance Tribunal* [2002] VCAT 495; *Cf Purcell v Victims of Crime Assistance Tribunal* [2011] VCAT 1463.

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## **Removing the application time limit**

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

27.1. We refer to our submission in Q26. Time limits should be abolished for child victims of crime, victims of family violence, and victims of sexual abuse and assault.

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

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

28.1. Issues

28.1.1. The factors given in section 29(3) of the Act allow the Tribunal to take many aspects of family violence and sexual assault into account when deciding whether to hear an application out of time, including “the age of the applicant”, whether the perpetrator “was in a position of power, influence or trust in relation to the applicant” and the “psychological effect of the act of violence”. However, it is the stance of SMLS that these factors fail to adequately compensate for the unique nature of family

violence and/or sexual assault and the disproportionate impact this time-limit for making an application has on victims of family violence.

28.1.2. Family violence and sexual assault victims often take long periods of time to recognise their own victimisation and come forward, if they report the crime at all. [1] There are a range of varying and unique reasons for this. As stated above, A study conducted in consultation with The New South Wales Bureau of Crime and Statistics for example found that just over half (51.8%) of family violence victims report their most recent incidents of family violence to the Police. The top three reasons for failing to report were found to be fear of revenge or further violence from the offender (13.9%); being embarrassed or ashamed (11.8%) and thinking the incident was too trivial or unimportant (11.8%).[2].

## 28.2. Recommendations

28.2.1. As stated above, SMLS recommends abolishing time limits for victims of family violence and victims of sexual assault. In the alternative, SMLS submits that family violence should be made an explicit factor for the Tribunal to consider when deciding whether to hear an application made out of time, to align with the Northern Territory approach. We recommend that VOCAA s29(3) should be amended to read as follows:

*In determining whether to further hear and determine an application made out of time, the Tribunal must 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 age of 18;*
- (g) Whether the act of violence, or related acts of violence, included family violence within the meaning of Family Violence Protection Act 2008 (Vic) s 5***
- (h) All other circumstances that it considers relevant.*

28.2.2. SMLS submits that this would direct the Tribunal to consider any of the diverse reasons which could lead a victim of family violence to delay when making VOCAT applications. Importantly however, this still grants the Tribunal a discretion to strike out an application if the delay threatened “the capacity of the Tribunal to make a fair decision” or was otherwise unreasonable in the circumstances.

28.2.3. We also refer to our recommendations in Q3, Q7 and Q18 which advocates for the integration of family violence into the Act within the meaning of s 5 of the *Family Violence Protection Act 2008 (Vic)*.

[1] Jeffrey S. Jones, et al, Why Women Don't Report Sexual Assault to the Police: The Influence of Psychosocial Variables and Traumatic Injury, In The Journal of Emergency Medicine, Volume 36, Issue 4, 2009, Pages 417-424, ISSN 0736-4679, <https://doi.org/10.1016/j.jemermed.2007.10.077>.

(<http://www.sciencedirect.com/science/article/pii/S0736467908000358>)

[2] Emma Birdsey, and Lucy Snowball, 'Reporting Violence to Police: A Survey of Victims Attending Domestic Violence Services', (2013) 91 *Crime and Justice Statistics*.

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## Improving transparency in the decision-making process

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

#### 29.1. Issues

29.1.2. Many victims of family violence are deterred from making VOCAT applications due to an understanding that their application is going to be made out of time, while failing to understand that the Tribunal still has discretion as to whether hear their matter. Many victims of family violence however, are also deterred from making applications due to fears of their matter being made public, which could lead to shame or embarrassment, or retaliation from offenders who are often close or hold a position of authority over victims.

#### 29.2. Recommendations

29.2.1. We refer to our submission in Q26 which relates to the abolishment of time limits for victims of family violence.

29.2.2. SMLS further submits that the publishing of anonymous data, which indicates the types of matters which are regularly heard or struck out when applications are made out of time, would increase the transparency and accessibility of VOCAT for victims of family violence. This would increase awareness of the availability of VOCAT for applications made out of time. However, SMLS submits that strong confidentiality mechanisms are required to ensure that not all matters are made readily available to the public or alleged perpetrators.

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## Chapter 8: Making an award

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### Requirement to report to police within reasonable time

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

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

#### 30.1. Issues

30.1.1. Currently, 'special circumstances' is not defined within the Act which is particularly troubling as section 52 is a mandatory requirement on Tribunals to refuse an award if it is not met.

Furthermore, a common issue in family violence is under-reporting of incidents, as less than half of all incidents may be reported. [1] Only a small proportion of sexual assaults are reported to the police, for example, In New South Wales only 10 to 30 percent of adult female sexual assault victims report their victimisation to police [2].

30.1.2. The prevalence of family violence, considered to be up to one in four women according to the Australia's National Research Organisation for Women's Safety Violence Against Women in Australia report, shows that family violence is unfortunately common. Despite the high prevalence in Australia, many victims of family violence are concerned about reporting to the police, and face unique and complex suffering and recovery. In the case of *King v Crimes Compensation Tribunal*, [3] per Ball DP, the dynamics of a domestically violent relationship were found to be sufficient to warrant a finding of 'special circumstances'. In our view this is the correct approach. This case however goes against the trend of most decisions. The high prevalence of family violence should never be mistaken as 'common' and must remain a 'special circumstance'.

30.1.3. While the factors outlined in section 53(c) of the Act may cover acts of family violence, it would require the applicant establishing to the Tribunal that the perpetrator was in a position of "power, influence or trust". The lack of explicit recognition of family violence as a potential delaying factor in reporting to the police increases the evidentiary burden on victims of family violence. It is possible that victims of family violence are more likely to turn to others, such as medical practitioners, for support. However, the utility in encouraging alleged victims to report incidents to the police (enabling more effective investigations) is lost if the report is made to other persons.

#### 30.2. Recommendations

30.2.1. Given the particular issues surrounding victims reporting to the police in cases of sexual assault or family violence, SMLS recommends that the requirement that incidents be reported to police should be explicitly excluded for these victims. Alternatively, if it is deemed impossible to remove this section for victims of sexual assault or family violence, SMLS recommends amending section 53 to explicitly recognise family violence as a factor that delays or deters victims from reporting to the police. The language of the new subsection can be similar to that of section 53(b) and

directly link to the definition of family violence as defined in section 5 of the *Family Violence Protection Act 2008*.

