Submission to Victorian Law Reform Commission – Review of the Victims of Crime Assistance Act 1996

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Introduction

The Centre for Innovative Justice ('the CIJ') welcomes this review by the Victorian Law Reform Commission ('the VLRC') and commends the Victorian Government for recognising the need for reform in this area.

The stated objectives of the *Victims of Crime Assistance Act* 1996 ('the VOCA Act') include to help victims to recover from the effects of crime and to acknowledge and express the community's sympathy to certain victims that a serious wrong has occurred. While the CIJ notes that the VLRC's expanded terms of reference now incorporate consideration of all victims, it is important to acknowledge that the failure of this scheme to recognise family violence; its dynamics; or its impacts is a serious wrong in itself – a failure that has pervaded the bulk of our systemic and justice response. Equally this wrong is reflected in our concurrent failures to recognise the impacts of violence against people with disabilities; elder abuse and other forms of interpersonal violence which, the CIJ suggests, can often also be understood through a family violence lens.

This means that, like so many reforms recommended by the Royal Commission into Family Violence ('the RCFV'), the chance to review and reform the VOCA Act so it reflects contemporary understanding is a dual opportunity to support recovery and recognition – for those who have experienced violence themselves, absolutely; but also for a community which has burdened itself with the damage these concurrent failures have caused.

The following submission by the CIJ looks at the background and the opportunities to correct these failures, predominantly through the lens of family violence, although the discussion is applicable to other vulnerable victims.

Background – a lost opportunity

As the VLRC's consultation papers explain, compensation schemes for victims of crime are internationally recognised as a mechanism for crucial redress. Like Charters of Victims' Rights; Victims of Crime Commissions; and the range of other counselling and support services, criminal compensation schemes reflect the community's growing awareness of the impact of crime on those who experience it; as well as the inadequacy of criminal justice systems to take this impact into account.

Just like these myriad other policy and statutory mechanisms, however, criminal compensation schemes often develop on an *ad hoc* basis, and are subject to the whim of political developments of the day. This means that they are sometimes a policy response to community concern about crime more generally – a signal sent when decision makers feel under pressure in the context of law and order debates that they understand and sympathise with victims of crime.

Just as relevantly, any mechanism which offers public compensation payments can also be subject to other political imperatives. It should be remembered, therefore, that the VOCA Act of 1996 was brought into being during a period of significant economic rationalism in government policy – a period during which the perceived excesses of previous administrations were concertedly being wound back.

As a result, pain and suffering payments to victims of crime – a significant feature of the preceding scheme in Victoria – were abolished. In this context, the drive to identify 'deserving' victims - victims who would not, as the Premier of the day was infamously reported as complaining, spend taxpayers' money on comforts such as a 'red coat'.[1]

Objecting to the abolition of pain and suffering compensation at the time, the subsequent administration then attempted to reintroduce some form of recognition, this time through Special Financial Assistance payments, but faced criticism that the payments were inadequate and should have been retrospective. Payments were subsequently raised by a third in 2006, while a number of other reforms were introduced to make the application process simpler and more streamlined.

Whatever the political or economic context, however, at each point legislative reform reveals what was known and what was not known at a particular point about a particular issue – a snapshot of what was seen and what was invisible; what was valued and what was waved aside. The relative silence of the VOCA Act 1996 about family violence is a palpable example of a snapshot of this kind.

At no point when pain and suffering compensation was abolished; nor when Special Financial Assistance was introduced and then increased, was the application of the Act to victims of family violence or many other forms of interpersonal abuse properly explored. The introduction and subsequent reforms to the VOCA Act therefore reflect the failure of successive policymakers to perceive family violence as a criminal matter; to understand its dynamics and the experience of those who endured it. Equally it is a snapshot of the failure of policymakers to recognise the myriad forms that family violence can take; that it is usually a pattern of behaviour designed to coerce and control over many years, rather than a single incident; as well as the diversity of those who experience it.

Indeed, as referenced throughout the VLRC's consultation papers, the VOCA legislation mirrors an understanding of 'violent crime' as public, isolated incidents; while the 'certain victims' who the legislation accepts as eligible for the community's sympathy are those victims who were most likely to have been functioning members of the community; who experience a single incident of crime; and who are capable of recovering to their previous situation within a relatively short space of time.

In other words, the framing of violent crime in the VOCA legislation is concerned with compensating people for the type of crime that is predominantly experienced by adult men – crime that is committed in public by strangers or distant acquaintances; which is potentially witnessed by others and then quickly reported to police; which involves an injury from which it is possible to recover.

By contrast, the kind of crime which is predominantly experienced by women and children – crime committed by those known to the victim and who may wield considerable power over the victim; crime committed in private and with no witnesses; crime committed repeatedly over a relatively long period of time; crime for which the victim is made to feel responsible – is not properly accommodated by this scheme.

[1] Victorian Parliament, Hansard, http://hansard.parliament.vic.gov.au/isysquery/4eee206a-0c5e-4f7b-8722-3312fafaeb63/26/doc/

The exception is the scheme's recognition of rape and other forms of sexual assault within the highest category of violent crime eligible for assistance. Arguably, however – and as the VLRC's consultation papers recognise - this was envisaged as an isolated sexual assault by a stranger, rather than repeated sexual abuse by a family member or intimate partner. The CIJ also suggests that the capacity of the criminal justice system and policy makers to recognise sexual assault, as well as the tendency to take a highly punitive response to this kind of offending, suggests that sexual assault is not only easier to understand and conceptualise as 'deviant' but historically has been experienced as more of an affront to men's ownership of women's bodies than other forms of interpersonal violence.