30.2.2. We also refer to our recommendations in Q3 Q7, Q18 and Q 28 which advocates for the integration of family violence into the Act within the meaning of s 5 of the *Family Violence Protection Act 2008 (Vic)*.

[1] Emma Birdsey and Lucy Snowball, Reporting Violence to Police: A Survey of Victims Attending Domestic Violence Services, Issue Paper no 91 (New South Wales Bureau of Crime Statistics and Research, 9 December 2013) 1.

[2] Australian Bureau of Statistics 2004, Crime and Safety, April 2004, Cat No. 4509.1, Australian Bureau of Statistics, Sydney

[3] Unreported, Vic AAT, 1 September 1994.

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## Requirement to provide reasonable assistance to police and prosecution

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

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

##### 31.1. Issues

31.1.1. Many victims of family violence may withdraw assistance from police investigations or prosecutions, including not making a statement after calling police due to the nature and dynamics of family violence.[1] Victims of family violence may still be living with the alleged offender and have reconciled, or they may fear the consequences in assisting the police – either in the form of reprisals, threats to their financial stability (if the primary breadwinner is imprisoned) or other cultural/social stigmas in assisting the police. Providing assistance to the police is most often done after separation. [2] However, separation is often the most dangerous time for a victim of domestic violence. [3] For victims of sexual assault, there are also complex reasons as to why a victims may not be willing to cooperate with a police investigation. [4]

##### 31.2. Recommendations

31.2.1. SMLS recommends that the requirement to provide reasonable assistance to police and prosecutors should be explicitly excluded for victims of family violence and victims of sexual assault.

[1] Magistrates' Court of Victoria and Children's Court of Victoria, Submission No 978 to Royal Commission into Family Violence, Royal Commission into Family Violence (June 2015), 58.

[2] J Duncan and D Western, Addressing 'the ultimate insult': responding to women experiencing intimate partner sexual violence, Australian Domestic and Family Violence Clearinghouse stakeholder paper, no. 10, Australian Domestic and Family Violence Clearinghouse, Sydney, 2011, p. 4, viewed 17 August 2011, [http://www.austdvclearinghouse.unsw.edu.au/PDF%20files/Stakeholder\\_Paper\\_10.pdf](http://www.austdvclearinghouse.unsw.edu.au/PDF%20files/Stakeholder_Paper_10.pdf)

[3] Jacquelyn C. Campbell et al, Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study | AJPH, Vol. 93 Issue 7

[4] Lievore D 2003. Non-reporting and hidden recording of sexual assault: an international literature review. Canberra: Office of the Status of Women. <http://www.aic.gov.au/publications/reports/2003-06-review.html>

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

### **32. How do the 'reasonable assistance' requirements impact on victims of crime?**

32.1. For victims of sexual assault and family violence, avoiding police can be part of a safety plan to not arouse further abuse from the perpetrator. Past negative experiences and mistrust of police and other authorities also factors into cooperation with the police for example, victims from Aboriginal and Torres Strait Islander communities, LGBTQI communities, and persons from immigrant and refugee backgrounds. Victims and their children may also be financially dependent on perpetrators and are therefore reluctant to cooperate further with authorities for fear that they will be economically disadvantaged. [1] In our experience, sometimes when clients are not 'cooperative' with police, it can result in a reduction or rejection of awards. For victims of sexual assault, providing reasonable assistance with the police can inflame past trauma and be incompatible with recovery. Therefore, the requirement to provide reasonable assistance to police and prosecutors should be explicitly excluded for victims of family violence and victims of sexual assault. [2]

[1] Phillips J, Vandebroek P. Domestic, family and sexual violence in Australia: an overview of the issues. In: Research paper series. Parliamentary Library. 2014. ([http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/4214443/upload\\_binary/4214443.pdf;fileType=application/pdf](http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/4214443/upload_binary/4214443.pdf;fileType=application/pdf)).

[2] Lievore D 2003. Non-reporting and hidden recording of sexual assault: an international literature review. Canberra: Office of the Status of Women. <http://www.aic.gov.au/publications/reports/2003-06-review.html>

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### **33. Should the Act be amended to improve the operation of the 'reasonable assistance' provisions for victims of crime? If so, what changes should be made to the Act?**

33.1. For the reasons discussed above in Q30, the requirement to provide reasonable assistance to police and prosecution should be explicitly excluded for victims of family violence and victims of sexual assault.

33.2. If the reasonable assistance requirement is retained, section 52(a)(ii) should be amended to include family violence as a factor to be considered in determining whether reasonable assistance was provided. In the alternative, section 53 should be amended to read:

*"In considering whether the act of violence was reported to the police within a reasonable time or whether the applicant*

*provided 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, the Tribunal may have regard to any matters that it considers relevant including—”.*

33.3. By amending section 53, along with the amendment to outlined at Q30 (to amend s 53 to explicitly recognise family violence as a factor that delays or deters victims from reporting to the police), the Tribunal will be provided with explicit factors to consider in determining whether there are special circumstances warranting an exception to the mandatory refusal of an application.

33.4. We also make further reference to our recommendations in Q3 Q6, Q18 and Q 28 which advocates for the integration of family violence into the Act within the meaning of s 5 of the *Family Violence Protection Act 2008 (Vic)*.

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## Character and behaviour considerations

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

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

#### 34.1. Issues

34.1.1. SMLS has identified that section 54 of the Act involve the consideration of actions that may have provoked or contributed to the act of violence occurring. In cases of family violence where there are often a series of interactions that cumulatively indicate evidence of family violence, there is a some scope for the victim’s actions to have been found to have been a factor in the act of violence occurring. There is also scope for evidentiary issues if the Tribunal attempts to dissect a series of interactions to determine the degree of provocation.

34.1.2. Factor e) of section 54 of the Act was identified as potentially disadvantaging victims of family violence by the Magistrates’ Court of Victoria.[1] It may cause issues if it is found that compensation that goes to indirectly benefit the person by whom the act of violence was committed or alleged to have been committed. This could occur where the victim and the offender live together, have children together or have some other form of ongoing relationship as commonly occurs in family violence situations.

34.1.3. The s54 (a) reference to the victim’s character, behaviour or attitude of the victim is unreasonably broad. Provocation and/or contributory considerations in the current Act can feed into ‘victim-blaming’. Victims may sometimes respond to perpetrator’s threats through defensive and/or protective behaviours. Judgements about character, behaviour, criminal records and drug use should be removed from the legislation.

## 34.2. Recommendations

34.2.1 SMLS fully endorses the Submission by Dr Kate Seear (et al) regarding recommendations made to section 54.

[1] Magistrates' Court of Victoria and Children's Court of Victoria, Submission No 978 to Royal Commission into Family Violence, Royal Commission into Family Violence (June 2015) 58.

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### Removing consideration of some section 54 factors

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

35.1. SMLS fully endorses the Submission by Dr Kate Seear (et al) regarding recommendations made to section 54.

### Removing the perpetrator benefit provisions

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

36.1. SMLS recommends that VOCAT adopt a victim centred approach. By refusing VOCAT applications on the basis that perpetrators may potentially benefit fails to account for the complex dynamics of family violence and sexual assault [1]. It can result in negative impact of a victim deciding to stay or leave abusive relationships due to financial considerations. Victims going through the court process are most often linked to a perpetrator as they separate financial and familial responsibilities post separation. Victims should not be excluded from compensation if they continue to maintain contact with perpetrators.

Recommendations

36.2.1 Section 54(e) should be amended to remove references to perpetrator benefit for family violence related applications.

[1] Australian Law Reform Commission and New South Wales Law Reform Commission (2010). Family Violence—A National Legal Response: Final Report, ALRC Report No 114 and NSWLRC Report No 128. Canberra, Sydney: ALRC/NSWLRC, pp. 1393-4.

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## Questions 37- 41

SMLS refrains making comment on questions 37-41.

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## Chapter 10 Timeliness of awards

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### Practice Direction to expedite decision making

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

##### 42.1. Issues

42.1.1. Whilst VOCAT is under an obligation to resolve matters expeditiously, we also recognise that VOCAT is under an obligation to determine the application according to the ‘substantial merits of the case’. [1]

42.1.2. In order to determine the application according to the substantial merits of the case, VOCAT will need to be satisfied that the victim meets the stringent eligibility requirements of the Act. Specifically, VOCAT will need to be satisfied that an act of violence has occurred. Though VOCAT can hear an application even if a criminal act or related criminal acts have not yet been proven in the criminal jurisdiction, when related proceedings have already commenced or are likely to commence, then we recognise that adjournments can preserve the tribunal’s resources. If the existence of a criminal act has already been proven in another court of law beyond a reasonable doubt, then presumably VOCAT will have the benefit of conclusive evidence establishing the violence.

42.1.3. However, we submit these provisions are concerning in the context of family violence. If the determination of an application is delayed, then the victim will also experience delay before any financial assistance is granted. This is particularly concerning because, without immediate financial assistance, victims of family violence might be unable to leave an abusive relationship and obtain safety. We reiterate that **victims of family violence**, upon relocating, often encounter additional housing, health, child care and legal assistance costs.

##### 42.2. Recommendations

42.2.1. We submit that a balance must be struck between the need to determine an application expeditiously and the need to determine an application according to the substantive merits of the case. We advocate that this balance could be struck by the insertion of a new subsection into section 32 of the Act. Specifically, we submit that the following be inserted:

*s 32(3A): In deciding whether or not to delay determining the application that concerns family violence, the tribunal must have regard to the applicant’s financial circumstances and the impact that any delay may have on the victim of family violence, including but not limited to, their ability to leave an abusive relationship.*

42.2.2. We submit this would appropriately strike the balance between two competing objectives. The tribunal retains their original powers to delay determining an application, but will be required to have specific regard to the impact that such delay would have on a victim of family violence.

[1] *Victims of Crime Assistance Act 1996* (Vic) s 32(1)(b).

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### Triaging, co-location or specialist streams

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

### 43.1. Issues

43.1.1. We firmly believe that VOCAT hearings present unique challenges for an applicant that has been victim to family violence. We refer to issues especially highlighted in Q48 in relation to the notification of perpetrators in hearings, which, in the experience of SMLS, serve as a way of unnecessarily re-traumatising victims of crime.

### 43.2. Recommendations

43.2.1. We do not believe it is necessary to completely overhaul the current system to increase efficiency. Instead, we submit that small changes should be made to the composition of VOCAT.

43.2.2. We believe that the Chief Magistrate and all magistrates and reserves magistrates under the *Magistrates Act 1989* (Vic) should be *eligible* to comprise VOCAT. However, we believe that an eligible magistrate **must elect** to make themselves a tribunal member before they become a tribunal member that is able to determine an application.

43.2.3. In this way, we envisage that only those magistrates who are trauma informed and recognise the importance of the state-financial assistance program would elect to make themselves a tribunal member. Consequently, we believe each tribunal member would be a specialist magistrate who is familiar with the needs of victims, thereby ensuring that VOCAT is more responsive and alert to the circumstances of violence. We envisage that this would ultimately make the system more efficient.

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## An administrative model

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

44.1 Please refer to SMLS joint submission.

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## Hearing VOCAT matters during other civil and criminal hearings

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

45.1. Consistent with our recommendation for a specialised stream in Q43, SMLS is of the view that VOCAT decision-making will be more consistent and efficient with small changes to the structure of

VOCAT. The reform that SMLS proposes assists in ensuring that only those magistrates who are trauma informed and recognise the importance of the state-financial assistance program would elect to make themselves a tribunal member.

45.2. Enabling all magistrates who elect to be a tribunal member to make interim VOCAT awards will likely increase the number of awards for family violence victims. This approach allows a balance to be achieved between hybrid-specialisation and making optimum use of courts' resources when other civil and criminal matters are involved.

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## **Evidentiary requirements for counselling and medical expenses**

### **46. Should applicants be able to support their applications with documentary evidence other than medical and psychological reports? If so, what other documentation should applicants be able to provide?**

#### 46.1. Issues

46.1.1. SMLS has identified issues in the current law in relation to delay, re-traumatisation and other inefficiencies.

46.1.2. Firstly, the requirement under the Act causes unnecessary delay to the provision of assistance to victims and thus the timeliness of assistance provided. Lawyers cite obtaining relevant supporting documentation for VOCAT applications as one of the principal difficulties of running a VOCAT case and one of the primary reasons for delays and cost increases.[1]

46.1.3. Secondly and with respect to the extent to which the current scheme minimises trauma and maximises therapeutic effect for victims, delays in securing awards can operate so as to impact victims' recovery time and worsen distress. The documentation and evidentiary requirements can also be potential sources of re-traumatisation for victims, and increase the scheme's vulnerability to fraudulent claims by external parties.