Either way, the differing responses to sexual assault and intimate partner violence have been starkly highlighted in the VLRC's consultation papers. This includes through a case study in which a woman had separately applied to VOCAT for compensation in relation to two distinct matters – a rape committed by a stranger in one case; and longstanding family violence in another. For the former the woman received $10,000; while for the latter she was awarded only $1,000. The woman told the RCFV that she had found this contrast odd because, while she perceived the rape as 'horrible…but one night of my life', the family violence she had endured had inflicted serious and ongoing harm.[2]

More broadly, some of the decisions by the Victims of Crime Assistance Tribunal (VOCAT) and review of decisions by the Victorian Civil and Administrative Tribunal (VCAT) cited in the VLRC's consultation papers reflect a similar failure to grasp the impacts of family violence; sexual assault or the trajectory of victimisation on applicants fully. It is not possible to know whether these are representative of broader VOCAT case law, given that most is not reported. However, reported decisions include:

- Decisions in which neither VOCAT nor VCAT accepted a victim's substantial delay in reporting a multiple rape when she was 17 to police given that she had not been threatened or intimidated by the alleged offenders, 'only mocked';[3]

- Decisions in which VOCAT determined that a failure to report to police for fear of retaliation by a perpetrator – a perpetrator who had previously made threats to kill and was a member of a motorcycle gang with seven convictions for manslaughter – was not a special circumstance because '…it was common for such victims to fear reprisals';[4]

- A decision by VOCAT and VCAT alike that an applicant who had experienced ongoing abuse was not eligible for compensation because she had withdrawn her complaint and 'pulled the rug out from under the police at the last minute';[5]

[2] Victorian Law Reform Commission, *Family Violence and the Victims of Crime Assistance Act* 1996, Consultation Paper No. 1, June 2017, p 66.
[3] *S v Victims of Crime Assistance Tribunal* [2002] VCAT 1257; cited at VLRC Consultation Paper No 1, p 97.
[4] *TUN v Victims of Crime Assistance Tribunal* [2009] VCAT 1599. VCAT overturned this decision but only on the basis this applicant's experience was different from 'others faced with domestic violence' because of her former partner's criminal profile and what she knew had happened to others when they went to police. Cited at VLRC Consultation Paper No. 1, 98
[5] *Nichol v Victims of Crime Assistance Tribunal* [2000] VCAT 840, Cited at VLRC Consultation Paper No. 2, 112.

- A decision by VOCAT and then VCAT that a woman's failure to report to Centrelink that she was living in a de facto relationship – despite this relationship being abusive and her partner's appropriation of the Centrelink payments being part of the violence – disqualified the woman from receiving Special Financial Assistance;[6]

- A refusal by VOCAT to accept a claim by an applicant who, when he was 8, had witnessed his father beat his step-father to death. VOCAT refused the claim because it said that the incident was only one of many difficulties that the applicant had faced, including a sexual assault, a period in residential care and a period in youth detention.[7]

Puzzlingly, these comments have occurred against a backdrop of VOCAT/VCAT members acknowledging family violence and associated issues such as alcohol and drug addiction as so endemic and 'depressingly common' that they should not qualify as an extraordinary circumstance in terms of preventing victims from seeking access to the VOCA scheme within relevant timelines.[8] In other words, decision makers have described the impact and experience of family violence as so widespread that it should not qualify as a reason to exempt people from the strict timelines of the VOCA scheme.

These comments alone suggest that there is considerable work to be done in terms of increasing understanding of the dynamics of interpersonal violence amongst VOCAT and VCAT members. Given that all Magistrates are currently able to sit in the VOCAT jurisdiction, VOCAT decisions may be yet another sphere in which the absence of specialisation and the resulting inconsistency is entrenching the damage that many victims experience at the hands of the system whose assistance they seek.

Seizing opportunities instead

The VLRC's consultation papers provide a subtle but comprehensive analysis of the failures of the VOCA legislation in relation to victims of family and other violence. The fact that the RCFV recommended, and then the Government commissioned, a review of the legislation also reflects this recognition. In other words, we know already that the VOCA Act has thus far failed too many victims.

The question then becomes, what do we do in light of this knowledge?

One of the objectives of the VOCA legislation is to enable victims to recover from wrongdoing and to restore them as far as possible to the position they were in before the wrong was committed. The review of the legislation is an opportunity to recognise these wrongs and to reform the VOCA scheme so that it provides much needed support. It is also, however, an opportunity to recover from the wrong by successive Victorian governments which failed victims of violence in the first place – and to acknowledge how far we have come in policy understanding over time.

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[6] *MK v Victims of Crime Assistance Tribunal* [2013] VCAT 1582

[7] *NF v Victims of Crime Assistance Tribunal* [2012] VCAT 1740. VCAT subsequently overturned this on appeal. Consultation Paper No. 2, p 66.

[8] *Nichols v Victims of Crime Assistance Tribunal* [2000] VCAT 840 Cited at VLRC Consultation Paper No. 1, p 99

This is where the opportunity for substantial reform of the VOCA Act comes in. The scheme is currently designed around very narrow parameters, with clear signals at each point that successive policymakers did not want the proverbial floodgates to open. As a result, it functions as a token, band-aid solution which nevertheless has very practical and sometimes reparative effects *in some cases* but most certainly not in all.