46.1.4. Further aspects of the current scheme's design may be creating inefficiencies, such as the significant costs associated with obtaining medical reports to support applications and award variations.

46.1.5. In some cases, the broader harms of violence suffered by victims may not be recognised under the Act or may be difficult for victims to prove using medical and psychological reports.

#### 46.2. Recommendations

46.2.1. SMLS recommends that the evidence required to meet eligibility tests can be simplified. In particular, evidentiary and documentary evidence requirements of the Act should be amended to include other forms of documentary evidence, such as:

- Statutory declarations;
- Police reports;
- Death certificates and/or funeral notices;
- Proof of attendance at support services;
- Letters and statements from counsellors;
- Letters from landlords or employers; and
- Letters and statements from family and friends verifying what happened.

46.2.2. This would allow applicants to avoid incurring unnecessary and disproportionate costs. This is also consistent with our submission in Q7, which advocates for the removal of certain evidence to encourage the use of support service for rehabilitation of victims.

46.2.3. It is contemplated that lowering the evidentiary requirements may potentially result in further delays in VOCAT’s processing of applications as a wider variety and greater volume of documentary evidence will have to be scrutinised and contemplated upon on a case to case basis. As such, acceptable forms of documentary evidence will be limited to those listed in the Act. Forms of documentary evidence not listed in the Act may be admitted only in exceptional circumstances.

[1] Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996: Supplementary Consultation Paper* (2017) xxvi [77].

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

47.1. We refer to our submission in Q 46. In relation to the provision of greater assistance provided by VOCAT, SMLS has identified that making it easier for applicants to understand all of their potential entitlements and quickly and easily access the assistance offered by the scheme can help victims satisfy the evidentiary requirements.

47.2. In the experience of SMLS, the provision of legal assistance has been crucial to helping victims satisfy evidentiary requirements. We refer to our submission in Q57 for a discussion at length on the necessity of legal support especially for vulnerable victims.

## **Chapter 11 VOCAT hearings**

### **Perpetrator notification and right to appear**

#### **Removing the perpetrator notification provision**

## **48. How do the rights of perpetrators—to be notified or appear—fit with the purpose of the Act, which is to provide assistance to victims of crime?**

48.1. Issues

48.1.1. It is the experience of SMLS that victims often withdraw an application once they are informed of the possibility that the perpetrator might be notified under the provision, for fear of experiencing additional trauma as a result of the hearing process, or reprisals from the perpetrator.

48.1.2. As a result, the possibility for the perpetrator to be notified presents a significant barrier for victims in such circumstances.

## 48.2. Recommendations

48.2.1. SMLS submits that the purpose of the Act, and the determinations of the Tribunal do not enliven a right on the part of perpetrators to be notified of VOCAT hearings. Accordingly, SMLS recommends that VOCAT be prohibited from notifying alleged perpetrators of hearings. There are three reasons for this:

1. Excluding alleged perpetrators from being notified of a relevant application will improve engagement with the statutory scheme by victims;
2. The purpose of the Act is to assist victims of crime and not to determine the guilt of an alleged perpetrator – therefore, the extent to which procedural fairness should be afforded to the alleged perpetrator is diminished;
3. Structural aspects of the Act already curtail rights to procedural fairness on the part of alleged perpetrators.

48.2.2. SMLS submits that the explicit inclusion of the alleged perpetrator in the notification provision is at odds with the purpose of the Act and undermines its efficacy particularly in circumstances involving sexual offences or family violence.

48.2.3. SMLS advocates that excluding the alleged perpetrator from being notified of hearings will significantly improve engagement with the scheme by victims of crime. Further, such an amendment would achieve a greater consistency with the purpose of the Act.

48.2.4. Excluding alleged perpetrators from the notification system is expected to raise concerns of procedural fairness – the idea being that if an alleged offender is named, that person should be allowed the opportunity to defend what appears to be an allegation made against them. This concern is misplaced given the purpose of the statutory scheme, which is not to determine the guilt of offenders, but to assist victims of crime.

48.2.5. This principle of procedural fairness is flexible, and refers to a court's obligation to adopt fair procedures that are appropriate to the nature of the determinations it makes.[1] VOCAT is charged with determining whether to grant financial assistance to applicants who claim to be victims of crime. To this end, the Tribunal concerns itself with determining whether a claimant has been the victim of an act of violence, and then determining which awards are properly available to the claimant. In making these determinations, the Tribunal is not required to conduct itself in a formal manner,[2] nor is it bound by rules or practice as to evidence.[3] Findings of whether the claimant has been the victim of an act of violence, and whether the victim is entitled to a particular item claimed are made on the balance of probabilities.[4] These features of VOCAT's processes are inconsistent with the mandatory procedural and evidentiary protections afforded to persons being tried for criminal offences. This is because VOCAT is "victim-centred". Its determinations affect the right of an applicant to receive financial assistance. Its concern is not to determine the criminal liability of an alleged perpetrator.

48.2.6. Structural aspects of the Act also reduce the requirement to afford procedural fairness to an alleged perpetrator. In *AB v Victims of Crime Assistance Tribunal*,<sup>[5]</sup> a review which considered whether the Tribunal had properly excused an alleged perpetrator's witness from giving evidence, McDonald J referred to sections 33 and 34(3) of the Act, stating that they "fall into the category of provisions which are wholly inconsistent with a requirement of procedural fairness".<sup>[6]</sup> These provisions refer respectively to the power of a Tribunal to determine applications without a hearing, and to the requirement to allow the applicant to argue why the alleged perpetrator should not be notified of a hearing. These structural aspects of the scheme demonstrate a "victim-centred" approach which should be followed.

48.2.7. As an alternative recommendation, SMLS recommends the amending of the notification provision to include a presumption against perpetrator notification. We refer to our response to Q49.

[1] *Kioa v West* (1985) 1590 CLR 585.

[2] *Victims of Crime Assistance Act 1996* (Vic) s 38(1)(a).