While caution about opening floodgates is understandable from an economic perspective, it ignores the opportunity to use this scheme to aid support and recovery in a way which may ultimately save resources. It ignores the opportunity to use this scheme, in whatever revised form it takes, as a positive intervention – one which, if delivered relatively early in a victim's contact with the justice system, might prevent further harm from being entrenched.

This is how the CIJ urges the VLRC to conceive its recommendations. Rather than tinkering at the edges, the scope of the VLRC's terms of reference allows it to make recommendations for significant reform. The implications of this reform in almost all of the areas identified by the VLRC's consultation papers are the expanded reach of the scheme and, as a consequence, increased public investment.

However, the CIJ urges the VLRC to frame this resulting investment as an opportunity for earlier, positive intervention – for the experience of contact with this part of the justice system to be a reparative and restorative experience, for the *process* to be part of a victim's support and recovery, as well as any resulting payment.

The CIJ urges the VLRC to conceive its recommendations in this way as a small part of the systemic reparation which the community owes victims of family and other forms of interpersonal violence. It is also an opportunity to intervene in a cycle of harm that so many victims of violence experience, and do so in a way which may reduce further demands on the system down the track.

With these broad considerations in mind, the remainder of the CIJ's submission will address the range of questions posed by the VLRC through the lens of two particular areas in which it would like to promote substantial consideration and reform.

It will do so mindful that a number of specialist agencies, including community legal centres, will make submissions on the full range of specific questions in more detail.

Victims vs offenders – an artificial dichotomy

The VOCA legislation is based on a very clear but artificial dichotomy between victims and offenders. In other words, it is premised on an assumption that the community's sympathy should be directed towards 'certain victims' who lead otherwise blameless lives. As such, it fails to acknowledge (or perhaps accept) the mess of the human experience and the real consequences of crime – including the fact that many victims do not fall into neat categories, but may experience a combination of disadvantage, from mental illness and drug or alcohol abuse, as well as becoming or already being offenders themselves.

This includes victims of family violence, adult or child sexual abuse who have fallen into offending as a result of the profound harm they have experienced - and who may continue to experience subsequent victimisation *and* offending throughout their lives. The VLRC's first consultation paper recognised this, pointing to the RCFV's observations that a vastly disproportionate number of women in Victoria's female prisons are victims of family violence or childhood sexual abuse.

In short, the RCFV acknowledged that, as result of poverty and homelessness; of drug and alcohol abuse; of mental illness; and, of course, of trauma, women who are victims of gendered violence can fall into offending. Equally, it acknowledged that children who are victims of family violence or abuse are more likely to experience or perpetrate it as adults; and more likely in general to commit crime.

Certainly, literature points to the high prevalence of victimisation among Victoria's female prisoners.[9] In fact, the Australian Institute of Criminology reported that 86 per cent of incarcerated women were victims of sexual, physical or emotional abuse, either in their childhood (63 per cent) or as adults (78 per cent), while some researchers suggest that 'exposure to traumatic events is nearly universal among incarcerated women'.[10] This in turn has led the CIJ to question whether we would need women's prisons at all were it not for the endemic nature of men's violence.[11]

What's more, while offending as a consequence of poverty linked to family violence might be reasonably well known, less understood is the fact that women's offending behaviour is often linked *directly* to their experience of family violence. For example, many women are often mistakenly arrested as the 'primary aggressor' by police attending a callout;[12] others are arrested for carrying a concealed knife when they do so for reasons of protection;[13] while others assume culpability for their partner's offences because they are too frightened of him to do anything else.[14]

Implications also flow when the status of a woman switches from victim to an offender and prohibits her from being able to access services or report her own history. For example, many women accumulate debt in the context of family violence, debt which is sometimes deliberately foisted on them by their partners and which makes establishing stable lives outside prison almost impossible.[15]

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[9] See Corrections Victoria, Standards for the Management of Women Prisoners in Victoria, Department of Justice, July 2014, p 10.

[10] B Green, M Jeanne, A Daroowalla & J Siddique, 'Trauma exposure, mental health functioning and program needs of women in jail', *Crime & Delinquency*, 51, no. 1 (2005), 133-151, p 134. At http://cad.sagepub.com/content/51/1/133.full.pdf+html.

[11] Mental Health Legal Centre, Inside Access, Centre for Innovative Justice (2015), 'Submission to Royal Commission on Family Violence', 29 May 2015. At http://www.rcfv.com.au/Submission-Review

[12] Centre for Innovative Justice, *Opportunities for early intervention: bringing perpetrators of family violence into view*, March 2015, RMIT University.

[13] Professor Judy Atkinson, 'Trauma, Violence and the Law', Presentation at Centre for Rural Regional Law and Justice, Deakin University, Geelong, 28 October 2015.

[14] Mental Health Legal Centre, Inside Access, Centre for Innovative Justice, above note 6.

[15] Ibid, 15

Equally, women who have had housing difficulties in the context of family violence - property damage caused by a violent partner, for example, attaching to a woman's residential tenancy record - are often precluded from accessing further public housing.[16] Where referrals to community based services, such as those facilitated by Corrections Victoria designed to assist with prisoner reintegration, require an address, homelessness is not only perpetuated but compounded - a history of housing insecurity prior to incarceration only cementing further disadvantage upon release.[17]

Meanwhile, people with disabilities are also overrepresented in the criminal justice system, both as offenders, and as victims of crime.[18] As the CIJ's recent report *Recognition, Respect and Support* explores, people with ABI can not only experience disproportionate rates of victimisation and disadvantage which then makes them more vulnerable to contact with the criminal justice system; but also experience significant stigma and isolation when this contact occurs.[19]

As the CIJ's report explains, Acquired Brain Injuries (ABI) are often regarded as a hidden disability because they are not present or evident at birth and, while an estimated 2.2 per cent of the general population have an ABI, a study commissioned by Corrections Victoria revealed that 42% of men and 33% of women surveyed from the Victorian prison population had a confirmed ABI.[20]

Further, evidence heard at the Royal Commission into Institutional Responses to Child Sexual Abuse reveals all too clearly how swift the trajectory from victim to offender can be. Mental illness, isolation, loss of self-esteem - all those consequences of crime that we more readily recognise can propel people onto the wrong side of the law. With the majority of children in the juvenile justice system having experienced child abuse, and with experience of family violence in childhood recognised as increasing the risk of criminal behaviour overall,[21] it is difficult to conclude that past victimisation is anything but a major feature of offenders' lives.

This is certainly echoed in the experience of the CIJ's strategic partners, the Mental Health Legal Centre and its program *Inside Access* which provides civil legal advice and assistance to women in Dame Phyllis Frost Centre, Victoria's maximum security female prison.

[16] Ibid p 11
[17] Ibid, 16
[18] Victorian Equal Opportunity and Human Rights Commission, *Beyond Doubt: the experiences of people with disabilities reporting crime*, July 2014.
[19] Centre for Innovative Justice and Jesuit Social Services (2017) *Recognition, respect and support: enabling justice for people with an acquired brain injury*, RMIT University, Melbourne. At https://www.rmit.edu.au/content/dam/rmit/documents/college-of-business/graduate-school-of-business-and-law/RMIT_CIJ_RRS_SHORT_170823_01.pdf
[20] Victorian Ombudsman, *Investigation into prisoner access to health care*, 2011.
[21] Mental Health Legal Centre, Inside Access, Centre for Innovative Justice, above note 6.

Through this service, *Inside Access* lawyers have worked with clients who have assumed culpability for their violent partner's offending; who have acquired a brain injury as a result of family violence which in turn has contributed to offending as well as a negative experience with police; whose status as an offender has prevented them from gaining access to family violence services; who remain afraid of the perpetrator and the implications for their safety if they seek the justice system's help.[22]

The context of criminalisation therefore compounds the challenges that victims already experience in qualifying for compensation through VOCAT, and about which many agencies will no doubt have made detailed submissions to the VLRC. These challenges include eligibility in relation to time limits; in relation to reports made to police; in relation to subsequent cooperation with investigation and prosecution; in relation to the perpetrator notification provision; in relation to provocation and, of course, in relation to the section 54 'character requirement'.

For the purposes of this submission, lawyers from *Inside Access* reported that, although the VOCA Act provides a means for people to make application out of time – a means which they had successfully used in a number cases - the two-year time limit was a particular deterrent for women who have experienced family violence but have also become offenders. This is because the coercion that other victims experience has been compounded by an additional reluctance to report to police when women themselves are seen as offenders – particularly if this increases the risk of removal of their children by child protection.

This includes women who have an Acquired Brain Injury as a result of family violence. Certainly, the CIJ's project concerning people with ABI in the criminal justice system involved participants who described police attending after they had experienced violence but, rather than being viewed by police as a victim, had been charged themselves because they were previously known to police.[23]

Meanwhile, the requirement to cooperate with a police investigation – requirements that many victims of family violence are unable to meet because of pressure from or and fear of the perpetrator – is even more onerous for women who are seen as offenders themselves. In fact, lawyers from *Inside Access* reported that, where clients have been aware of the chance to apply to VOCAT (and this is not always the case) clients have assumed that they are ineligible and have not pursued the application.

They also reported that clients often decided not to pursue their application once they are aware of the possibility that the perpetrator will be notified of the application – an even more likely scenario in the precise context that criminalised victims of family violence experience, being a lack of report to or cooperation with police; as well as the provocation and character provisions.

[22] Mental Health Legal Centre, Inside Access, Centre for Innovative Justice (2015), 'Submission to Royal Commission on Family Violence', 29 May 2015. At http://www.rcfv.com.au/Submission-Review
[23] Centre for Innovative Justice and Jesuit Social Services, above note 19.

Lawyers from *Inside Access* provided this case study to highlight clients' experience in this regard:

> *Naomi [not her real name] has made a VOCAT application in relation to family violence committed against her by her former partner over 10 years. The abuse included extensive physical assaults, including assaults with weapons, false imprisonment and sexual assault. Her injuries include multiple loss of consciousness and subsequent ABI;… and mental illness. Naomi has a long history of drug use and her offending is extensive, although non-violent and predominantly drug-related.*
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> *There is ample evidence of the violence committed against Naomi by way of police reports and entries in Naomi's medical records from her GP. When lodging this material, the lawyer made submissions to the Tribunal with respect to section 54, including that Naomi was forced by her partner to commit the offences to fund their drug habit, for which there was ample evidence in the police material, including the following: '…At approximately 0800 AFM sitting in front of heater when respondent has approached saying "You fucking dog…Go and get me some gear". The respondent then struck the AFM with a closed fist on the right cheek.'*
>
> *Despite this evidence, the Tribunal required further submissions with respect to section 54, as well as section 52 in relation to the fact that the client would often withdraw her complaint to police.*

Just as importantly, the CIJ points to the value of recognising the victimisation of people who were *already* offenders for other reasons. The VLRC's consultation papers have already highlighted research which examined reported decisions of VOCAT in relation to applicants with drug and alcohol addiction.[24] This research found that, in five out of the seven cases examined, the applicant's drug use was raised in connection with s 54, and understood by the Tribunal as relevant to the question of whether or not he or she was deserving of compensation.