[3] *Ibid* s 38(1)(b).

[4] *Ibid* s 31.

[5] [2015] VSC 245.

[6] *AB v Victims of Crime Tribunal and Ors* [2015] VSC 245 at [25].

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

49.1. For the reasons discussed in the response to Q48, SMLS strongly recommends that VOCAT be prohibited from notifying alleged perpetrators of hearings. Alternatively, SMLS recommends that the Act be amended to include a **presumption against perpetrator notification**.

49.2. Such an amendment may involve replacing the existing section 34(3) provision with one which simply prohibits the Tribunal from considering an alleged perpetrator as having a 'legitimate interest' for the purposes of section 34(2). Such an amendment would maintain the current wording of subsections 34(2) and 34(3).

49.3. SMLS further suggests the inclusion of a new subsection 34(4) to allow the Tribunal the option of notifying the alleged perpetrator **only** in circumstances where there are substantial doubts about the veracity of the applicant's application, and the Tribunal believes on reasonable grounds that the alleged perpetrator is in a unique position to give evidence that cannot be obtained from other individuals/parties.

49.4. Such a restriction would ensure that the provision continues to serve the purpose of the Act by making it clear that the purpose of notifying the perpetrator is an evidentiary one, and not to enshrine in legislation a right to contest the claim at a hearing. This would shift the focus from whether an alleged perpetrator has a 'legitimate interest' to whether the notification is justifiably required for VOCAT to reach a fair decision. It would also give effect to VOCAT's responsibility to ensure the scheme is not abused by unmeritorious claims.

49.5. The Act should specify that if VOCAT notifies the alleged perpetrator, they should be given the choice whether to attend the hearing. However, in order to fulfil the evidentiary purpose of the

notification, the alleged perpetrator chooses to attend, they should be notified that they will be examined by the Tribunal member or the other parties to the proceeding. This will ensure the evidentiary purpose of the notification is pursued.

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## **Enhancing safety considerations in the Act**

### **50. Should the notification provision be amended to recognise the safety concerns of victims more specifically? If so, what changes should be made to the Act?**

50.1. SMLS strongly recommends the express exclusion of alleged perpetrators from the notification provision. SMLS also recognises that notification of other parties should carry the requirement to consider the effect of notification on the physical and psychological well-being of the claimant, with a view to the circumstances described in the claimant's application.

50.2. The provision should be amended to include in express terms that the Tribunal must **not** notify a party of an application if it believes on reasonable grounds that such an action will have significant adverse effects on the applicant's physical or psychological well-being.

50.3. In the event that notification of a perpetrator or third party is inevitable, we refer to our recommendations in Q52, which relate to evidentiary and procedural protection for vulnerable victims.

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### **51. Given the aim of the Act is to assist victims of crime, should the Act be amended to include a guiding principle protecting victims from undue trauma, intimidation or distress during VOCAT hearings?**

51.1. SMLS submits that a guiding principle should clearly stipulate that it is to apply when the Tribunal is making decisions about whether to notify interested parties of a hearing, whether to allow evidence to be submitted to the Tribunal, and the manner in which parties give evidence.

51.2. The guiding principle should direct Tribunal Members to conduct their determination of submitted applications in a manner which avoids, wherever possible, the risk of victims experiencing trauma, intimidation or distress during any stage of VOCAT's determination of an application.

51.3. Furthermore, the guiding principle should be considered by the Tribunal *particularly* when determining the procedure used during hearings. Currently, VOCAT members have the discretion to set their own procedure. Some hearings will require applicants to give evidence, even when details of the act(s) of violence have been previously filed with the Tribunal in a police statement. This can contribute to trauma and be unnecessarily distressing to an applicant.

51.4. The guiding principle should operate to ensure applicants are not required to give evidence when other forms of evidentiary support exist and have been submitted to VOCAT.

51.5. Accordingly, SMLS endorses the Victorian Law Reform Commission's recommendation that a guiding principle should specify that in determining the procedure of hearings and the giving of

evidence,[1] VOCAT is to have regard to the fact that measures should be taken to limit the trauma, intimidation and distress suffered by victims when giving of hearing evidence.

51.6. We further refer to our recommendations in Q52, which relate to evidentiary and procedural protection for vulnerable victims.

[1] Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996: Supplementary Consultation Paper* (2017) 161.

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## Evidentiary and procedural protections for vulnerable witnesses

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

#### 52.1. Issues

52.1.1. A wide discretion as to procedural and evidentiary arrangements can lead to protections being applied inconsistently and inadequately.

#### 52.2. Recommendations

52.2.1. SMLS recommends that the Act be amended to replicate the procedural and evidentiary protections found in the *Criminal Procedure Act 2009* (Vic) and the *Family Violence Protection Act 2008* (Vic).

52.2.2. Procedural and evidentiary regulation in the Act should be harmonised with these legislative frameworks to ensure victims are afforded the same protections as those in criminal and IVO proceedings. Such amendments would be well suited to realising the proposed guiding principle. We refer to our discussion above in response to Q51).

52.2.3. SMLS recommends that the Act should be amended to expressly prohibit a victim of a sexual offence being personally cross-examined by the offender. Further, Tribunal members should be required to restrict inappropriate questioning in such circumstances – one example being questioning about the applicant’s sexual history.

52.2.4. The protections relating to child victims should also be integrated in the Act. The Act should **explicitly prohibit** the cross-examination of a child victim of a sexual offence. This protection should also extend to persons with a cognitive impairment. Furthermore, in circumstances where a child witness might give evidence, the Act should direct Tribunal members to consider the desirability of protecting children from unnecessary exposure to the court system and the harm that could occur to the child their family relationships if the child were to give evidence. Such an amendment would further harmonise the Act with the *Family Violence Protection Act*.<sup>[1]</sup> The Act should state expressly the power of the Tribunal member to excuse the witness from giving evidence should there be such a risk of harm.

52.2.5. With respect to further harmonisation of the Act with the Family Violence Protection Act, we refer to our submissions in Q3 Q6, Q18, Q28, Q30, Q33 and Q34 which advocates for the integration of family violence into the Act within the meaning of s 5 of the *Family Violence Protection Act 2008* (Vic).

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[1] *Family Violence Protection Act 2008* (Vic) s 67.