This means that, in each of these five cases, the Tribunal treated the applicant's addiction as a factor that raised the potential that he or she was not an eligible victim, based on character. However, where the applicant was able to establish that he or she had taken steps towards rehabilitation, the application tended to succeed. The researchers observe:

> *It is vital, in other words, for the applicant to show that she or he is now exhibiting behaviours typically associated with "responsible citizenship."*[25]

Where the applicant could establish that the drug use was a result of his or her experience of victimisation, the Tribunal tended to see the application favourably, in contrast to cases where the applicant's drug use preceded the crime, or where a causal link was not found by the Tribunal.

[24] Kate Seear and Suzanne Fraser, 'The addict as victim: Producing the 'problem' of addiction in Australian victims of crime compensation laws' (2014) 25 *International Journal of Drug Policy* 826, 833. Cited at VLRC Consultation Paper No. 1, p 101

[25] Seear and Fraser, above, 833.

In light of their findings, the authors question whether 'judicial processes allow space for alternative accounts of use and addiction',[26] finding that where an applicant's story might stray from the narrative acceptable to the Tribunal – that the drug use was a consequence of the offending, and the applicant has successfully engaged in rehabilitation – it is possible that an award will be refused. They conclude:

> *In analyses regarding the nature and function of drug courts that have an ostensible focus on rehabilitating rather than punishing 'addicts', it has often been argued that the criminal law still operates to stigmatise, marginalise and punish addicts for their putative 'illness'. This research shows that a similar process is in operation even among legislative schemes with an explicitly remedial rationale…*[27]

Accordingly, lawyers from *Inside Access* and the CIJ more broadly recommend the exclusion of restrictive requirements – both in terms of timeframes; police reports and cooperation; potential provocation; and character - for victims of family violence and sexual abuse. We also advocate for an expansion of the kind of evidence on which the Tribunal can rely to support the argument that the act of violence occurred, by including such things as medical reports; intervention orders; child protection reports; and risk assessments conducted by specialist family violence or sexual assault services.

In addition, lawyers supporting clients through *Inside Access* note the inadequacy of the quantum of payments through VOCAT when compared with the amount available through no-fault schemes. One lawyer noted that, in a former role, she had acted for a woman who had experienced multiple forms of family violence from her partner over many years. One incident this client had experienced had involved a motor vehicle collision, for which the woman had accessed a comparatively larger financial award through the Transport Accident Commission's no-fault scheme. Yet the other acts of violence which, in the client's eyes, had caused much more significant psychological damage, were incidents which only attracted awards of minimal financial compensation from VOCAT.

On the issue of payments, lawyers explained that it was difficult to expedite claims purely for financial assistance while women were in custody. This was because it was hard to obtain supporting material. Yet what women in this situation really needed was a swift assessment for Special Financial Assistance to aid with housing and other stabilising influences upon release. As such, a link with Flexible Support Packages, as the VLRC's consultation papers suggest, may be the most appropriate approach.

A simple, straightforward process which not only assists victims in the short term, but which starts them on the road to longer term support is surely a common-sense goal for any state-funded compensation scheme. Yet the narrow requirements of the current VOCA legislation - and its consequent exclusion of those who have been damaged as a result of crime and have fallen into offending - not only fails in this objective but may entrench offending even further.

[26] Ibid, 834.
[27] Ibid.

This is because research clearly shows that the opportunity to be seen as something 'other than offender' is crucial to a person's rehabilitation and their capacity to reintegrate (or simply integrate) into the community. In other words, the capacity to be seen not only as a human being, but one who has experienced significant wrongdoing, is a crucial part of a victim's recovery. Given that so many victims are offenders, yet are by virtue of their criminal history generally excluded from redress, this means that the scheme is failing in one of its most important goals.

Perhaps harder to reconcile, of course, is one of the scheme's other current goals, being to offer recognition of the community's sympathy. Unfortunately – and as the CIJ has said in other contexts – while the broader community may have immense sympathy for victims of violent crime, too often we experience a sympathy bypass when those victims fall onto the wrong side of the law.[28]

Nowhere could this be clearer than in the recent Federal decision to limit the new redress scheme for victims of institutional sexual abuse to those without a criminal record. This is despite *extensive* evidence before the very Royal Commission which led to the redress scheme's establishment that experience of child sexual abuse often drives victims into crime.

The fact that this decision was made in 2017 – after multiple relevant Royal Commissions and Parliamentary Inquiries - is a lost opportunity to make reparations for past collective wrongs. The question is whether the current Victorian government will take up this opportunity instead and expand the reach of a two decades old compensation scheme so that it can start to acknowledge the *reality* of victimisation, not just the whitewashed and highly gendered conceptualisation that is currently perceived.

The three Rs - recovery, reparation, restoration

What are the benefits for the community if the VOCA scheme takes this more inclusive approach?

Many would, unsurprisingly but unimaginatively, argue that the financial burden of expanding its reach is too great – that, as the government which introduced the legislation in 1996 argued, offenders should pay, not the public. Accordingly, that particular administration put greater emphasis on provisions for victims to pursue compensation from offenders as part of the criminal trial process.

As critics then and now pointed out, however, the capacity to achieve and *retrieve* compensation from an offender is not only profoundly limited, but may serve to entrench the trauma of the criminal trial process, and potentially the perpetrator's control. This is reflected in the very small number of payments achieved through this process, as the VLRC's consultation papers observe.

Rather, the purpose of payments from the public purse – and in particular, payments of pain and suffering compensation or Special Financial Assistance – is to take responsibility as a community for the harm which victims have experienced, and to make some kind of amends as a community by acknowledging that it has occurred.

[28] Centre for Innovative Justice, Submission to the Victorian Law Reform Commission Review on the Role of Victims in the Criminal Trial Process, October 2015.

As noted above, this recognition by the community can be part of the recovery for many victims of crime – a process that is separate from the trauma of the criminal trial process (if there has been one) in which an individual's experience is believed and acknowledged, and our compassion for them expressed. Where it is reformed to be more inclusive, this means that the VOCAT process could be restorative and reparative in itself – an *experience*, as well as a payment, which helps people to heal.

Certainly, as the VLRC's consultation papers acknowledge, many victims do find the VOCAT experience therapeutic. In particular, lawyers and practitioners report that some clients experience the recognition and respect afforded them by a Magistrate – someone acting in authority on behalf of the community – as a crucial and positive step in their ongoing support. In fact, for some women who have experienced profound disadvantage and long-term family violence victimisation, it may be the first time that anyone in authority has spoken to them with respect or believed what they have said.

At the same time, however, other clients have experienced the VOCAT process as akin to other court processes in which they felt their own behaviour, not the perpetrator's, was on trial; in which their experience has been belittled, disbelieved or dismissed.

In addition to a more inclusive approach in the VOCA legislation, therefore, what is desperately needed is a more specialised approach to VOCA hearings, including specialised training – at least for those hearing matters involving child sexual abuse, or family violence. Given that this is the majority of violent crime that women and children experience, however, it makes sense that all members sitting in VOCAT be required to have specialist training.

Where therapeutic, specialist approaches are adopted, this is an opportunity for harm to be repaired. The concept of the harm of crime being repaired is consistent with the aims of restorative justice and, certainly, the CIJ views the VOCAT scheme as a context ripe for restorative approaches more broadly. Of course, the term 'restorative justice' refers to a broad range of practices which attempt to repair the harm caused by a crime by including those with a stake in the offence in its resolution.[29]

Restorative justice conferencing is one of the more common applications of restorative justice in the criminal justice system. It involves a scheduled, mediated encounter between a consenting victim and offender, and/or their representatives and, in some cases, their families and broader communities,[30] in order to decide collectively how to repair the harm caused by a crime.[31]

[29] See generally, H Strang, 'Restorative Justice as Evidence-Based Sentencing', in J Petersilia and K Reitz (eds), The Oxford Handbook of Sentencing and Corrections (Oxford University Press, 2012), 215-243; J Braithwaite, Restorative Justice and Responsive Regulation (Oxford University Press, 2002); T Marshall, Restorative Justice: An Overview (1996) Home Office— United Kingdom, 5.

[30] What 'community' means will differ from case to case. Some cases do not involve community, however when they do, it most often involves support people for the victim and offender, such as friends, broader family, Elders, religious groups or community support people.

[31] See generally, Strang, above n 24.

Certainly – and as the VLRC's consultation papers recognise – the CIJ has identified the value of restorative justice conferencing as an adjunct to the criminal trial process in the context of sexual assault.[32] Since that time, the CIJ has also supported work involving the use of restorative justice conferencing in a range of other contexts, including culpable and serious driving offences;[33] workplace and transport accidents;[34] and, of particular relevance, adult family violence matters.[35] Of course, the most well-known context in which restorative justice conferencing has been occurring in Victoria is in the juvenile justice setting, through youth group conferencing.

The value of restorative justice conferencing is recognised internationally. Benefits for victims include:

- Procedural fairness: victims feel that they were provided with the information they needed, when they needed it, and that the process was sufficiently explained;
- Participation: victims play an active role, have a chance to 'have their say' and the opportunity to express their feelings directly to the offender;
- Sometimes victims receive an apology from the offender;
- Some victims choose to forgive the offender;
- Victims feel less frightened of the offender after a conference;
- Victims feel less angry with the offender after a conference;
- Victims have more sympathy for the offender after a conference;
- Victims feel less anxious;
- Victims feel that they can put the offence behind them.

Further to this, victims often say they experience more 'justice' (as they understand justice) from participating in restorative justice conferencing compared to court processes.[36] Meanwhile, studies of restorative justice conferencing programs consistently find high levels of victim satisfaction with the process, with victims reporting that they felt fairly and respectfully treated.[37]

[32] Centre for Innovative Justice, (2014) *Innovative justice responses to sexual offending: pathways to better outcomes for victims, offenders and the community.* At http://mams.rmit.edu.au/qt1g6twlv0q3.pdf
[33] Centre for Innovative Justice http://us11.campaign-archive1.com/?u=5be80c2fd8760b2faa88f5fcc&id=248eebb8b4
[34] Ibid
[35] Ibid
[36] Heather Strang and Lawrence Sherman, 'Repairing the harm: Victims and restorative justice' (2003) 15 *Utah Law Review* 15.
[37] Jacqueline Joudo Larson *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminolgy, 2014) 26.