## Restricting access to and the use of VOCAT records

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

53.1. SMLS agrees with the Victorian Law Reform Commission's recommendation that VOCAT applications and documentation prepared for the purpose of a VOCAT application should not be admissible as evidence in criminal or family law proceedings.[1]

53.2. Examples of materials gathered for VOCAT applications are commonly, but not exhaustively:

- Medical reports,
- Psychological assessments, and
- Reports of social workers and counsellors.

53.3. Documents are prepared with the specific purpose of elucidating eligibility for financial assistance under the Act.

53.4. It is improper for those documents to be used in other contexts, especially to discredit the victim applicant in related proceedings.

53.5. SMLS also agrees with documents' inadmissibility in any proceedings except:

- Criminal proceedings in which the applicant is the accused;
- Proceedings in VOCAT, or arising out of proceedings before VOCAT (eg. fraud-related proceedings); or
- With the applicant's consent.

53.6. SMLS notes that section 65(2) of the Act allows documentary evidence to become admissible if, on the application of a party to a proceeding, the judicial decision-maker is satisfied that it is in the interests of justice to hear that evidence. SMLS recommends that this discretion be amended to be available only where exceptional circumstances exist, and it is in the interests of justice to admit the evidence.

[1] Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996: Supplementary Consultation Paper* (2017) 162.

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

### **54. How could transparency and consistency in VOCAT processes and decision making be improved?**

54.1. SMLS recommends three aspects of reform to improve transparency and consistency in VOCAT processes and decision-making.

54.2. Firstly, our recommendation to adopt an election-based Tribunal membership will improve consistency in the operations of the Tribunal as well as the awards given, due to the opportunity for Tribunal members to have an interest in the area. We refer to our submissions in Q43 and Q45.

54.3. Secondly, SMLS recommends a review of the drafting of the application for financial assistance form. The form could be drafted in simpler terms, with the inclusion of explanatory notes to make it easier for applicants in understanding how to formulate their claim with the Tribunal. The various heads of claim (such as safety-related expenses, “other expenses” etc) should be further described in ordinary terms to allow claimants to better understand the legislative framework within which VOCAT operates, and to ensure claimants do not miss the opportunity to claim for certain amounts simply because of an error in the way they have classified an expense.

54.4. In relation to our third submission in this question, we also refer to our recommendations in Q26 and Q29 with respect to publication of data for determining whether an application will be heard or struck out. SMLS submits that data availability will give further clarity to victims.

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## Questions 55-56

SMLS refrains making comment on questions 55-56.

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## Chapter 12 Awareness of VOCAT and accessibility

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

### 57.1. Current system

57.1.1. Under the current system, the Victorian Law Reform Commission has identified the benefits of costs in the role of legal representation in making VOCAT applications. [1]

57.1.2. Benefits include victims being able to be aware of their rights, including rights of appeals, as well as increased awards.[2] On the other hand, the Victorian Law Reform Commission has identified that legal representation can increase financial costs for victims and varying experiences with lawyers.[3]

### 57.2. Recommendations

57.2.1. In the experience of SMLS, the most vulnerable clients are often in need of legal representation. We refer to the case study below as an example of one of our client’s experience, giving rise to the importance of legal representation for vulnerable victims.

#### *Case Study – Cassie*

*Cassie was raped on almost a daily basis by her father from the ages of 3 to 17. The abuse often took place in her parents’ bed*

*when her mother was present. Cassie's mother did not approve of the abuse but took no action to stop it or to protect Cassie. Out of jealousy, Cassie's mother would often assault her viciously. When Cassie was 8 years of age she was tied to a chair and stabbed in the eye by her mother. Her mother told her this was "an eye for an eye for stealing her husband".*

*When Cassie was a teenager, her father started to "sell" her sexual services to his friends and acquaintances. She ran away from home regularly and reports were made to the Department of Human Services (DHS) but despite regular respite in foster care, Cassie was usually returned to her father's care.*

*By the age of 17, her father had sold her into sexual servitude at a brothel and although Cassie worked 7 days a week, her earnings were taken by her father.*

*Cassie fled overseas when she turned 18 and worked abroad for many years before her mental health started to deteriorate and she was forced to return to Australia as she could no longer work.*

*Cassie is now in her 40s and suffers serious mental health issues. She lives alone, has never married nor had children – she does not have any friendships or personal relationships. She is agoraphobic and rarely leaves the safe confines of her home. She struggles with hygiene and rarely washes as showering and bathing remind her of her time working in the brothel. She suffers complex post-traumatic stress symptoms and self-harms. She has made countless attempts to take her life. Reminders of her abuse often trigger a suicide attempt.*

*When she was in her thirties, Cassie reported the abuse to the police. An investigation ensued however, no charges were laid against Cassie's parents. The investigating officer believed Cassie however, given her complex mental health issues, felt that taking part in a criminal prosecution would be beyond Cassie's emotional capabilities.*

*Cassie requires a great deal of assistance. As a result of the injury to her eye, Cassie is visually impaired. It is hoped that the VOCAT will assist her in modifying her home to take into account her visual limitations. Her needs in terms of psychiatric and psychological support are extensive. In addition to this, Cassie withdraws from the process regularly, as her self-worth is so fragmented, she does not feel she is worthy of any assistance and she sabotages her application. Her lawyer reports that she is uncontactable for months on end. She desperately wants acknowledgement and assistance from VOCAT but she needs a lawyer who will support her to obtain the documentation she is not capable of obtaining herself. She also needs a persistent and loyal advocate.*

*Cassie would be unable to bring a claim under a scheme akin to that in NSW. This would simply be beyond her.*

57.2.2. SMLS recognises the costs involved in seeking private legal representation. From the perspective of a community legal centre and in light of the Cassie's case study, a victim's vulnerability can be beyond financial constraints and extend to physiological and physical constraints that make it valuable to have legal support and representation.

57.2.3. SMLS advocates that legal representation in the VOCAT system is valuable for victims who may be particularly vulnerable.

57.2.4. We further refer to our submissions in Q47, which highlights lawyers' challenges in obtaining documents to satisfy current documentary requirements. It is the experience of SMLS that obtaining required documents, while already difficult for lawyers, prove more difficult to an applicant unfamiliar with the requirements conveyed in legal terms.