Certainly, VOCAT could be a doorway through which access to restorative justice conferencing is facilitated – either as part of or in addition to the VOCA process. Given that there already trained restorative justice conveners in Victoria, this could involve the engagement of in-house restorative justice conveners to run restorative justice conferencing under VOCAT supervision. Alternatively, it could occur through a distinct VOCAT award stream, in which VOCAT expressly provides funds to enable victims to fund private restorative conveners akin to it provision for counselling expenses. This would in turn offer victims a greater level of choice – something which many have not experienced in other contexts.

Further afield, the approach employed by the Defence Abuse Response Taskforce offers a glimpse at what a broader restorative justice conferencing process looks like, one in which a victim has the opportunity to meet with senior Defence representatives (in this case) to relate their experience and to receive acknowledgment and recognition from the organisation. Similarly, therefore, VOCAT could make a conference available to a victim once a claim has been finalised in which the victim could convey to a VOCAT Member what their experience of the justice system, including VOCAT, has been.

As much as the CIJ supports opportunities for restorative justice conferencing to occur, of course, it is vital to acknowledge that this is only one restorative approach. Rather than simply including an RJ conferencing process as an 'add-on' to the VOCAT scheme, therefore, the CIJ argues that it is equally important to make the entire VOCA process itself a restorative one.

As the New Zealand Ministry of Justice notes, restorative justice is 'both a way of thinking about crime and a process for responding to crime'.[38] Its Restorative Justice Manual explains:

> *From this it follows that justice processes may be considered "restorative" only inasmuch as they give expression to key restorative values, such as respect, honesty, humility, mutual care, accountability, and trust. The values of restorative justice are those values that are essential to healthy, equitable, and just relationships. It cannot be emphasised too strongly that process and values are inseparable in restorative justice. For it is the values that determine the process, and the process that makes visible the values. If restorative justice privileges the values of respect and honesty, for example, it is crucially important that the practices followed in a restorative justice meeting exhibit respect for all parties and give ample opportunity for everyone present to speak their truth freely. On the other hand, as long as these values are honoured, there is room for a diversity of processes and a flexibility of practice.*[39]

To take this broader approach, the VOCA legislation and VOCAT process needs to recognise and grapple with victims' justice needs or interests. The concepts of 'victims' justice needs' or 'victims' justice interests' are used to explain that victims of crime have expectations of how the justice system responds to the crime they have experienced, and how it responds to them as victims.

[38] New Zealand Restorative Justice Trust, *New Zealand Restorative Justice Practice Manual* (Ministry of Justice, 2000) 13.
[39] Ibid, 30.

While each victim's experience is unique, researchers have identified broad themes that consistently emerge from victims' experiences of justice system processes. Kathleen Daly's work has been particularly influential and identifies victims' justice interests as encompassing five elements, being:

- **Participation.** Being informed of options and developments in one's case, including different types of justice mechanisms available, discussing ways to address offending and victimisation in meetings with admitted offender and others; and asking questions and receiving information about crimes (e.g. the location of bodies, the motivations for an admitted offender's actions).

- **Voice.** Telling the story of what happened and its impact in a significant setting, where a victim/survivor can receive public recognition and acknowledgment. Voice is also termed truth-telling and can be related to participation in having a speaking or other type of physical presence in a justice process.

- **Validation.** Affirming that the victim is believed (i.e. acknowledging that offending occurred and the victim was harmed) and is not blamed for or thought to be deserving of what happened. It reflects a victim's desire to be believed and to shift the weight of the accusation from their shoulders to others (family members, a wider social group, or legal officials). Admissions by a perpetrator; although perhaps desirable to a victim, may not be necessary to validate a victim's claim.

- **Vindication.** Having two aspects of the vindication of the law (affirming *the act* was wrong, morally and legally) and the vindication of the victim (affirming *this perpetrator's actions* against the victim were wrong). It requires that others (family members, a wider social group, legal officials) do something to show that an act (or actions) were wrong by, for example, censuring the offence and affirming their solidarity with the victim. It can be expressed by symbolic and material forms of reparation (e.g. apologies, memorialisation, financial assistance) and standard forms of state punishment.

- **Offender accountability.** Requiring that certain individuals or entities 'give accounts' for their actions. It refers to perpetrators of offences taking active responsibility for the wrong caused, to give sincere expressions of regret and remorse, and to receive censure or sanction that may vindicate the law and a victim.[40]

It is important to note that Daly uses the term 'justice interests' rather than 'justice needs' because she wishes to recognise the victim as a citizen, capable of rational reflection and engagement. Daly argues that using the term 'justice needs' and focusing on victim healing or therapeutic outcomes as goals risks responses becoming solely about a mental health or rehabilitative process.[41]

[40] Kathleen Daly, 'Reconceptualising Sexual Victimization and Justice' in Inge Vanfraechem, Antony Pemberton & Felix Mukwiza (eds) *Justice for Victims: Perspectives on Rights, Transition and Reconciliation* (Taylor & Francis, 2014) 388.

[41] Kathleen Daly *Redressing Institutional Abuse of Children* (2014) 176.

However, other scholars have found that victims themselves use the language of 'need,' and that mental health and therapeutic outcomes feature strongly in some victims' accounts of what they want from a justice process.[42] The CIJ's position is that it is possible to recognise victims as having both needs and interests – interests as citizens, as well as therapeutic needs as people who have experienced trauma – and that justice processes can respond to both.