57.2.5. We also refer in our discussion in Q54, which recommends the simplification of terms used in the application for financial assistance form. SMLS believes the amendments arising from Q54, if implemented, would assist victims and legal representatives who, ultimately, act on behalf of victims who may require more assistance due to their particular experiences.

57.2.6. Please refer to SMLS secondary joint submission.

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

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

#### 58.1 Recommendations

58.1.1 SMLS recommends making VOCAT more accessible through strategies such as community legal education for diverse and remote communities, providing resources in multiple languages, and engaging with settlement service agencies.

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### **Question 59**

SMLS refrains making comment on question 59.

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

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

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

#### 60.1. Issues

60.1.1. A number of provisions of the Act can make it difficult for the Act to assist victims to recover from crime. These include the eligibility criteria, application time limit, the ability of VOCAT to refuse and reduce awards, the quantum of awards, the flexibility afforded to VOCAT in making awards, as well as VOCAT delays.

60.1.2. There are also certain provisions of the Act narrowly define who may be certain victims under the Act. This includes limiting financial assistance only to primary victims who are ‘appropriate’ or ‘deserving’ victims, such as victims that report to police in a timely way, assist police and prosecution, do not contribute to the circumstances of victimisation and do not have a criminal history. We refer to our discussions in Q 20 in relation to limitation of financial assistance, and our discussion in Q30 in relation to reporting provisions.

60.1.3. It is important to note that, in practice, it appears that VOCAT is often the only source of compensation for many victims, rather than being a supplement to other forms of compensation.

60.1.4. Although the object of the Act is to complement services provided by the government to victims of crime, VOCAT sits separately to other victim support services. Some components of financial assistance and victim support are provided through the victim support system, while other components are available through VOCAT. It appears that there are limited referral pathways. Also, many supports—practical and financial— provided by generalist or specialist victim support services, can overlap with the assistance available through VOCAT, such as financial assistance for security measures or counselling.

## 60.2. Recommendations

60.2.1. We refer to our submissions as responses to questions posed by the Victorian Law Reform Commission.<sup>[6]</sup> Our submissions predominantly relate to the experience of victims of family violence, which can be improved to assist VOCAT achieve its purpose to provide assistance to victims of crime.

60.2.2. There has been concerns raised regarding the term ‘sympathy’ and linking it to awards of compensation. The use of this term evokes the consideration of who ‘deserves’ sympathy and who does not. Please refer to the submission of Dr Kate Seear et al.

60.2.3 SMLS supports the recommendations made by Dr Kate Seear et al, that Section 1(2)(b) of the VOCAA be amended to remove reference to awards of compensation being a ‘symbolic expression’ of ‘sympathy’, or alternatively to repeal the subsection altogether.

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

[2] *Ibid* s 1(2)(a).

[3] *Ibid* s 1(2)(b).

[4] *Ibid* s 1(2)(c).

[5] *Ibid* s 1(4).

[6] Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996: Supplementary Consultation Paper* (2017).

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## Amend the Act to focus on support

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

#### 61.1. Issues

61.1.1. SMLS have identified two issues relating to the provision of assistance in the Act in its current form.

61.1.2. Firstly, the Act does not currently provide for assistance to victims with longer term injuries, even if they continue to incur expenses directly related to the act of violence.

61.1.3. Secondly, people who provide care and assistance to victims after an act of violence, such as family members, can also be excluded as the Act has been interpreted narrowly to require proactive and substantial aid at the same time of the act of violence or immediately after. We refer to our discussion in Q1 in relation to our recommendation with respect the removal of term 'proactive' in s 7(2) of the Act.

#### 61.2. Recommendations

61.2.1. The Act should focus on supporting victims rather by only assisting recovery, to better reflect victims' lived experiences of crime and assist with longer term needs.

61.2.2. The Act should distinguish between financial assistance (for expenses incurred, or likely to be incurred) and lump sum payments which acknowledge and recognise the harm caused to victims by crime. Continuing financial assistance in conjunction with or instead of a lump sum payment should be made available to victims where deemed appropriate in all circumstances.

[1] *Victims of Crime Assistance Act 1996* (Vic) s 1(2)(a).

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## Recognising appropriate people as victims

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

#### 62.1. Issues

62.1.1. With respect to the extent to which the current scheme is fair, equitable and timely, it is noted that current eligibility requirements mean that some victims' experience of crime may not be adequately recognised under the Act and that some victims may be excluded, although they may be appropriate recipients. This may be because of the narrow victim categories or because of the narrow definition of act of violence or injury. In some cases, the broader harms of violence suffered by victims may not be recognised under the Act or may be difficult for victims to prove.

62.1.2. We refer to our discussion in Q1 in relation to the difficulties that arise in the current categorisation of victims, especially to child victims of family violence.

62.1.3. In addition, most family members of a primary victim are not considered secondary victims and the definition of 'related victim' excludes some family members, such as grandparents and aunts. Moreover, the Act does not explicitly include domestic partners as related victims. This means domestic partners must prove they have an 'intimate personal relationship' with a victim, which has been interpreted narrowly by VCAT. An 'intimate personal relationship' may be used to show that a person is a related victim, but that term is not defined in the Act. This leaves it very much open to discretion of VCAT.

62.1.4. We refer to our discussion and recommendations in Q3 in relation to expanding the definition of 'act of violence' in the Act, given the current narrow definition. SMLS has recognised that the current definition of 'act of violence' as it exists does not consider to the full extent the harm experienced by some victims of non-physical criminal offences and non-criminal forms of family violence including:

- Forms of financial abuse and psychological abuse,
- Causing a child to hear, witness or be exposed to forms of violence,
- Non-contact sexual offences, and
- Property offences.

62.1.5. We further refer to our discussion in Q6 and Q7 in relation to expanding the definition of 'injury', as we have identified that the current definition provides a barrier to assistance.

## 62.2. Recommendations

62.2.1. SMLS advocates that the Act should be amended to better recognise appropriate people as victims.

62.2.2. Amendments may involve reducing some of the differential treatment under the Act by amending eligibility requirements and relevant considerations of the decision maker. We refer to our discussion in Q1 in relation to eligibility requirements. We also refer to recommendations of insertions to guiding principles for considerations of the decision maker in Q26 and Q51.

62.2.3. For our recommendations in relation to amendments to the definition of 'act of violence' to accommodate broader classes of victims, we refer to our discussion in Q3.

62.2.4. For our recommendations in relation to amendments to the definition of 'injury' to make the scheme more accessible to victims of crime, we refer to our discussion in Q6 and our recommendation in Q7.

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

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

#### 63.1. Issues

63.1.1. SMLS has identified two primary issues in relation to the focus on ‘certain victims of crime’ and implications underlying section 1(2)(b) of the Act.

63.1.2. Firstly, the objective’s focus on ‘certain victims of crime’ appears to be underpinned by a philosophy that some victims are ‘innocent’ or ‘deserving’ of assistance, while others are not.[1]

63.1.3. This philosophy risks shifting VOCAT’s focus away from assisting victims with the harm they suffer as a result of violent acts, and encouraging the tribunal to assess a victim’s potential culpability in the crime that harmed them. Indeed, in *Attard v Victims of Crime Assistance Tribunal*,[2] VCAT drew reference to the phrase ‘certain victims of crime’ in section 1(2)(b) of the Act in denying the victim an amount representing a symbolic expression of the community’s sympathy, condolence and recognition.

63.1.4. This has potential to be particularly problematic in cases involving ongoing patterns of abuse, such as family violence. For instance, alcohol is involved in 21.2% of family violence incidents recorded by Victoria Police, 45% of which involve the victim being recorded for using alcohol at the time of offence.[3] In light of s 1(2)(b) and *Attard v VCAT*,[4] VOCAT could unjustly find that these victims are less worthy of financial assistance on the basis that this represents a condition or disposition that contributed to the victim’s injury. [5]

63.1.5. Secondly, section 1(2)(b) implies that some victims who receive only ‘regular’ financial assistance are not symbolically recognised by the community. In SMLS’s experience, recognition is important for many of our clients.

#### 63.2. Recommendations

63.2.1. SMLS suggests removing the reference to ‘certain victims of crime’ from section 1(2)(b) of the Act, and instead limiting the scope of its second stated objective by making reference to the eligibility criteria. For instance, section 1(2)(b) may read as follows:

*“to pay primary, secondary and related victims of acts of violence financial assistance (and primary victims who suffer a significant adverse effect as a direct result of an act of violence and some related victims suffering distress special financial assistance) as a symbolic expression by the State of the community’s sympathy and condolence for, and recognition of, adverse effects experienced or suffered by them as victims of violent acts; and”*

[1] See David Miers, 'Compensating Deserving Victims of Violent Crime: The Criminal Injuries Compensation Scheme 2012' (2014) 34(2) *Legal Studies* 242.

[2] [2011] VCAT 2429 (21 December 2011).

[3] (Crime Statistics Agency, 'Family Violence, Alcohol Consumption and the Likelihood of Criminal Offences' (2016) 7 *In Brief* 8.

[4] [2011] VCAT 2429 (21 December 2011).

[5] See *Victims of Crime Assistance Act 1996* (Vic) s 54(d).

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## Reconceiving 'financial assistance' and 'special financial assistance'

### 64. Would 'special financial assistance' be better classified as a 'recognition payment' as in the New South Wales and Australian Capital Territory schemes?

#### 64.1. Issues

64.1.1. The term 'special financial assistance' is couched in terminology of assistance. However, given that these are a symbolic expression of the community's sympathy, condolence and recognition,<sup>[1]</sup> practically speaking these function as recognition payments. It would be preferable for the Act to recognise this practical reality.

64.1.2. However, the term 'recognition payment' implies that 'regular' financial assistance payments do not recognise the harm that victims have suffered. As a result, victims who are not primary victims that suffer a significant adverse effect as a direct result of an act of violence (i.e., those who do not meet the criteria for 'recognition payments') are excluded from community recognition. In the experience of SMLS, recognition is an important outcome for many of our clients, and so it is necessary to avoid this implication.

#### 64.2. Recommendations

64.2.1. SMLS recommends redefining the terminology of 'special financial assistance' to:

1. "additional recognition payment";
2. "further recognition payment"; or
3. "extra recognition payment".

64.2.2. Additionally, in order to allow all victims community recognition, we recommend adopting our proposed amendment detailed in Q63, or one which similarly expresses that 'regular' financial assistance payments do come with a symbolic expression of the community's sympathy, condolence and recognition.

[1] *Victims of Crime Assistance Act 1996* (Vic) s 1(2)(b).

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## Requiring offenders to contribute

**65. What is the practical operation of section 51 of the Act which enables a victim to assign their rights to the state to recover from the offender? Should a State-funded financial assistance scheme retain ‘offender recovery’ provisions as a parallel process to other reparation mechanisms?**

### 65.1. Issues

65.1.1. The current model is both impractical, and from the perspective of family violence victims, acts as a deterrent against seeking financial assistance under the Act.

65.1.2. Firstly, relevant perpetrators often face significant financial disadvantage and are thereby unable to contribute to the consolidated fund via damages imposed through civil proceedings. More importantly, as discussed in Q48, Q49 and Q50, it is the stance of SMLS that it is more appropriate for victims to be able to confidentially seek financial assistance without notification of the alleged perpetrator, due to its deterrent effect for victims of family violence. The potential notification of perpetrators to VOCAT proceedings by civil action undertaken by the State may deter family violence victims from assigning their rights to the state or seeking financial assistance under the Act at all.

### 65.2. Recommendations

65.2.1. SMLS recommends that the current section 51 of the Act should be removed. This is because SMLS has identified the section in question as being an impractical means of funding financial assistance to victims of crime and possessing a deterrent effect for victims of family violence.

65.2.2. If the State requires further means of funding financial assistance to victims of crime, the victim’s support levy model operating in other Australian jurisdictions (ie. NSW and ACT) would be more appropriate. As these levies would be automatically and directly paid into the consolidated fund of the State of Victoria or any other appropriate victim’s support fund, this would allow family violence victims to anonymously seek financial assistance under the Act without the need for perpetrator notification. This would also provide a more therapeutic effect for victims, knowing that they are receiving compensation from convicted offenders rather than the State.

[1] *Victims of Crime Assistance Act 1996* (Vic) s 69.

[2] *Victims Rights and Support Act 2013* (NSW).

[3] *Victims of Crime (Financial Assistance) Act 2016* (ACT) ss 82–83.

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

66.1. We refer to our recommendation in Q65.

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## Questions 67- 75

For responses to these questions, please see SMLS join submission.

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