Way forward

So is VOCAT already consistent with restorative values broadly and with meeting victims' justice interests and/or needs? Certainly, providing reparation for victims of crime is a primary objective of restorative justice,[43] meaning that the fact that Victoria has a state-funded scheme which has been created expressly to assist victims is significant from a victims' justice needs perspective.

What's more, the opportunity to recount an experience of crime in a significant or meaningful setting is a crucial element of Participation and Voice, the first two justice interests identified above.[44] Having this experience acknowledged and believed by someone in authority - with a payment made to express the community's sympathy - are equally vital avenues for Validation and Vindication.

Were a restorative justice element include in VOCAT's processes, this could not only lend further support to these first four justice interests, but also go some way to meeting the fifth. This is because, in addition to the crucial benefits to victims, evidence suggests that restorative justice conferencing can also promote perpetrator accountability and thereby reduce reoffending.[45]

The question is, however, whether these principles translate to the ways in which VOCAT operates.

In the VOCAT annual report 2015-2016, the Chief Magistrate noted:

> *…VOCAT provides a forum for victims to tell their story and have their experiences of loss and suffering acknowledged. The Tribunal is not required to conduct itself in a formal manner nor is it bound by strict rules as to evidence and procedure. It can inform itself in any manner that it thinks fit. It is not uncommon for a Tribunal Member to sit at the bar table with a victim and engage in a frank discussion about the impact the crime has had and to investigate openly options which the Tribunal could fund to assist in recovery from the act of violence.*[46]

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[42] Jane Bolitho, 'Putting justice needs first: A case study of best practice in restorative justice' (2015) 3 *Restorative Justice: An International Journal* 256, 267.

[43] See for e.g. Kate Warner and Jenny Gawlik, 'Mandatory Compensation Orders for Crime Victims and the Rhetoric of Restorative Justice' (2003) 36 *Australian and New Zealand Journal of Criminology* 60.

[44] Howard Zehr, *The Little Book of Restorative Justice* (Good Books, 2002) 14.

[45] Jacqueline Joudo Larson, *Restorative Justice in the Australian Criminal Justice System,* (Australian Institute of Criminology), 26.

[46] https://www.vocat.vic.gov.au/sites/default/files/publication/2016-10/VOCAT%20Annual%20Report%202015-16.pdf

If VOCAT always functioned in the manner described above, it would certainly be a very effective forum for meeting victims' justice interests. As the VLRC consultation papers eloquently highlight, however, the nature of the VOCAT jurisdiction is that all Magistrates can potentially sit in VOCAT. This means that the skills and aptitude of VOCAT Members to create a therapeutic and validating environment - one which requires a deliberate shift in judicial demeanour and behaviour from the mainstream court process[47] - is not consistent across the board. What's more, where a person's criminal history becomes the centre of the Tribunal's interest, this limits a victim's ability to tell their story in their own way – entrenching, rather than addressing, stigmatisation.

In order to create a victim-centred, restorative experience for victims, therefore, VOCAT needs to undergo a transformation whereby everyone – from counter staff to Magistrates – commits to using restorative principles in every interaction they have with parties.

In tandem with the VLRC's recommendations concerning reform in relation to victims of crime in the criminal trial process, reform of VOCA legislation marks a chance to make a real difference to a much wider span of victims and to do so at an earlier point in their contact with the justice system. This does not have to mean abandoning the existing scheme, however, but could mean harnessing the opportunity that has remained largely untapped in the VOCA scheme for too long.

So much potential lies in the VOCA scheme to offer genuine reparation and support to victims who have been long neglected – for the *process* to be part of a person's recovery, as well as any payment. While reform does not have to mean abandoning the existing scheme, nor should it mean tinkering at the edges. To fulfill its objectives – and the broader obligations of the community – the reach of the Act needs wholesale expansion. The *operation* of the Act also needs wholesale reform, so that every part of the process, as well as every professional it involves, are working towards the support and recovery of victims at every point.

The existence of a compensation scheme is not a step towards recovery in itself. In the CIJ's view, the VOCA model as it currently exists is not going to make any genuine dent in the financial and social burden that the community carries as a result of violent crime. Carefully and thoughtfully reformed, however, it could start to function as a positive intervention – the *priority* intervention, perhaps, that victims experience before the rest of the justice wheels start to turn.

In doing so, it could act on the substantial evidence base which tells us that, the earlier the provision of support, compassion and assistance, the more effective a victim's recovery. As challenging as the community may find this, this includes for victims of crime who have also been offenders – victims who may not otherwise have experienced respect or recognition, victims who may otherwise go on to reoffend and cost the public more money as a result.

[47] For a comprehensive bibliography of Australasian scholarship on the topic of therapeutic jurisprudence and judging see the Australasian Institute of Judicial Administration's website at http://www.aija.org.au/index.php/research/australasian-therapeutic-jurisprudence-clearinghouse/resources#Therapeutic Jurisprudence and Judging

For this is the next step on the continuous policy journey. Now that the community and decision makers alike are starting to acknowledge the confronting reality of family and other forms of interpersonal violence it is time to start acknowledging another reality. This is that interpersonal violence and abuse not only places demand on our health and legal system because it causes damage, but *because it causes further crime*.

This means that victims need support to recover from the crime they have experienced *and* support to prevent them from committing crime of their own. Until the remaining 226 recommendations from the RCFV start to reduce the rate of family violence across the community – and until a range of recommendation from other inquiries start to stem the tide of other forms of abuse - a revised and strengthened VOCA scheme is in the perfect position to offer both.